



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 10 OF 2016

ANNAH WATETU THEURI.....APPELLANT

-VERSUS-

EUSTACE MAINA WACHIRA.....RESPONDENT

RULING

1. The Appellant filed a Notice of Motion dated **3rd June, 2016** seeking orders of stay of execution of the judgment in **Civil Case No 346 of 2000** pending hearing of this application and the appeal. She also prays that costs abide the outcome of the main appeal.
2. The application is premised on the grounds that the appeal has a high chance of success; that eviction if carried out will bring undue hardship to the appellant who has lived on the suit property (**Nyeri/Municipality Block II/1146**) for over 40 years and knows no other home.
3. In support of her application, the appellant swore an affidavit on **4th June, 2016** reiterating what is stated in her grounds. In addition she depones that she lives on the suit property with her three deaf daughters and her grandson who if evicted, will be rendered destitute.
4. At the time of filing the instant motion, the Appellant had not annexed the court's judgment and the decree. She swore a further affidavit on **20th June, 2016** and attached the judgement but not the decree. Instead, she attached a judgment in Civil Appeal No. 88 of 2000 directing that the matter be heard before another magistrate. It is the Appellant's contention that this decision meant that the proceedings in **Civil Case No 346 of 2000** were a nullity, as her prayers to consolidate them with **CMCC No 669 of 1994** were denied.
5. In further support of her application, a further affidavit was sworn on **28th June, 2016** by Antony Mwangi Nganga (appellant's counsel), asserting the position that the order issued on **14th June, 2016** decreeing that security be provided during the execution of the decree (which is attached) is irregular and that it is in the interests of justice that the stay be granted.
6. The application is opposed. The respondent filed Grounds of Opposition dated **13th October, 2016** that the applicant is guilty of laches (inexplicable and long delay), thus the application is bad in law, frivolous, vexatious and ought to be struck out; that the application is an abuse of the court process as execution has already taken place and that the appeal has no chance of success.
7. When the application came up for hearing on **14th October, 2016** **Mr. Nganga** appeared for the

appellants but there was no representation for the respondent.

8. Mr Nganga urged the court to strike out the Grounds of Opposition for not conforming with the provisions of **Order 51** of the Civil Procedure Rules(CPR). He further submitted that the Appellant has been in occupation of the suit property all her life and should execution proceed, she will be unable to find another home; that the appeal has good chances of success and that no warrants of attachment were served upon the appellant as is required under **Order 22** of the CPR.

9. On the issue raised by Mr. Nganga that the Grounds of Opposition have failed to conform with **Order 51** of the CPR, I agree with counsel for the applicant. The grounds were filed out of time (over three and a half months after the respondent was served with the application) and without leave of the court. I find the application by counsel for the applicant merited and expunge the grounds of opposition from the court record.

10. The law governing stay of execution pending an appeal, is found in **Order 42 Rule 6(2)**of the **Civil Procedure Rules 2010** which provides as follows:-

“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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. This is further supported by the case of **Butt v. Rent Restriction Tribunal (1982)KRL 419** which laid down the general conditions governing the grant of stay of execution pending appeal.

“It is in the discretion of court 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 out to exercise its best discretion in a way not to prevent the appeal if, successful from being nugatory...The court will grant a stay where special circumstances of the case so require...”

12. Courts have interpreted “substantial loss” to be the primary issue for consideration while granting an order for stay of execution pending appeal. In the case of **Sammy Some Kosgei v. Grace Jelet Boit [2013] eKLR** the court observed:-

“...The relevant provisions in relation to stay pending appeal are contained in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010..... The more critical issues herein are whether the applicant stands to suffer substantial loss if the order is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal...” (emphasis supplied).

Analysis and determination:

13. From the provisions of the law and cases cited above, it is clear that this court has discretionary power to grant stay of execution pending appeal. That power is, however, exercised on the basis of settled principles as established in the **Butt** case (supra) and the applicants must satisfy the conditions set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. In the circumstances of this case, whilst the instant application was filed without unreasonable delay, I find that there was delay on the part of the Appellant’s counsel in filing a copy of the judgment and decree in court. I also find that the applicant has not offered any security and more importantly she has since been evicted from the suit property.

14. For the reasons given, I find that the application has no merit and I dismiss it with costs to the respondent.

Dated, signed and delivered in open court at Nyeri this 2nd day of November, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. Githi h/b for Mr. Nganga for the applicant/appellant

N/A for the respondent

Court assistant - Esther