



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 830 OF 2015 (FORMERLY HCC 02 OF 1999)**

**FRANCIS ODHIAMBO OTURU (suing as the Administrator of the estate of the late**

**SAMUEL OTURU ADUONGA (deceased).....PLAINTIFF**

**VERSUS**

**JACKTON OKULA ADUOGO.....DEFENDANT**

**RULING**

1. Jackton Okula Aduogo, the Defendant, filed the notice of motion dated 19<sup>th</sup> January 2018 seeking for “a stay of execution of the decree/order/Judgment” dated 22<sup>nd</sup> November 2017 “pending the hearing and determination of the appeal to the Court of Appeal at Kisumu, being Kisumu Court of Appeal, Civil Appeal No....of 2017,” and that the costs of the application do abide the outcome of the appeal. The application is based on the nine (9) grounds headed “**GROUND OF APPEAL**” and marked (1) to (9) on its face. It is also supported by the affidavit sworn by the Defendant on the 19<sup>th</sup> January 2018.

2. The application is opposed by Francis Odhiambo Oтуру, the Plaintiff on five grounds on the grounds of opposition dated 12<sup>th</sup> February 2018.

3. The application came up for hearing on the 19<sup>th</sup> April, 2018 and after hearing, Mr. Onsongo and Mr. Odeny, the learned counsel for the Defendant and Plaintiff respectively, the court gave directions on filing and exchanging written submissions. That consequently, the learned counsel for the Defendant and Plaintiff filed their written submissions dated 20<sup>th</sup> April 2018 and 26<sup>th</sup> May 2018 respectively.

4. The issues for determinations are whether the Defendant has shown that he is likely to suffer substantial loss if stay is not granted. Whether the application was filed without undue delay and finally, whether the Defendant has offered security of loss.

5. The Court has carefully considered the grounds on the notice of motion, the affidavit evidence, the grounds of opposition , the submissions by both counsels and come to the following determinations;

a. That the Defendant filed the Notice of Appeal under **Rule 75 of the Court of Appeal Rules, 2010** dated 19<sup>th</sup> December 2017, and received by the Deputy Registrar of the Court on the 7<sup>th</sup> December 2017. That through the said notice, the Defendant signaled his dissatisfaction with the court’s judgment of 22<sup>nd</sup> November, 2017.

b. That the application has invoked **Sections 1A and 1B of the Civil Procedure Act** and **Order 42 Rule 6 of the Civil Procedure Rules** that empowers this court to deal with stay of execution pending appeal applications. That parties seeking stay orders pending appeal are obligated to show that substantial loss may result unless the order is made. That though it has not been disputed that the Defendant has been residing on the suit land for long, the Plaintiff has disputed that his eviction would amount to substantial loss. The learned counsel for the Plaintiff referred the court to the case of **Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR** in which Mativo J made reference to the following passages from other superior courts on what constitutes substantial loss: “**The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted [5] what constitutes substantial loss was broadly discussed by Gikonyo J in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [6] where it was held inter alia that:**

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. That even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rule. This is so because execution is a lawful process. The applicant must establish other factors which show the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs Chesoni....”**

c. That the Defendant's main reason for seeking the stay of execution is borne from his long stay on the suit land and the inconvenience and expenses that would arise if he is evicted from the land and later be successful in appeal. That as the dispute between the parties was primarily ownership and use of the suit land, and that was what the court granted the Plaintiff in its judgment of the 22<sup>nd</sup> November 2017, the court finds that the Defendant has not shown what substantial loss that he would suffer if stay of execution order is not issued. That the court is of the view that should the Defendant emerge victoriously after the appeal, the Court will issue appropriate orders to compensate him for any loss he may have suffered if execution will have been carried out.

d. That the Defendant is also required to show that the application for stay was filed without undue delay. The application dated the 19<sup>th</sup> January 2018 was filed on the 24<sup>th</sup> January 2018 while the judgment sought to be stayed was delivered on the 22<sup>nd</sup> November 2017. That therefore a period of over Sixty (60) days had lapsed from the date of the judgment to the date the application was filed. That as the judgment of 22<sup>nd</sup> November 2017 had given a period of ninety (90) days before eviction could be carried out, the court is of the view that the application was filed without undue delay.

e. That further to the issue of substantial loss and undue delay, the Defendant is obligated to offer security for costs in an application under **Order 42 of the Civil Procedure Rules**. That the court has perused the grounds on the application and the supporting affidavit and there is no offer for security of costs. That such an offer would have signaled good will on the part of the Defendant and some comfort on the Plaintiff that at least the costs or part of it is assured in case the appeal fails.

6. That from the foregoing, though the application was filed without undue delay, the Defendant has failed to show what substantial loss, if any, he is likely to suffer if the stay order is not issued. That he has also not made an offer for security of costs and accordingly the notice of motion dated 19<sup>th</sup> January 2018 is found to be without merit and is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**

**In the presence of:**

Plaintiff Absent

Defendant Absent

Counsel Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**