



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC APPEAL NO. 51 OF 2017

ELIAS KIMANI & 2 OTHERS.....APPELLANTS

VERSUS

MARY WAMBUI.....RESPONDENT

(An appeal from the Judgement of the Senior Resident Magistrate's Court at Nairobi.

(The Honourable Mr D.O Mbeja) delivered on 17th November ,2017

in the Chief Magistrate's Court Civil Case No.10068 of 2007).

RULING.

1. This is a Ruling in respect of a notice of motion brought by the appellants who seek orders of stay of execution pending appeal. The appellants/applicants contend that they have preferred an appeal against the Judgement of Hon. D O Mbeja SRM. They contend that the appeal has high chances of success and that should stay not be granted, they will suffer substantial loss.
2. The applicants are willing to offer security for costs as the court may direct.
3. The respondent has opposed the applicants' application based on a replying affidavit sworn on 4th January 2018. The respondent contends that this application is only meant to delay her from enjoyment of the fruits of her judgement; that the grounds being raised in the memorandum of appeal are the same issues which were raised before the trial court and the court made a decision on the same; that she has waited for the judgement for over 10 years and any further delay will prejudice her as she is not enjoying the property which she purchased but for which she has not been enjoying since she was kicked out of the same. She further states that the applicants have not demonstrated that they will suffer substantial loss.
4. I have carefully considered the applicants' application as well as the objection to the same by the respondent. I have now to decide whether the applicants have met the threshold for grant of stay pending appeal. Order 42 Rule (6) of the Civil Procedure Rules gives the conditions for grant of stay pending appeal. Firstly, the application has to be brought without unreasonable delay. Secondly, the applicant has to demonstrate that he will suffer substantial loss should stay be declined. Thirdly, there has to be such security given as the court orders for the due performance of the decree as may ultimately be binding upon the applicant.
5. In the instant case, the judgement being impugned was delivered on 17th November 2017. The application for stay was made on 30th November 2017. I find that the application was brought without unreasonable delay.
6. I have gone through the judgement of the trial Magistrate. The appellants are the ones in possession of the suit property. The Court of Appeal in **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, held that the general principles for granting or refusing a stay is , if there is no any other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judges' discretion.
7. I have considered the judgement vis-a vis the grounds raised in the memorandum of appeal. I find that the appeal raises arguable grounds and if stay was to be refused , it will mean the applicants being evicted which might render the appeal nugatory. If this were to happen the appellants would have suffered substantial loss. I will therefore order that there shall be no execution of the judgement of the lower court until the appeal herein is heard and determined. The appellants are directed to deposit in court Kshs.200,000/= as security for costs within 30 days failing which stay shall automatically lapse.

It is so ordered

Dated, Signed and delivered at **Nairobi** on this **24th** day of **May 2018**.

E.O.OBAGA

JUDGE

In the absence of:-

M/s Chepngeno for Mr Kimani for respondent

Mr Mureithi for applicant

Court Assistant: Kelvin

E.O.OBAGA

JUDGE