



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 195 OF 2015

DAVID ANDANDA OKUMU.....PLAINTIFF/APPLICANT

VERSUS

GEOFFREY EVANS OMWOMA

NANCY BENTA OKUTOYL.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 8th August 2018 and is brought under order 40 rule 1 of the Civil Procedure Rules 2010 and sections 1A, 1B and 3a of the Civil Procedure Act seeking the following orders;

1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
2. That this honourable court be pleased to order stay of execution of the judgment of honourable Justice N.A. Matheka, J given herein on 31st may, 2018, pending the hearing and determination of this application.
3. That this honourable court be pleased to order stay of execution of the judgment of honourable Justice N.A. Matheka, J. given herein on 31st May, 2018, pending the hearing and determination of the summons for revocation of grant dated 29th July, 2018 and filed by the plaintiff/applicant in Kakamega HC Succession Number 43 of 2006.
4. That the costs of this application do abide the result of the Summons for Revocation of grant filed by the plaintiff/applicant in Kakamega HC. Succession Number 43 of 2006.

It is supported by the following grounds, the affidavit of David Andanda Okumu and reasons that on 31st may, 2018, the honourable court ordered the plaintiff/applicant to vacate the suit property LR. No. S. Wanga/Musanda/8 within three (3) months from the said 31st May, 2018 and in default to be evicted forcefully. That the time within which the plaintiff must vacate the suit property as per the court's order is due to lapse on or about 31st August, 2018. That, however, the plaintiff has since filed an application dated 29th July, 2018 for revocation of the Grant in Kakamega HC Succession Cause No. 43 of 2006 touching on the suit property LR. No. S Wanga/Musanda/8, which application is scheduled for hearing on the 7th November, 2018. That the said application for revocation of grant has overwhelming facts and evidence and is likely to see the said grant annulled/revoked and consequently, the suit property herein (the subject of the judgment of 31st May, 2018) redistributed afresh among the beneficiaries of the estate of the deceased. That, however, the process of redistribution of the suit property will not be possible

unless the honourable court stays execution of its judgment delivered herein on 31st May, 2018.

The respondent submitted that, the applicant has not said why he could not make this application in the succession cause Kakamega High Court Succession Cause No. 43 of 2006. That the application herein amounts to this honourable court sitting in an appeal in a matter this very honourable court dismissed. That the applicant has not taken letter of administration in respect of the estate of his late father Rodgers Okumu Andanda deceased. That neither has the applicant's application in the succession going to succeed as the applicant herein still suffers the very lack of locus standing to even institute the objection proceedings in Kakamega High Court Succession Cause No. 43 of 2006.

This court has carefully considered the application and the submissions therein. 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.”

Be that as it may the plaintiff has not appealed against the decision of this court but instead is asking this court to order stay of execution of the judgment of it gave on 31st May, 2018, pending the hearing and determination of the summons for revocation of grant dated 29th July, 2018 and filed by the plaintiff/applicant in Kakamega HC Succession Number 43 of 2006. I concur with the respondents’ submission that this would amount to sitting on appeal over its own decision. I find this application is misconceived and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21ST DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE