



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 265 OF 2008**

**AMIRALI HASSANALI MOHAMED**

**ZARINA A. HASSANALI MOHAMED.....PLAINTIFFS/RESPONDENTS**

**-VERSUS-**

**JOHN O. NYAGANGA alias**

**JOSEPH O. NYAGANGA.....DEFENDANT/APPLICANT**

**RULING**

1. The defendant's application dated 4<sup>th</sup> December 2017 is brought under the provisions of Section 13 & 18 of the ELC Act, Order 22 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act. The defendant/applicant is seeking for an order of stay of execution of the judgment pending determination of his appeal to the Court of Appeal. The application is supported by the grounds laid out on the face of the application, the supporting affidavit dated 4<sup>th</sup> December 2017 and the further affidavit dated 12<sup>th</sup> February 2018 together with the written submissions filed on 19<sup>th</sup> February 2018.

2. The plaintiff/respondent in opposing the application relied on his grounds of objection dated 11<sup>th</sup> January 2018. Inter alia the plaintiff has pleaded that the applicant has not demonstrated that he will suffer substantial loss since the decree only requires him to vacate the suit premises. That the Respondents do not intend to demolish the structure or sell the property. The plaintiff also averred that the defendant did not say that putting up the building cost him time and money.

3. Whether to grant an order of stay of execution or not the Court is guided by the provisions of Order 42 rule 6 (1) & (2). This Court delivered a judgment on 1<sup>st</sup> November 2017 which the defendant/applicant is unhappy with. He has since lodged a notice of appeal dated 3<sup>rd</sup> November 2017. This application was filed on 4.12.17 about a month after the judgment. Now the lodging of notice of appeal and filing the application a month later makes the Applicant to have partially met the requirements for granting of stay.

4. The only issue is whether the Defendant/Applicant has demonstrated that he will suffer substantial loss unless the stay orders are granted. It is not in dispute that the applicant has a storey building which he put up on the suit property and which the decree requires him vacate/leave as this Court found he built on the suit land without permission of the land owner/Respondent. Putting up a storeyed building costs money and time which does not require a party to place documentary evidence to prove such costs were incurred. The applicant in any event stated in paragraph 5 of his affidavit of 4.12.17 that putting up the structure cost him time and money. The Plaintiff/Respondent has not given an undertaking (although the law does not require him to do so) that he will not demolish the applicant's structure. In the circumstances of this case, such an undertaking may have been prudent given that one of the prayers granted was for vacant possession of the suit property.

5. In order not to render the appeal nugatory, it serves the interest of justice that the order of stay be allowed. Since the subject of the dispute is land, the same will remain intact at the conclusion of the appeal. Further given the applicant receives rental income from the impugned building, the plaintiff will be in a position to recover his costs if at all the appeal fails. I see no justification why the application should fail for failure to provide security. The result is that the application dated 4<sup>th</sup> December 2017 succeeds in terms of prayer 3. The costs do abide the winner of the appeal.

**Dated, signed & delivered at Mombasa this 26<sup>th</sup> June 2018**

**A. OMOLLO**

**JUDGE**