



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 340 OF 2014

LIVINGSTONE NGAIRA ANJILA.....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN LIMAKI LIPANGA.....DEFENDANT/APPLICANT

RULING

This application is dated 21st September 2018 and is brought under sections 1A, 1B and 3A of the Civil Procedure Act and orders 42 rule 6 (1) and 51 rule 1, 3, 4 and 10 of the Civil Procedure Rules 2010 seeking the following orders;

1. That this application be certified as urgent and heard exparte in the first instance.
2. That upon (1) above this honourable court be pleased to issue an exparte temporary order of stay of execution of the decree herein pending inter partes hearing of the application.
3. That upon inter parties hearing thereof this honourable court be pleased to issue an order of stay of the decree herein pending hearing and final determination of Kisumu court of Appeal Civil appeal No. 113 of 2018 (Stephen Likami Lipanga & Another vs. Livingstone Ngaira Anjila)
4. That costs of this application be provided for.

The applicant submitted that, on 11/7/2018 this honourable court delivered judgment in favour of the plaintiff/respondent for his eviction from the parcel of land known as BUTSOTSO/SHIKOTI/1281. That pursuant to the said judgment he was to vacate land parcel No. BUTSOTSO/SHIKOTI/1281 within three months from the date of judgment. That the said three months are almost ending and he face imminent eviction by the plaintiff/respondent. That being aggrieved by the said judgment delivered on 11/7/2018 he filed a Notice of appeal on 13/7/2018 and subsequently lodged an appeal in the Court of Appeal at Kisumu being Civil Appeal No. 113 of 2018 on 10/9/2018. Annexed and marked "SLL 1" is a copy of the notice of appeal and "SLL2 (a & b) are copies of receipts paid for lodging the appeal. That the appeal will be rendered nugatory in the absence of an order of stay of execution. That he stands to suffer irreparable damage if a stay order is not issued and execution proceeds since it will lead to his being evicted from the parcel of and he has known for over 20 years as his home together with his co-defendant/applicant.

The plaintiff/respondent opposed the application dated 21st September, 2018 on the grounds that the applicants' appeal is frivolous, vexatious, lacks merit and has no chances of success. That the applicant does not stand to suffer any loss and the application has been made with unreasonable delay. That the applicant has not given any security for the performance of the decree. That there is no sufficient cause to warrant issuance of the orders sought.

This court has carefully considered the application and the submissions therein. It is based on the following principal grounds and on the affidavit of Stephen Likami Lipanga and grounds that judgment was entered against the 1st and 2nd defendants/applicants on 11/7/2018 and the 1st and 2nd defendants/applicants have lodged an appeal in the Court of Appeal to challenge the same. That if a stay order is not granted the appeal will be rendered nugatory. That if a stay order is not granted the 1st and 2nd defendants/applicants stand a great risk of being evicted in execution of the decree herein. That the period within which the 1st and 2nd defendants/applicants were to vacate the suit land voluntarily may expire before the appeal is heard and determined. That the 1st and 2nd defendants/applicants will suffer irreparable damage if they are evicted from the suit land on which they have been residing for over 20 years. That the plaintiff/respondent will not suffer undue prejudice as he will be given an opportunity to present his case on appeal.

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