



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC.113 OF 2017**

**SUSAN NJERI NJOROGE.....PLAINITFF/APPLICANT**

**-VERSUS-**

**MWANGI KIARIE.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the *Notice of Motion* dated **12<sup>th</sup> August 2015**, brought by the Appellant/Applicant herein **Susan Njeri Njoroge**, who has brought this application under Section 42 Rule 6(1) of the Civil Procedure Rules 2010. The Applicant has sought for the following orders:-

- 1) That pending the hearing of the application, the Honourable court be pleased to order for stay of execution of the Judgement and subsequent orders made on 24<sup>th</sup> July 2015 in CMCC No.1331 of 1991 (Thika).**
- 2) That the Honourable Court be pleased to order for stay of execution of the Judgement and subsequent orders made on 24<sup>th</sup> July 2015 in CMCC No.1331 of 1991 (Thika), pending the hearing and determination of the appeal filed herein.**
- 3) That the costs of this application be provided for.**

This application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Susan Njeri Njoroge**. These grounds are:-

- a) That on 24<sup>th</sup> July 2015, Judgement was entered in favour of the Respondent in CMCC No.1331 of 1991 (Thika).**
- b) The appellant/Applicant was aggrieved with the said Judgement and on 30<sup>th</sup> July 2015, she filed appeal against the said Judgement.**
- c) The subject matter of appeal is land and the Applicant is in occupation running a petrol station.**
- d) The Applicant stand to suffer substantial loss if stay of execution is not granted as she is likely to be evicted and the said petrol station demolished before the appeal herein is heard and determined.**

***e) The Applicant is ready and willing to abide by any terms and/or conditions the Honourable court may impose in the circumstances.***

***f) It is fair and in the interest of justice that the Honourable court may be pleased to grant stay of execution of the said Judgement pending the hearing and determination of the appeal.***

In her **Supporting Affidavit**, the Applicant averred that she has lodged an **Appeal** against **the Judgement** of the **lower court** delivered on **24<sup>th</sup> July 2015**. She also averred that the subject matter of appeal is land and she is in occupation of the suit property running a petrol station. It was her contention that she is ready and willing to provide such security as the court may impose in the circumstances. She alleged that she stands to suffer irreparable loss if at all stay of execution is not granted as the Respondent is likely to proceed with execution before her Appeal is heard and determined. She also alleged that the Respondent is likely to cause her eviction and further proceed to demolish her petrol station before the Appeal

is heard and determined. It was her contention that unless the stay of execution is granted, her Appeal will be rendered nugatory. That it was in the interest of justice and fairness that the court be pleased to grant stay of execution of the said Judgement and preserve the suit property, pending the hearing and determination of the Appeal filed herein.

The application is **contested** and **Mwangi Kiarie**, the Respondent herein filed his **Replying Affidavit** and averred that the Appeal filed on **30<sup>th</sup> July 2015**, does not raise any substantial issues as claimed by the Applicant as the prior dating of the Judgement before it was read in court has not occasioned any prejudice to the Applicant in any way. Further that the Applicant has not proved that she has an arguable appeal with high chances of success as he is the legal and rightful owner of the suit property. It was his contention that for the interest of justice and fairness, the application should be dismissed as the same is just but a delaying tactic meant to frustrate execution of the Judgement entered in his favour on **24<sup>th</sup> July 2015**. He urged the Court to disallow the application herein.

This **Notice of Motion** was **canvassed** by way of **written submissions**. The **Law Firm of Oyugi & CO. Advocates** filed **two sets** of submissions. The **first** one is dated **21<sup>st</sup> April 2017** and urged the Court to allow the instant application. The Appellant/Applicant **further filed supplementary submissions** on **11<sup>th</sup> July 2017**, and submitted that he is ready to abide by any security granted by the court. The Applicant relied on the case of **Sammy Kosgey..Vs...Grace Jelet Boit (2013) eKLR**, where the Court held that:-

***“In a matter related to land, the nature of land and its user is therefore important in determining whether substantial loss would be occasioned. There would be an inclusion to grant stay with condition where the subject matter is the home of the Applicant or the suit land is so utilized in a way that would cause hardships to the Appellant or to members of the public if stay is not granted subject of course to the issuance of security.”***

On the part of the **Respondent**, the **Law Firm of F.N.Kimani & Associates** filed their written submissions on **21<sup>st</sup> June 2017** and submitted that the Applicant has not met the threshold for granting a stay of execution pending appeal as envisaged by Order 42 Rule 6. It was submitted that the Applicant has not shown that he will suffer substantial loss unless the order is made. It was also submitted that the circumstances of the case herein do not warrant a stay. He relied on the case of **Butt...Vs...Rent Restriction Tribunal (1982) KLR 417**, where the Court held that:-

***“The point which clearly emerges from these cases is that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.”***

The Respondent urged the Court to dismiss the instant application.

This Court has now considered the instant application and the annexures thereto. The Court has also considered the rival submissions and makes the following findings”-

There is no doubt that the Court entered a **Judgement in Thika CMCC No.1331 of 1999**, in favour of the Plaintiff allegedly on **24<sup>th</sup> July 2015**, but the Judgement is dated **9<sup>th</sup> June 2015**. It is also evident that the Appellant herein **Susan Njeri Njoroge**, who was the Defendant therein, was aggrieved by the said Judgement in **Thika CMCC No.1331 of 1999**. It is also not in doubt that she filed a **Notice of Memorandum of Appeal** on **30<sup>th</sup> July 2015**, wherein she faulted the learned trial Magistrate for holding as he did in the said Judgement and also by declaring among other things that the Respondent herein **Mwangi Kiarie**, was the true owner of the suit premises. Subsequent thereto, the Appellant/Applicant filed the instant **Notice of Motion** application on **12<sup>th</sup> August 2015**, and sought for stay of execution of the said Judgement and subsequent orders. On the first instance, the Court stayed the execution of the said Judgement until the application is heard and determined and the said interim orders have been extended on various dates. The matter for determination is whether the said interim orders should be confirmed or whether the Applicant is deserving of the orders sought.

The principles to be considered in determining an application for stay of execution pending appeal are found in Order 42 Rule 6(2) which provides that:-

**“No order for stay of execution shall be made under Subrule (1) unless:-**

- a) The Court is satisfied that substantial loss may result to the Applicant unless the order is made and 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 the Applicant.”**

The Applicant has therefore to satisfy this Court that she has met the threshold for grant of the orders sought.

Even as the Court considers the principles set out in Order 42 Rule 6(2), it will also take into account that the power to grant or not to grant stay of execution pending appeal is discretionary, which discretion must be exercised judicially based on facts and sound legal principles. See the case of **Fina Bank Ltd...Vs... Spares & Industries Ltd, Civil App.No.25 of 2000 LLR 5845 (CAK)**.

Further the Court will also take into account that the purpose of stay of execution pending appeal is guided against the appeal lodged being rendered nugatory. However, the Court should also take into account that a successful litigant should not be deprived of the fruits of his success. In the case of **Consolidated Marine..Vs..Nampijja & Another, Civil Application No.93 of 1989**, the Court of Appeal held that:-

**“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.**

So is the Applicant deserving of the orders sought?

The Applicant needed to satisfy to this court that she will suffer substantial loss unless the orders sought are granted. The Appellant herein has alleged that she is the one in occupation of the suit property and she operates a Petrol station. The Court in its Judgement declared the Respondent as the exclusive owner of the suit property. The Appellant has faulted the trial court for that finding. The Appellant has also alleged that if the said Judgment is not stayed and the Respondent herein executes the same, then she will be evicted and her petrol station will be demolished and certainly she will lose her livelihood and investment. That would be before the Appeal is heard and determined. If indeed her appeal would turn out to be successful, then the same would be rendered nugatory as the Petrol station and her investment will have been demolished. The Court in the case of **Selected Ltd...Vs....Goldrock Development Ltd (2015) eKLR** stated that:-

**“It is not in dispute that the suit premises are used for commercial purposes/business venture.**

***In my view, the appellant will suffer substantial loss if the eviction orders are enforced...”***

Equally, in this matter if the appellant is evicted before the appeal is heard and determined, she will suffer substantial loss.

The other issue is whether the application was filed without unreasonable delay. The Judgement in issue was allegedly delivered on **24<sup>th</sup> July 2015**, and this application was filed on **12<sup>th</sup> August 2015**. Indeed the application was filed within a very reasonable time and there is indeed no unreasonable delay herein.

On the issue of security, the Applicant has submitted that she is ready to abide by any condition the court may impose. It is evident that in determining an application for stay of execution, the court would be balancing the two competing rights of a successful litigant and the undoubted right of appeal of the aggrieved party. Such was the finding in the case of **Absalom Dova ...Vs... Tarbo Transporters (2013) eKLR**, where the Court held that:-

***“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage but administers the justice that the case deserved. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefit under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”***

Though the Applicant has demonstrated that she will suffer substantial loss, she has a duty to deposit a security to warrant the grant of the orders sought. She submitted that she is ready to abide by any conditions that would be imposed by this court.

The Court finds and holds that the Appellant/Applicant herein should deposit **Kshs.300,000/=** as **security** for the due performance of such decree or order as may ultimately be binding on the Applicant.

Having now considered the instant **Notice of Motion** dated **12<sup>th</sup> August 2015**, the **Court finds it merited** and **is allowed entirely in terms of prayer no.4, on condition that the Appellant/applicant deposits Kshs.300,000/= as security, within a period of 15 days from the date hereof.**

***Failure to abide*** by the above condition, the ***order granted*** herein ***will automatically be vacated.***

It is so ordered.

Dated, Signed and Delivered at Thika this **27<sup>TH</sup>** day of **October 2017**.

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Manyara holding brief for Oyugi for Appellant/Applicant

Mr. Makori holding brief for Kimani for Defendant/Respondent

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Ruling read n open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

27/10/17

Before: HON. L. GACHERU, ELC J.

Court Assistant - Lucy

Mr. Manyara holding brief for Mr. Oyugi for the Appellant

Mr. Makori holding brief for Mr. Kimani for the Respondent

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**27/10/2017**