



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CASE NO. 258 OF 2015

ABDULRAZAK KHALIFA SALIM.....PLAINTIFF/APPLICANT

- VERSUS -

HARUN RASHID KHATOR

IBRAHIM RASHID

MUSTAFA RASHID.....DEFENDANTS/RESPONDENTS

RULING

1. For determination is the application dated 23rd March 2015. It is brought pursuant to the provisions of section 3A, of the Civil Procedure Act and Order 42 of the Rules. The prayers sought are:

1. Spent

2. Spent on admission by counsel for Respondent.

3. The Court be pleased to stay further proceedings herein or stay execution of the decree pending the lodgement and determination of an intended appeal to the Court of Appeal.

2. The grounds upon which the application is premised is listed on its face. It is also supported by the affidavit of the plaintiff/applicant. Mr Salim deposed that by the judgement of the Court, he is required to demolish his house without land. That he has timeously filed and served a notice of appeal and applied for typed proceedings. The applicant deposed that his appeal has good chances of succeeding given that this Court did not ensure that the defendants or their predecessors in title had issued appropriate notices. He annexed the notice of appeal to the affidavit.

3. The Respondents submitted that they opposed the application. I have perused the file but did not come across their grounds of opposition or replying affidavit. In their submissions, the Respondents state that for a stay of execution to be granted, the applicant must show that he has filed an appeal which has overwhelming chances of success and substantial loss will be occasioned to him. They continued that the applicant has not filed a memo of appeal to date and served.

4. The defendants admit that demolition is a permanent action and is irreversible but justifies it as the essence of an execution order. They stated that the applicant was given 90 days to enter into a house without land agreement but none has been entered although the applicant was now offering to pay ground rent at Kshs 500 per month. They urged the Court to dismiss the application.

5. This is purely an application for stay of execution of the judgement delivered on 6th February 2015. It is not denied that a notice of appeal has been filed. It appears parties attempted to negotiate this matter as per the terms of the judgement but no settlement was reached. The conditions for granting stay of execution pending appeal are provided under Order 42 Rule 6 of the Civil Procedure Rules.

6. Under Order 42 Rule 6 (4) it states that ***“for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”*** The applicant is not required to file a memorandum of appeal as submitted by the Respondents. Secondly this Court is required under Rule 6 (2) to grant stay only if satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

7. The Respondents have admitted that demolition of the house if undertaken is irreversible. To me this is sufficient proof of substantial loss that the applicant will suffer unless the orders are given. Further the application was filed within a month after the delivery of the judgement. It was therefore filed without delay. Consequently I find am satisfied that the applicant has satisfied the grounds for granting the order of stay. Accordingly I do grant a stay of execution of the judgement pending determination of the appeal to the Court of Appeal.

8. As for security, I do direct that the applicant do deposit monthly sum of Kshs 500/= as ground rent of effective 1.1.2017 until his appeal is determined in a joint interest account opened in the names of the advocates on record. Costs of this application abide the outcome of the appeal.

Dated, signed and delivered at Mombasa this 11th day of May 2017.

A. OMOLLO

JUDGE