



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 400 OF 2014

FLORENCE MAKUNGU HARUN

NITAS ACHANGA INGATSO.....PLAINTIFFS/RESPONDENTS

VERSUS

STANLEY MAFOLI MUSINDI

SOLOMON MUNYASI ATIANYI.....DEFENDANTS/APPLICANTS

RULING

This application is dated 23rd July, 2018 and seeks the following orders;

1. That service of this application be dispensed with, the same be certified as urgent and heard ex-parte in the first instance.
2. That pending the hearing and determination of this application inter-parties, there be stay of execution of the decree herein.
3. That there be a stay of execution of the decree herein pending the hearing and determination of the appellants' appeal.
4. That costs of this application be provided for.

The applicant submitted that, their application dated 15th May, 2018 was dismissed on 11th July, 2018. That they were dissatisfied with the ruling of this court delivered on 11th July, 2018 and have since preferred an appeal (annexed and marked SMA-1 is a copy of notice of appeal). That they have since served the notice of appeal to the respondents (annexed and marked SMA-2 is a copy of the affidavit of service) That their appeal has high chances of success (annexed and marked SMA-3 is a copy of the memorandum of appeal) That they have since applied and paid for certified copies of the proceedings, judgment and order (annexed and marked SMA-4 (a) and 4 (b) are copies of the letter dated 16th July, 2018 and filing receipt). That they are ready and willing to deposit any such security as may be ordered by the court for the due performance of the decree and/or order. That the respondents are in the process of executing the decree herein unless this application is allowed and the applicants stand to suffer substantial loss.

This court has carefully considered the application and the submissions therein. The respondents did not file any papers in opposition. The application is supported by the annexed affidavit of Solomon Munyasi Atianyi, 2nd defendant/applicant and the grounds that the applicants were dissatisfied with the ruling of

this court delivered on 11th July, 2018 and have preferred an appeal. That the appellants' appeal has high chances of success and the appellants stand to suffer substantial loss unless the orders sought are made. That this application has been made without unreasonable delay. That the applicants are ready and willing to provide any such security for the performance of the decree. That it will be in the interest of justice if this application is allowed.

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 eKLR** 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.”

The applicant have demonstrated to this court that there exists arguable appeal and have 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 9TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE