



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**HCA NO . 91 OF 2015**

**GATEMBE NGUMI KAGU .....PLAINTIFF**

**VERSUS**

**MARY MUTHONI KAMAU.....RESPONDENT**

**RULING**

***(Application for stay pending appeal; stay granted subject to deposit of security).***

1. The application before me is that dated 3 November 2015. It is an application seeking stay pending appeal. In the decision being appealed from, which is a judgment of the Magistrate's Court, the applicant was the defendant, whereas the respondent was the plaintiff. In the said suit, the respondent had sued the appellant to have him evicted from the land parcel Nakuru Municipality Block 1/1848. After a hearing, judgment was delivered in favour of the respondent on 21 June 2015. On 16 July 2015, the appellant filed this appeal. In this appeal, the appellant essentially wants a reversal of the judgment of the Magistrate's Court.
2. Through this application, the appellant wants the execution of the said judgment stayed pending the hearing and determination of his appeal. In his supporting affidavit, he has averred that he was allocated the suit property in the year 1988 and has been on site since then. He has averred that if the order of eviction is executed, he stands to suffer great prejudice and his rights will be infringed upon. He has stated that this application for stay of execution is meant to maintain the status quo.
3. The respondent has sworn a replying affidavit to oppose the motion. She has inter alia averred that the applicant does not live on the suit land and all he has built is a temporary structure which is now dilapidated. She has further averred that no records in the lands registry reflect the appellant as title holder.
4. At the hearing of the application, only Mr. Waiganjo, counsel for the appellant attended. There was no appearance on the part of Mr. Kiburi for the respondent. I allowed the application to be heard as the date was taken by consent. In his submissions, Mr. Waiganjo stated that the current status quo is that it is the appellant on the ground. He stated that the structures on the suit land belong to him and that the respondent has never taken possession.
5. I have considered the application. It is one for stay of execution pending appeal. Although the application as drawn, was said to be brought under the provisions of Order 22 Rule 52 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act, applications for stay pending appeal are governed by the provisions of Order 42 of the Civil Procedure Rules, specifically

Order 42 Rule 6. The same is drawn as follows :-

*Stay in case of appeal [Order 42, rule 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 subrule (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.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) 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.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.*

6. It will be discerned from the above, especially from Order 42 Rule 6 (2) that no order for stay of execution ought to be made unless the following three conditions are met :-

*a. The court is satisfied that substantial loss may result to the applicant unless the order is made.*

*b. The application has been made without unreasonable delay.*

*c. There is security for the due performance of the decree.*

7. I do not think that the application has been filed after unreasonable delay and all I need to determine is whether the applicant stands to suffer substantial loss if the decree is executed and if so persuaded, make a decision on the sort of security that needs to be tendered.

8. The decree in issue is one for possession of property. Through the same, the applicant is required to vacate the suit premises and leave the same in the hands of the respondent. The applicant has stated in his affidavit that the land was allocated to him in the year 1988 and he uses it as a charcoal site. I am assuming that he uses the same as a charcoal selling point and therefore does business on it. I assume further that he does make some money out of this business. I therefore take it that what the applicant stands to suffer is monetary loss. If I balance this interest with that of the respondent, I think the interest of the respondent, pending the hearing of this appeal, can be covered if I order the applicant to tender

security which is more or less the loss that the respondent stands to suffer for not using the suit property for the duration of this appeal.

9. Neither party tendered to me the site value of the property, or how much such property would be leased out for. I have little choice but to make some assumptions. From the copy of title annexed to the replying affidavit, I can see that the land is 0.0229 hectares. It cannot be a very big piece of land. There is nothing developed on it save for a small structure which I assume is used as a store. Doing the best I can under the circumstances, I think, and I am aware that I am assuming here, that the same may be leased out in the range of Kshs. 10,000/= to Kshs. 15,000/= or so per month. I am ready to take the average sum of Kshs. 12, 500/= per month. Assuming that this appeal takes about 1 year or so to be completed, the loss that the respondent stands to suffer in the event that she is successful, is about Kshs. 150,000/= or so. I think the interests of the respondent will be adequately addressed if I order the appellant to deposit this sum as security for the due performance of the decree.

10. From the above, I allow this application and order the status quo to be maintained pending appeal. The appellant should not make any additional structures on the suit property and should continue using it in the same manner as before. However, the continued occupation of the appellant on the suit land is subject to the appellant depositing the sum of Kshs. 150,000/= as security. This sum be deposited in a joint interest earning account of both counsel for the appellant and counsel for the respondent within a period of 14 days. In default, the appellant to cede possession of the suit property to the respondent.

11. The costs of this application shall be costs in the appeal.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of March 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr Waiganjo present for applicant.

N/A on part of M/s Kamonjo Kiburi & Co. Advocates for respondent

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**