



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 230 OF 2010

MARGRIT SOMMER CHARO.....PLAINTIFF/RESPONDENT

-VERSUS-

ISAAC NJUGUNA NJOROGE.....DEFENDANT/APPLICANT

RULING

1. The Defendant has moved this Court vide his notice of motion dated 17th July 2017 seeking the following orders:

1) Spent

2) Spent

3) That this Honourable Court be pleased to order a stay of execution of the Judgment/Decree delivered on the 12th July 2017 pending the hearing and determination of the Appeal.

4) That the costs of this Application be provided for.

2. In support of the motion are listed grounds on the face of the motion and an affidavit deposed to by the defendant/applicant.

3. The motion is opposed by the replying affidavit of the Plaintiff/Respondent of 20.11.2017. In brief, the Respondent deposes that the application is made in bad faith because to date the applicant has not prepared and filed a record of appeal. That she should be allowed to enjoy the fruits of her judgment as she is able to account for everything in case the appeal is successful.

4. Parties filed written submissions. The applicant buttressed his submissions by relying on the following cases:

i) Butt -vs- Rent Restriction Tribunal (1982) eKLR

ii) Erinford Properties Ltd vs Cheshire County Council (1974) 2 ALL ER 448

iii) Kenya Shell Ltd vs Kibiru & Another (1986) KLR 410.

iv) Gitahi & Another vs Warugongo (1988) KLR 621

5. In the Butt case, the Court noted that the power to grant or refuse an application for stay is discretionary which should be exercised in such a way not to prevent an appeal. In the instant case, the Applicant is claiming a stake in the subject matter of the dispute. He had already filed a notice of appeal on 14.7.2017 which is all he is required to do at this stage of the proceedings as per order 42 rule 6 (4).

6. This application was filed on 18th July 2017. The judgement being appealed from was delivered on 12th July 2017. It is clear the application was filed within the same month thus the same was brought without any delay as is required of an applicant by Order 42 rule 6 (2). In paragraph 6 of the affidavit in support of the application, the Applicant deposed that he will suffer substantial loss because it will be highly impossible to recover possession, costs and interest from the Respondent. For these reasons, he urged the Court to grant him the orders he is seeking.

7. The Respondent submitted that the applicant has not provided evidence of substantial loss. However in my view, the Applicant's

explanation that difficulty to recover possession of the suit premises is sufficient proof of loss. The Respondent also submitted that there was no memo of appeal annexed to this application to enable the plaintiff & the Court determine whether the grounds of appeal are weighty and likely to succeed. Order 42 rule 6 (4) does not require an applicant seeking stay orders at the High Court to file memo of appeal for consideration of the Court whose decision is being appealed. Consequently, I find no justifiable ground offered by the Respondent why this Court should not grant the order of stay. Instead, I am satisfied that the Applicant has fulfilled the requirements of Order 42 rule 6 (2) & (4) and is therefore deserving of the Court's exercise of discretion to allow the application for stay of execution of the decree. Accordingly the application of 17.7.2017 is granted in terms of prayer 3 with costs to abide the outcome of the Appeal in the Court of Appeal.

Dated, signed & delivered at Mombasa this 14th June 2018

A. OMOLLO

JUDGE