



**REPUBLIC OF KENYA**

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

**AT NYERI**

**ELCA NO.7 OF 2015**

**GEORGE MUNA ..... 1ST APPLICANT**

**CHARITY NJERI ..... 2ND APPLICANT**

**VERSUS**

**SALOME WARUARE.....RESPONDENT**

**RULING**

**Introduction**

1. On **9th March, 2014** the Applicants brought the notice of motion of even date seeking stay of execution of the judgment of **Ombwayo J.** delivered on 4th February, 2015 pending the hearing and determination of the their intended appeal.
2. The motion is premised on the grounds that the applicants being dissatisfied with the judgment referred to above, intend to file an appeal against it; that unless the orders sought are granted, the respondent may execute the decree obtained pursuant to the judgment. It is contended that execution of the decree will occasion irreparable loss and damage on the applicants and that it will render the intended appeal, which is arguable, nugatory. Further, that the application has been brought without delay and that the applicants are willing to abide by any conditions and terms as to security which this court may deem fit to impose.
3. In support of the averments contained in the application, the 1st applicant George Muna, has annexed to his supporting affidavit a notice of appeal dated 18th February, 2015 marked **GM-1** and a letter addressed to the Deputy Registrar of this Court dated 17th February, 2017 requesting for certified typed proceedings and judgment, marked **GM-2**.
4. Maintaining that unless the orders sought are granted, the respondent may execute the orders obtained pursuant to the judgment appealed from and render the appeal nugatory, the applicants contend that it is in the interest of justice to allow the application.
5. In reply and opposition to the application, the respondent filed the replying affidavit sworn on 24th March, 2015 where she has deposed that the application is misconceived and an abuse of the process of

the court as mere filing of a notice of appeal does not show that the appeal has any chances of success; that since she has not taken any steps to execute the judgment, the application is premature. Terming the application a scheme meant to deny her the fruits of her judgment which she has waited for a long period of time (since 2000), the respondent contends that the applicants have not demonstrated that they will suffer irreparable loss if the orders sought are not granted.

6. Contending that the developments on the suit property were effected in disobedience of a court order and as such incapable of making a basis for issuance of the orders sought, the respondent maintains that the applicants have failed to satisfy the conditions for grant of the order sought.

#### **Analysis and determination:-**

7. The sole issue for determination is whether the applicants have made up a case for grant of the order sought (stay of execution pending appeal).

#### **The Law applicable to the application:-**

8. The law on stay of execution pending appeal is found in **Order 42 Rule 6(1)** of the Civil Procedure Rules which provides as follows:-

**“(1) No appeal or second appeal shall operate as 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.....”**

9. Under the above provision of the law, it is clear that the court appealed from has discretion to grant stay of execution pending appeal. The guidelines for grant of an order of stay pending appeal are provided for under **sub rule (2)** which provides as follows:-

**“Order 42 Rule 6(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 applicant.”**

10. According to the pleadings/documents filed in this application, the judgment appealed from was delivered on 4th February, 2015 and the current application made on 9th March, 2015 barely one month after the date of delivery of the judgment appealed from.

11. Although counsel for the respondent relying on the decision in the case of **Samson Kazungu Kalama vs. Robert Shume & 3 others Malindi ELC 144 of 2011 (2014)e KLR**, submitted that there was unexplained delay of 35 days, in the above case, it was stated:-

**“Even after being served with the said notice (seven day’s notice to vacate the suit properties), the did not file the current application immediately. The defendants waited until the plaintiffs/respondent**

12. Unlike in the **Samson Kazungu Kalama vs. Robert Shume and 3 others** case (*supra*), where the applicants moved the court for stay after steps had been taken in execution of the decree of the court, in this case no such steps have been taken. I am satisfied that, in the circumstances of this case, that there was no unreasonable delay in bringing the application for stay of execution of the decree/judgment of this court (read decree/judgment of the Environment and Land Court hereto).

13. On whether the applicants have demonstrated that they stand to suffer substantial loss unless the order sought is granted, despite there being no evidence of any threats to demolish the structures

constructed in the suit property, I hold the view that without any order protecting the structures on the suit property, nothing stops the respondent from dealing with the structures on the suit property in a manner prejudicial to the applicants' interest therein before the appeal is heard and determined.

14. With regard to the respondent's contention that the orders sought should not issue in favour of the applicants because the applicants effected the developments on the suit property in violation of a court order, whilst that would have been a good ground for denying the applicants the order sought, I found no evidence capable of proving the allegation that the structures in the suit property were constructed in violation of a court order. The order that the applicants allegedly violated was not annexed to the respondent's replying affidavit, if any. I also found no such court order in the record before me.

15. Noting that the applicants' are in possession of the suit property and that they have erected commercial premises thereon, I am satisfied that if the structures erected in the suit property are destroyed/interfered with before the appeal filed is heard and determined, the applicants may suffer substantial loss.

16. On the issue of security, I note that the applicants have intimated their willingness to abide with any order for security that this court may make and being satisfied that the applicants have made a case for granting of the order sought, I allow the application on condition that the applicant shall, within 30 days from the date of this ruling deposit in an interest bearing account to be opened in the name of the advocates of the parties herein the sum of Kshs. 500,000/= . The applicants are also directed to, within fourteen days from the date of this ruling, file an undertaking to prosecute the appeal filed herein without unreasonable delay.

17. The costs of this application shall be costs in appeal.

**Dated, signed and delivered at Nyeri this 11<sup>th</sup> day of June, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Muhoro for the respondent

Mr. Kioni for the appellant

Court assistant - Lydia