



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO 229 OF 2017

HAMISI JUMA MBAYA.....PLAINTIFF/APPLICANT

VERSUS

ASMAN AMAKECHO MBAYA.....DEFENDANT/RESPONDENT

RULING

The application is dated 13th August 2018 and brought under order 22 rule 22 and order 10 rule 11 of the Civil Procedure Rules 2010 section 1 A, 3a of the Civil Procedure Act seeking the following orders:-

1. That this application be certified as urgent and service be dispensed with in the first instance.
2. That this honourable court be pleased to issue an order for stay of execution of the judgment dated 24th July, 2018 by Hon. N.A. Matheka and all other consequential orders pending the hearing and determination of this application and the appeal against the judgment.
3. That the status quo obtaining on land parcels No. L.R. No. south Wanga/Lureko/706 (plot 706) prior to 24th July, 2018 be maintained pending the hearing and determination of the application and the appeal.
4. That costs of this application be provided for.

It is based on the annexed affidavit of Hamisi Juma Mbaya, and on the grounds that, judgment was entered against the applicant on 24th July, 2018 in Kakamega ELC Case 210 of 2013 (OS). Dissatisfied with the judgment the applicant has preferred an appeal against the entire judgment and all consequential orders and have filed Notice of Appeal. The appeal has overwhelming chances of success for the reasons that; Prima facie the judgment had glaring contradictions and errors both in law and fact. The applicant's case was dismissed not on merit but on legal and procedural technicality. On the other hand the respondent has started cultivating land which was hitherto used by the applicants/appellants. The respondent has started to destroy the applicant's crops and property. The applicant is indeed a beneficiary entitled to the estate as claimed and thus need to determine the case on merit. The applicant risks being disinherited from part of the suit land to which he is entitled to as a son. Execution of the judgment shall expose the applicant to grave hardships as they risk being disinherited from their late father's legitimated entitlement to the suit land. No prejudice shall be occasioned to the respondents if the orders sought are granted since the applicant has a good appeal that raises triable issues.

The respondent submitted that this court is functus officio and cannot entertain this application. The principles for granting stay of execution are provided for under **Order 42 rule 6 (1)** of the **Civil Procedure Rules** as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (1) unless:-

a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court’s jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd– Civil Appl. No. Nai. 93/02 (UR)**, thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. *That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
2. *That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in **Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others KLR** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of **Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in **Carter & Sons Ltd Vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4** as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

I find this court has jurisdiction to entertain this application as it is the one that passed judgment. The applicant has satisfied the pre-requisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 to enable grant of stay of execution of decree pending the hearing and determination of the intended appeal. I find this application has merit and I grant the following orders;

1. That there be a stay of execution of the decree herein pending the hearing and determination of the appellants’ appeal.
2. Costs of this application to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE