



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC JUDICIAL REVIEW. NO. 6 OF 2017**

**AND**

**IN THE MATTER OF APPLICATION BY CLEUS WATAKO**

**LUTTA TO APPLY ON ORDERS OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF LANDS DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**AND**

**IN THE MATTER OF MUMIAS TRIBUNAL CASE NO. 17 OF 1996**

**REPUBLIC.....APPLICANT**

**AND**

**THE CHAIRMAN MUMIAS LAND**

**DISPUTE TRIBUNAL**

**THE CHIEF MAGISTRATES COURT**

**AT KAKAMEGA .....RESPONDENTS**

**RULING**

This application is dated 30<sup>th</sup> July, 2018 and seeks the following orders;

1. That this matter be certified as urgent and be heard ex-parte in the first instance.
2. That this honourable be pleased to issue stay orders pending hearing and determination of this application.
3. That this honourable court do further issue stay orders pending the outcome of the intended appeal to be file forthwith.
4. That the intended sale and attachment of the applicant's immovable properties be declared null and void pending hearing and termination of this application.
5. That costs be in the cause.

The applicant submitted that on the 10<sup>th</sup> day of July, 2018 this honourable court passed a ruling in favour of the respondent and which is going to be executed at any time in the cause of time as he has already been warned and called by the respondents advocate M/s. Makokha Oaka & Co. Advocates on several occasions this week to discuss about the same and which he has not been accepting because of the nature of the case. That he has since lodged a notice of appeal on 26<sup>th</sup> notifying the registrar of his appeal at the Court of Appeal at Kisumu marked and annexed is "C.W.L-2." That he is waiting for proceedings to be certified by this honourable court to enable him file an appeal in the

appellate court marked and annexed are copies of application for proceedings and draft appeal un-dated CLW-3 (a) and (b) respectively. That the orders sought should be granted in the meantime to allow him prosecute his appeal. That without prejudice the respondent shall not be aggrieved either because he can be compensated by way of costs at a later stage once appeal is concluded.

This court has considered the application and the submissions therein. The issue for determination is whether the Court should order stay of execution. It is premised by the sworn affidavit of CleusWatako Lutta on the following grounds that the respondent/judgment creditor has since obtained a decree in his favour and is already in the process of executing the same at any time same which was delivered on 19<sup>th</sup> July, 2018. That he has since launched a notice of appeal dated 24<sup>th</sup> July, 2018 and issued on 26<sup>th</sup> July, 2018 and wish to appeal at the appellate court in Kisumu. That he should be granted the orders sought as his appeal has high chances of succeeding. That in any event the respondent can still be later compensated by way of further cost if his appeal is disallowed in the circumstance.

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 in this matter has neither demonstrated to this Honourable court that there exists arguable appeal with high chances of success nor 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 no merit and I dismiss the same with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**