



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 7 OF 2014**

**JOHNSON THIAKA NYAGA.....PLAINTIFF**

**VERSUS**

**JAMES KINYUA NYAGA.....1<sup>ST</sup> DEFENDANT**

**NJAGI NYAGA.....2<sup>ND</sup> DEFENDANT**

**WANJOHI MUTHONI NYAGA.....3<sup>RD</sup> DEFENDANT**

**JOSPHINE WAKERA NYAGA.....4<sup>TH</sup> DEFENDANT**

**KAMAU NYAGA.....5<sup>TH</sup> DEFENDANT**

**LAZARO MURIUKI NYAGA.....6<sup>TH</sup> DEFENDANT**

**RULING**

**BACKGROUND**

The application before me is the Notice of Motion dated 20<sup>th</sup> June 2018 brought under *Order 42 Rule 6 Civil Procedure Rules*. The Applicant is seeking the following orders:

**1. Spent.**

**2. That the Honourable Court be pleased to issue an order of stay of execution of the Judgment/Decree in this case and any other subsequent proceedings and/or orders pending the hearing and determination of this application.**

**3. That this Honourable Court be pleased to issue an order of stay of execution of the judgment/decree in this case and any other subsequent proceedings and/or order pending the hearing and determination of the intended appeal.**

**4. That costs of this application be provided for.**

The application is supported by the affidavit sworn by the Applicant and grounds shown on the face of that application. In his affidavit, the Applicant deponed that he was dissatisfied with the judgment of this Court delivered on 20<sup>th</sup> March 2018 and have filed a notice of appeal and also requested proceedings. He contends that unless a stay of execution is granted, the intended appeal will be rendered nugatory. The Applicant also stated that this application has been brought timeously and that the intended appeal has high chances of success. The application is opposed with a replying affidavit filed by Johnson Thiaka Nyaga sworn on 3<sup>rd</sup> August 2018. In his replying affidavit, the said Johnson Thiaka Nyaga stated that the applicants have not stated what substantial loss they will suffer if the orders sought are not granted. The Respondent further stated that the Applicants have their own land being parcel No. INOI/KAMONDO/76 which is neighbouring his own land No. INOI/KAMONDO/79. He annexed a copy of the search certificate. The Respondent also deponed that this application has been brought after a long time as the judgment was delivered on 20<sup>th</sup> March 2018 and the application has been brought three months later without any explanation. The Respondent also stated that the Applicants have not offered any security for costs as required under the applicable law.

I have considered the affidavit evidence both in support and in opposition to the Notice of Motion herein. The applicable law in an application for stay pending appeal is provided for under *Order 42 Rule 6 (a) & (b)* which states as follows:

**42 (2) 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 judgment and decree of this Court giving rise to the intended appeal was issued on 20<sup>th</sup> March 2018. It was not until 21<sup>st</sup> June, almost three months that the Applicants filed the present application for stay. No explanation has been given why the Applicants took that long to bring the application. The requirements of the law is that an application such as before me should be brought without unreasonable delay. A period of more than three months without explanation in my view is unreasonable. The second requirement for the grant of an application for stay pending appeal is that an applicant must show that substantial loss may result to him unless the order is granted. The applicants have not indicated anywhere in the application or the supporting affidavit that they are likely to suffer any loss if the orders sought are not granted. They merely stated that they risk being evicted from their land if the stay is not granted. In his replying affidavit under oath, the Respondent has deponed that the Applicants will not suffer any substantial loss if they are evicted as they have an alternative place of abode in their own land parcel No. INOI/KAMONDO/75 which is bordering his own land. He attached a copy of search to his replying affidavit. The Applicants have not also given security for costs of the intended appeal or an undertaking that they are ready and willing to pay the same if ordered by this Honourable Court. It is my view that whereas the Applicant has a right of appeal to the highest Court, that right must be balanced against that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving him of that right. In the case of MUKUMA VS ABUOGA (1988) K.L.R 645, the Court held:

***“The granting of a stay of execution in the High Court is governed by Order XLI Rule 4(2). The question to be decided being whether substantial loss may result unless the stay is granted, whether the application is made without delay and whether the applicant has given security”.***

The Applicants have miserably failed to satisfy this Court on the

three conditions for the grant of the orders sought. Consequently, the Notice of Motion dated 20<sup>th</sup> June 2018 must fail and the same is hereby dismissed with costs.

**READ and SIGNED in open Court this 1<sup>st</sup> day of November 2018.**

**E.C CHERONO**

**ELC JUDGE**

**1<sup>ST</sup> NOVEMBER, 2018**

In the presence of:

Mr. Maina Kagio for Respondent

Ms Muthama holding brief for Mr. Kahiga for Applicant

Court clerk Gichia