



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 1135 OF 2016**

**KIRAITA MANGA.....PLAINTIFF**

**VERSUS**

**JOSEPH OMBAIRE ISABOKE.....1ST DEFENDANT**

**SALLY NGENY OMBAIRE.....2ND DEFENDANT**

**RULING**

**INTRODUCTION**

1. What is before me is a Notice of Motion dated 21st June, 2019 in which the 1st Defendant/Applicant seeks a stay of execution of this Court's Judgment dated 13th October, 2017 pending appeal.
2. The application is premised on the grounds stated on the face of the Notice of Motion and the Applicant's supporting Affidavit sworn on the 13th June, 2019. In the said Affidavit he deposes that Judgment was delivered against him on the 13th October, 2017. Being dissatisfied with the said Judgment, he filed an appeal to the Court of Appeal vide Civil Appeal No. 16 of 2018. He further deposes that he is apprehensive that the Plaintiff may proceed with execution of the decree before the appeal is heard and determined, in which event he would suffer prejudice and loss.
3. The application is opposed by the Plaintiff /Respondent through his Replying Affidavit sworn on the 18th September, 2019. In the said Affidavit he admits that there is an appeal pending in the Court of Appeal but claims that what he seeks to do is merely to recover his costs following the dismissal of the Applicant's counter claim and there is therefore nothing to be stayed.
4. The application was canvassed by way of written submissions and only Counsel for the Applicant filed his submissions.

**ISSUES FOR DETERMINATION**

5. Having considered the Notice of Motion, the rival Affidavits and submissions of the Applicant's Counsel the singular issue for determination is whether the Applicant has met the threshold for grant of an order of stay pending appeal

**ANALYSIS AND DETERMINATION**

6. The principles guiding the Courts while considering such an application are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

**Order 42 Rule 6 provides in part as follows: -**

*6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under sub-rule (1) unless—*

*(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been*

made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

In the case of *Kiplangat Kotut V Rose Jebor Kipngok (2015) eKLR* the Court observed as follows:

**Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. “**

7. Having set out the conditions for grant of stay, I shall proceed to consider whether the three conditions have been satisfied by the Applicant.

#### **Whether the Application has been brought without undue delay**

8. It is not in dispute that Judgment herein was delivered on 13.10.2017 while the application for stay of execution was filed on 21st June, 2019, after a lapse of two years. No explanation has been given for the delay in applying for stay of execution. It is therefore my finding that the application was not filed without undue delay.

#### **Whether the Applicant has demonstrated that he will suffer substantial loss if the Orders sought are not granted**

9. Counsel for the Applicant has cited the Case of **New Stanley Hotel Limited V Arcade Tobacconists Limited (1986) KLR 757** where the Court held that before making an order staying execution of the Judgment, the Court has to be satisfied that substantial loss may result on the applicant unless the order was made and that the application was made without unreasonable delay..

I am in agreement with the said decision as well as case of **Masisi Mwita V Damaris Wanjiku Njeri [2016] eKLR** where the court considered the question of what constitutes substantial loss. **Mativo J** stated as follows:-

**“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the Applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & Another VS Agnes Naliaka Cheseto* where it was held *inter alia* that:-**

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**

**The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein vs. Chesoni*, .....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”**

10. In the present application, the Applicant has merely stated that he will be prejudiced if the Respondent proceeds with execution. In this case execution means the recovery of costs following the dismissal of the Applicant’s counter claim. As held in the above decision, execution is a lawful process that does not necessarily amount to substantial loss.

#### **Whether the Applicant has furnished security for costs**

11. The Applicant has not indicated whether or not he is willing and ready to furnish such security. This being a prerequisite for an order for stay I am constrained to find and hold that the Applicant has failed to meet all the requirements for stay pending appeal.

12. The upshot is that I find no merit in the application and I dismiss it with costs to the Respondents.

**Dated, signed and delivered at Kisii this 17th day of December, 2019**

**J.M ONYANGO**

**JUDGE**