



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO.E004 OF 2020

AGNES WAMBUA MULWA.....1ST APPLICANT/APPELLANT

PETER MWENZE KYONGOI.....2ND APPLICANT /APPELLANT

MACHAKOS UNIFORMS.....3RD APPLICANT/APPELLANT

VERSUS

JOSEPH MUNYAO KIILU.....LANDLORD/CLAIMANT RESPONDENT

(Being an Application for an injunction and/or a stay of the orders of the Chief Magistrates Court at Machakos pending the hearing and determination of Appeal from the Ruling and Order of the Senior Principal Magistrate (Hon E.H Keago) delivered on 1st October 2020 in Machakos Misc Application No.39 of 2019).

BETWEEN

BENJAMIN M. MUTUNE T/A FAITH AGENCIES AUCTIONERS.....APPLICANT

-AND

JOSEPH MUNYAO KIILU.....LANDLORD /CLAIMANT

VERSUS

AGNES WAMBUA MULWA.....1ST RESPONDENT/APPLICANT

PETER MWENZE KYONGOI.....2ND RESPONDENT /APPLICANT

MACHAKOS UNIFORMS.....3RD RESPONDENT/APPLICANT

-AND

JOHN MULWA NZIOKI.....INTERESTED PARTY

RULING

1. By a Motion on Notice dated 6th October, 2020, the applicants/appellants herein seek stay of execution of the rulings delivered on 1st October, 2020 and 18th October, 2019 in Misc. Application No. 39 of 2019 pending the hearing and determination of this appeal.

2. According to the Applicants, the Landlord Claimant/Respondent herein filed a Misc. Application number 39 of 2019 on 18/10/2019 seeking for Security to enable M/S faith Agencies Auctioneers to evict the Applicants herein from their Business Premises on Plot number Machakos Town Block 11/285 and put the Respondent Mr. Joseph Kiilu Munyao in possession of the same. The Respondent also sought orders that the police provide security to the Auctioneers to carry out the said action. The said application was heard and orders issued ex

parte. The applicants complain that they were condemned unheard contrary to the rules of natural justice.

3. According to the applicants, their application dated 27th February, 2020 seeking to have the said orders reviewed and set aside and for joinder of **John Mulwa Nzioki** was similarly dismissed on 1st October, 2020 hence exposing them to a risk of eviction. It was this decision that provoked the present appeal.

4. In response to the application, the Respondent filed a replying affidavit in which he deposed that he is the registered owner of Land Parcel Number Machakos Town Block 11/285 for which he has been paying rent to the County Government of Machakos. He deposed that there was no tenancy relationship between him and the Applicants and referred to a judgement delivered in Machakos ELC No. 282 of 1996 which was issued against the interested party herein. He deposed that no stay of the said orders was issued.

5. The Respondent averred that the Applicants herein claim to be tenants on the assumption that the interested party is the owner of the said property. According to him, the grant of the orders sought herein will greatly prejudice him as he will be denied the right to enjoy the fruits of the said judgement.

6. In their submissions the Applicants contended that their appeal has high chances of success therefore if the order of stay is not granted the Appeal will be rendered nugatory. As regards the issues whether substantial loss will occur in case the order is not granted, it was submitted that if the order of stay is not granted the Respondents herein will proceed to execute the orders issued by the trial court on 24th October, 2019 which is in respect of providing Security to enable M/S faith Agencies Auctioneers to evict the Applicants/Appellants herein from their Business premises on Plot number Machakos Town Block 11/285 and put the Respondent Mr. Joseph Kiilu Munyao in possession of the same.

7. It was submitted this application was filed without undue delay in that the said application was filed on the 6th day of October 2020 before the expiry of 14 days from the date of the ruling being 1st October 2020. The Memorandum of Appeal dated 6th October 2020 was filed on the even date, 5 days after the delivery of the Ruling hence there was no undue delay.

8. On the issue whether the Appellants/Applicants must furnish security, it was submitted that the same is discretionary but contended that in this case the decree is not of monetary nature hence the order of security may not suffice.

9. The Respondents on the other hand reiterated the contents of the replying affidavit and averred that the before the ELC, the Interested Parties herein claimed possession of the suit property by way of adverse possession and in those proceedings the said interested party admitted to having rented out part of the suit property to some tenants who turned out to be the applicants herein. In those proceedings, it was submitted that the court found that the respondent landlord is the legal owner of the suit premises. According to the Respondents, the applicants' reluctance to pay rent to the respondent while engaging him in a series of legal proceedings amounts to an abuse of court process.

10. It was submitted that the applicants have not demonstrated that they will suffer substantial loss should the orders sought be disallowed. It was further submitted that the Applicants have not offered any security for the due performance of the decree.

Determination

11. I have considered the above matters.

12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** 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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

13. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

14. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**. This was the position of Warsame, J (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

15. Therefore, this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

“It is an affront to the rule of law to... render nugatory an order of Court whether real or anticipatory. Furthermore... parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”

16. On the first principle, Platt, Ag.JA (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

17. On the part of Gachuhi, Ag.JA (as he then was) at 417 held:

“In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement.”

18. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

19. In this case, it is contended which contention is not denied that orders of eviction were issued against the Applicants in ex parte proceedings vide Miscellaneous proceedings. It is clearly whether such drastic order can be issued in miscellaneous proceedings much less

ex parte.

20. As to the issue of delay I am satisfied that in the circumstances of this case where the issue is that of possession, the applicant cannot be said to have been guilty of inordinate delay.

21. As to whether substantial loss will be occasioned to the applicant if the stay ought is not granted, the Court of Appeal in **Nyals (K) Ltd. vs. United Housing Estate Ltd. Civil Application No. 129 of 1995** held that where the subject matter is simply a right to possess it is difficult to see how this can be preserved unless the *status quo* is maintained pending the determination of the appeal.

22. In this case, taking into consideration the fact that the Court should always opt for the lower rather than the higher risk of injustice and particularly the fact that the interests of children are at stake, it is my view that a stay ought to be granted. The effect of the said stay would be to maintain the status quo as it were before decision being appealed against was made.

23. In the premises, I hereby grant an order staying the decision made stay of execution of the Ruling delivered on 1st October, 2020 in Misc. Application No.39 of 2019, and the execution of the Ex-parte –ruling delivered on 18th October, 2019 pending the hearing and determination of the Applicants' Appeal but on condition that the Applicants pay to the Respondent rents they have been paying to the interested party herein.

24. The Costs of this application will be in the cause.

25. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of February, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Langalanga for the Appellant

Mr Hassan for Mr B. M. Nzei for the Respondent

CA Geoffrey