



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**MISC. APPLICATION NO. 14 OF 2018**

**ANGELINA KALAMBA MWASI**

**JULIUS MWASI TUMUNA**

**LONADA TABU MUNA MWASI**

**MARIA MAGHUWA MWASI**

**REHEMA MAHBONDO MWASI**

**MARIAMU WALI MWASI.....APPLICANTS**

**-VERSUS-**

**MBARUK AYUB ALI MBARUK.....RESPONDENT**

**RULING**

1. The applicants have moved the Court vide the notice of motion dated 3<sup>rd</sup> day of March 2018 seeking the following orders:

**1. Spent**

**2. That the execution of the judgment/decree, order and/or decision of Honourable Senior Resident Magistrate Ms L.T. Lewa delivered on 19/02/2018 be stayed until the hearing and final determination of the Appeal to be lodged by the Defendant/Applicant in the High Court.**

**3. That the costs of this application be provided for.**

2. The application is premised on grounds on the face of it inter alia that the applicants have an arguable appeal which has high chances of succeeding. Secondly that they are ready to furnish security if need be and that the Respondent will not be prejudiced if the application is allowed. The application is supported further by the affidavit sworn by Lonada Tabu Munamwasi & the annexures to the affidavit.

3. The application is opposed by the Respondent through his replying affidavit dated 14<sup>th</sup> March 2018. The Respondent deposes that the 2<sup>nd</sup> applicant is deceased and none of the remainder of the applicants have annexed letters of administration of his estate hence his name should be removed from these proceedings. The Respondent also aver that there is no house standing on the suit plot. Further that the 1<sup>st</sup> & 3<sup>rd</sup> applicants moved to Taita after selling the suit plot and only the 4<sup>th</sup> Respondent is using a mabati in the suit premises where she sells mnazi during the day and lives elsewhere. He also denies the applicants will suffer irreparable loss & damages. That instead it is him who has been suffering the applicants having received the sum of Kshs 1,400,000= as purchase price. Further that he had plans to develop the said plot and had put building materials. The Respondent states the intended appeal has no merit. He urged the Court to dismiss the application and or grant a stay provided the applicants deposit security of Kshs 3 Million.

4. The judgment appealed from was delivered on 19.2.18. This application was filed on 8.3.2018. Consequently I find that it was filed without undue delay as the same was done within a month from date of delivery of the judgment. The applicants already lodged an appeal against the said judgment being civil appeal No 27 of 2018. This Court only wondered why this application was not made in that file.

5. The applicants annexed a memorandum of appeal but did not annex a copy of the decree or judgement appealed from. They have submitted they have satisfied the two pronged criteria for granting stay pending appeal i.e. that they have an arguable appeal and or that the appeal should not be rendered nugatory they (cited the C. O. A decision in **KFCK vs Sharok Kher Mohamed Ali Hirji & Another (2015)**)

**eKLR**). The applicants point out that among the arguable points in their appeal, that the Respondent in the trial before the magistrate agreed that he was to build for them alternative house as part payment of the suit property. However the trial magistrate completely misapprehended this pivotal admission which would have changed the course of orders eventually given.

6. The Respondent submitted that he paid the entire purchase price. That the Court should note that the applicants are not disputing that they sold the suit plot. The Respondent also submits that the applicants have not met the threshold to deserve the orders of stay and he gave reasons why which I have considered.

7. Have the present applicants demonstrated that they will suffer substantial loss unless the orders are given? They annexed photographs in support of their motion. The photographs are of an old gate on the ground near some stones. The Respondent deposes that none of the applicants are living on the suit property. The applicants did not file additional evidence to contradict this assertion. A gate on the ground in my view is not sufficient proof that they are in possession of the land. Secondly the applicants have not denied there was a sale transaction. However they state that the agreement required the Respondent to build them alternative houses. First this means their loss if any has a remedy i.e. that an order being made to compel the Respondent to build them the alternative house in compliance with the terms of that agreement. But of more importance is the failure of the applicants to annex a copy of the sale agreement where such a provision was recorded and or a copy of the proceedings in the Court below where such an admission was made by the Respondent.

8. Unlike in appeals to the Court of Appeal where notice of appeal once lodged is sufficient when considering whether or not to grant an order of stay, appeals to the High Court (read ELC) requires parties to demonstrate that they have an arguable appeal. The example of the arguable point stated in the submissions is not supported by any evidence in the instant case. Even a copy of the judgment/decree was not annexed to demonstrate that the applicants were in danger. The Respondent has explained the prejudice he is suffering i.e. that he paid the agreed purchase price of Kshs. 1,400,000= and was in the process of developing the plot. He does not have his money and also denied possession of the suit plot. The applicants submitted that the scales of fairness tilt in favour of granting the stay. I hold a contrary view that the scales of fairness tilts in the orders of stay being refused so as not to enable the applicants eat their cake and keep it on the same breath.

9. In conclusion, I find the current application lacking in merit and proceed to dismiss it with costs to the Respondent.

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

**A. OMOLLO**

**JUDGE**