



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL NO. 35 OF 2014**

**JOSEPH NDUNGU.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**RUTH ANYANGU.....DEFENDANT/APPELLANT**

**RULING**

1. The appellant/applicant filed an application dated 15<sup>th</sup> June 2016 seeking several orders most of which have been ironed as a result of negotiations undertaken between the parties. The only prayers remaining for my determination are;

**d) That there be a stay of proceedings of the taxation of costs pending the hearing of the appeal.**

**e) That the appellant/Respondent be restrained from selling, transferring, disposing, doing any construction or otherwise dealing with any of the suit property plot No 281 section 1 Mainland West situated at Ziwa La Ngombe Village pending the hearing and determination of the appeal.**

2. The application is supported by the grounds that the applicant has preferred an appeal to the Court of Appeal which appeal has very high chances of success. The applicant also stated that construction may begin on the suit premises thus altering it to the detriment of the appellant & render the appeal nugatory.

3. In reply to the application the Respondent (Joseph Ndungu) filed an application dated 27.6.2016. The application questioned the legal representation of the appellant's advocate & validity of the appeal which was amongst the issues ironed out by the consent adopted on 9<sup>th</sup> September 2016. Essentially once the preliminary points of law were resolved there is nothing on record to oppose the granting the orders of stay.

4. Under Order 42 rule 6 (2) of the Civil Procedure Rules gives the Court principles to consider whether or not to grant an application for stay of execution i.e. whether substantial loss may result to the applicant & that the application has been made without unreasonable delay. Under subrule 4, an appeal is deemed to have been filed when a notice of appeal has been given.

5. The notice of appeal initially improperly filed has been regularised and there is now a Notice of appeal to the Court of Appeal. This application was filed on 15.6.2017 while the judgement was delivered on 26.2.2016. That is approximately 3 ½ months after the delivery of the judgement. The applicant has explained the delay in bringing this application to have been occasioned by her advocates previously on record. The delay of 3 months in my view is also not inordinate.

6. The question for the Court to determine is whether there will be substantial loss occasioned to the applicant if the stay orders is not granted. In the case of **Kenya Airports Authority vs Mitu-Bell Welfare Society & Another Court of Appeal No 114 of 2013**, the Court of appeal explained that the purpose of inquiring into whether the intended appeal if successful will be rendered nugatory is:

*“To obviate the spectre of a meritorious appeal when successful being rendered academic, the apprehended harm, loss or prejudice having come to pass in the intervening period. Stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases.”*

7. In this case, the Applicant fears the Respondent may dispose of the suit property to 3<sup>rd</sup> parties. In the alternative, she avers that if construction is allowed to proceed then the status of the suit premises will have been altered. Her fear is founded on the fact that the Respondent had started depositing stones in the suit premises in preparation for the construction works. This fact was not denied by the Respondent.

8. I am therefore satisfied that the applicant has shown sufficient cause to warrant the granting of the stay orders. Accordingly, I allow the application in terms of prayer (d) & (e) of the notice of motion dated 15.6.2016. Costs of the application do abide the outcome of the appeal.

**Dated and delivered in Mombasa 17<sup>th</sup> day of February 2017.**

**A. OMOLLO**

**JUDGE**