

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 68 OF 2010

ABSALOM U.P ABEBE.....PLAINTIFF

=VERSUS=

MBUKONI HOLDINGS LTD & ANOTHER.....DEFENDANTS

RULING

1. The plaintiff/applicant filed a notice of motion dated 31st October 2017 in which he seeks stay of execution of the Judgement delivered on 4th October 2017 pending hearing and determination of an appeal filed against the said judgement. The applicant had filed a suit against the defendants over ownership of plot No.17 comprised in LR No.12715/232 (now number 4083). The second defendant/respondent filed a defence and raised a counter-claim in which she claimed ownership of the same land. After a full hearing, the applicant's claim was dismissed and the respondent's claim was allowed. The applicant has now preferred an appeal against the said judgement.

2. The applicant contends that if stay of execution is not granted, the appeal which has been preferred will be rendered nugatory; that the appeal raises arguable grounds and that in the interest of justice, there should be stay of execution as the applicant pursues his undoubted right of appeal.

3. The respondent has opposed the applicant's application based on a replying affidavit sworn on 17th January 2018. The respondent contends that the applicant has not met the conditions necessary for grant of stay pending appeal and that the appeal has no chances of success.

4. I have carefully considered the applicant's application as well as the opposition to the same by the respondents. I have also considered the submissions filed by the parties herein. This court's discretion to grant stay pending appeal is fettered by the following conditions namely, that the application has to be brought without unreasonable delay; the applicant has to demonstrate that he will suffer substantial loss should stay be declined and that there has to be security for costs as may ultimately be binding upon the applicant.

5. In the instant case, the judgement which is being appealed against was delivered on 4th October 2017. The present application was made on 31st October 2017. There was therefore no delay in bringing the application. The applicant has not demonstrated what loss he will suffer in case there is no stay. It is not for this court to determine whether the appeal has high chances of success or not. That is the province of the court of appeal. The property which was the subject matter of the suit is intact. No party has constructed on it and there is no indication that the respondent is intent on disposing of it. In **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, it was held that the general principles for granting or refusing to grant stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge's discretion.

6. As I have said hereinabove, there is no threat that the subject property will be disposed of. Demonstration of substantial loss is the cornerstone for grant of stay. Where there is no demonstration of substantial loss, there is no basis upon which stay can be granted and in any case, a party is expected to prefer an appeal when there are strong reasons for doing so. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the second Defendant /Respondent.

It is so ordered

Dated, Signed and delivered at Nairobi on this 31st day of May 2018.

E.O.OBAGA

JUDGE

In the presence of:-

M/s Waititu for Mr Wangila for 1st Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE