



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 470 OF 2011**

**AHMED MOHAMED AHMED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**AHMED MOHIDEED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**KENYA UNITED STEEL**

**COMPANY (2006) LIMITED.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The motion for determination is dated 29<sup>th</sup> November 2017 and brought under the provisions of section 1A, 1B & 3A of the Civil Procedure Act and order 42 rule 6 of the Civil Procedure Rules. In this motion, the defendant/Applicant seeks for orders that:

**1) Spent**

**2) Spent**

**3) Pending hearing and determination of the Defendant's intended appeal against the judgment delivered herein on the 31<sup>st</sup> of October 2017, there be a stay of further proceedings and or execution of the decree resultant from the said judgment.**

**4) The Court do issue such further and other orders as may be in the interest of justice.**

**5) Costs be in the cause.**

2. The application is remised on the grounds inter alia that the defendant is dissatisfied with the judgment and has filed a notice of appeal. Secondly that the decree orders that the suit land now in the applicants' hands be divested from it. Further that the defendant has substantial investment on the land where it runs and operates a substantial multimillion business. Finally that if the orders of stay are not given, the appeal will be rendered an illusion. The same facts were pleaded in the affidavit of Abid M. Alam in support of the application.

3. The application is opposed by the plaintiff's grounds of opposition dated 18.12.2017. It contained the following grounds:

**1. The application is frivolous and abuse of Court process and a non starter.**

**2. The intended appeal raises no arguable issues for Court's consideration and has no likelihood of success.**

**3. All points of law on law of perpetuity and whether suit was time barred have correctly been determined by this Court.**

**4. The Applicant has not offered any security for costs and shall not suffer any substantial loss hence does not qualify for stay Orders.**

4. The parties opted to argue the appeal by way of written submissions. The applicant's submissions were filed on 14<sup>th</sup> February 2018 while the Respondents submissions were filed on 19<sup>th</sup> March 2018. I have read both submissions together with the enclosed case law. Both parties have discussed the principles set out under order 42 rule 6 which governs the granting of orders of stay. In this instant, the application has been brought without undue delay.

5. The only question for this Court's determination is whether the applicant will suffer any substantial loss. Both parties cited the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR** on what amounts to substantial loss. The Judge in that case had this to say *"an applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very core of the applicant as the successful party in the appeal."*

6. The applicant herein submits that on the suit land stands a steel mill put up with substantial investment running into hundreds of millions of shillings. That the plaintiff has not demonstrated that they would be able to make good such damages that may result from the enforcement of the decree. The applicant also submitted to the title changing to 3<sup>rd</sup> parties leaving the intended appeal a nag and a mere academic exercise.

7. The plaintiff/respondent on his part submitted that the execution of this judgment is to transfer the title from one person to another. That the same can easily be re-transferred back.

8. The applicant submitted that what stands on the land is not disputed. The defendant made no mention on the operations undertaken on the land both in their grounds of opposition and submissions. According to the Respondent the execution process is just a simple transaction of change of ownership of the title which can be reversed depending on the outcome of the appeal. It is true that change of names on a title is simple and can be reversed. However given the applicant has deposed that it has heavily invested on the land which fact was not disputed, the change/transfer of title in execution of the decree would result not only in change of names but also in the applicants losing the developments on the land. Such loss cannot be easily reversed by an action of re-transfer only as it also involve loss of incomes generated by the said developments.

9. Consequently, I am therefore satisfied that the defendants have demonstrated that they are likely to suffer substantial loss which necessitates the granting of stay of execution orders at this stage pending appeal. As to whether there are good grounds of appeal is not open for this Court to consider under the provisions of order 42 rule 6. Lastly it is my considered finding that the nature of this claim does not require provision of security as a condition for granting the stay.

10. In conclusion, I find merit in the application and allow it in terms of prayer 3. The costs of the application to abide the outcome of the intended appeal.

**Dated, signed & delivered at Mombasa this 20<sup>th</sup> July 2018**

**A. OMOLLO**

**JUDGE**