



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

HCC No. 70 OF 2006

BEATRICE NGONYO NDUNGU

CYRUS CHARLES KAMAU (Suing as legal representatives

of the estate of FRANCIS NDUNGU NJUGUNA (deceased).....PLAINTIFFS

VERSUS

SAMUEL K. KANYORO.....1ST DEFENDANT

ATTORNEY GENERAL (sued on behalf of the

COMMISSIONER OF LANDS).....2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....3RD DEFENDANT

RULING

1. Through Notice of Motion dated 25th May 2018, the plaintiffs sought the following orders:

1. Spent.

2. Spent.

3. That this honourable court be pleased to grant a stay of execution of the judgment and/or decree made on 3rd May 2018 and all other consequential orders thereof pending the hearing and the determination of the Appeal in the Court of Appeal.

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

2. The application is supported by an affidavit sworn by Cyrus Charles Kamau, the 2nd plaintiff. He deposed that the plaintiffs have lodged a Notice of Appeal in respect of the judgment delivered on 3rd May 2018 and that unless stay is not granted, the plaintiffs will suffer irreparable loss as they risk being evicted yet they have no other home besides the suit land. He added that they have already been served with an eviction notice dated 7th May 2018.

3. The 1st defendant responded to the application through a replying affidavit sworn by himself. He urged the court to order the plaintiffs to deposit Kshs.3, 500, 000 as security and Kshs.345, 140 being an amount claimed as party and party costs in defendants' bill of costs dated 7th June 2018 which is pending taxation. As justification for the Kshs.3, 500, 000 he annexed a copy of a valuation report by Prime Valuers dated 6th June 2018 in which the market value of the suit property as at the date of the report was put at KShs 3,500,000.

4. In a further affidavit sworn on 18th June 2018, Cyrus Charles Kamau deposed that as security, the plaintiffs are ready give the defendants possession of one half of the suit property.

5. Directions were given that written submissions in respect of the application be filed and exchanged. The applicants filed submissions on 26th June 2018. The defendants did not file any submissions but instead relied on the material on record.

6. I have considered the application, the affidavits and submissions.

7. The principles guiding an application for stay of execution pending appeal are found at **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides:

6.(1) No appeal or 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 application being made, to consider such application and to make such order thereon as may to it seem just, and 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 such order set aside.

(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.

8. A litigant who seeks stay pending appeal must therefore satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. The court of Appeal stated in **Butt v Rent Restriction Tribunal [1979] eKLR** as follows:

If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

*It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

*Megarry J, as he then was, followed Wilson (supra) in *Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59.***

9. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, Platt Ag JA (as he then was) stated:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

10. Judgment herein was delivered on 3rd May 2018 while the present application was filed on 28th May 2018. The application has therefore been made without unreasonable delay. I further note that Notice of Appeal was filed on 4th May 2018.

11. In the judgment, the court ordered that:

... the plaintiffs, their agents and servants to vacate the parcel of land known as Njoro/Township Block 1/1144 within thirty (30) days from the date of delivery of this judgment. In default, the plaintiffs, their agents and servants be evicted from the said property. The eviction to be done in accordance with the provisions of section 152G of the Land Act, 2012.

12. It is therefore clear that the applicants are faced eviction from the suit property. If that materializes, they will definitely suffer substantial loss. Regarding security, the applicants are offering the defendants possession of half of the suit property pending determination of the appeal. The defendants would rather have a deposit of KShs 3,500,000 which according to them is the value of the suit property. If I were to go the route of giving the defendants possession of half of the suit property, there is bound to be new disputes as to the identification of the said half and its boundaries. I therefore decline that option. Regarding the option of depositing KShs 3,500,000 as security, I note that the decree herein is for possession of land. I would therefore not wish to introduce onerous monetary considerations at this stage. I will try to balance the interests of both sides.

13. In the end, I am persuaded that the applicants have made out a case for the orders of stay of execution. I therefore make the following orders:

a) I grant stay of execution of the judgment and/or decree made on 3rd May 2018 and all other consequential orders thereof pending

hearing and the determination of the Appeal in the Court of Appeal.

b) The plaintiffs to deposit KShs 200,000 (two hundred thousand) in court as security within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders will lapse.

c) Costs to the defendants.

Dated, signed and delivered in open court at Nakuru this 14th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mbiyu for the plaintiff/applicant

Mr Maina holding brief for Mr Musembi Ndolo for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Mrs Oliech holding brief for Mr Kibet for the 3rd defendant/respondent

Court Assistants: Gichaba & Lotkomoi