



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 142 OF 2008

BERNARD T. GETECHA.....PLAINTIFFS/APPLICANTS

-VERSUS-

NATIONAL HOUSING CORPORATION & ANOTHER..... DEFENDANTS /RESPONDENT

RULING

1. This is a ruling on **Notice of Motion** dated **18th March, 2020** seeking the following orders: -

i. Spent.

ii. Spent

iii. THAT pending the hearing and determination of the intended appeal to the Court of Appeal, this Honourable Court be pleased to stay execution of the judgment, the resultant decree of 30th January, 2020 and all consequential orders arising thereof including execution as to costs.

iv. THAT pending the hearing and determination of the intended appeal to the Court of Appeal, this Honourable Court be pleased to stay execution of the judgment, the resultant decree of 30th January 2020 and all consequential orders arising thereof including execution as to costs.

v. THAT costs of this application be provided for.

2. Grounds on the face of the application are that judgment was entered against the plaintiffs/applicants on 30th January, 2020 wherein the plaintiffs' suit against the defendants was dismissed with costs. That the plaintiffs being dissatisfied with the judgment preferred an appeal against the decision to the Court of Appeal by lodging a notice of appeal.

3. That unless the orders of stay of execution are granted, the plaintiffs/applicants to suffer substantial loss; that the intended appeal raises weighty grounds with high probability of success and it is in the interest of justice that the execution be stayed (including the award of costs).

4. That if the decree resulting from the impugned judgment (including the award of costs) is executed, the appeal will be rendered nugatory. That the applicants are ready and willing to abide to any reasonable condition for security for costs set by the Court in order for the appeal to be heard and determined on its merits.

5. The application is supported by affidavit sworn by the applicant on **18th March 2020**. He restated grounds on the face of the application already captured above.

6. In response, the defendants/respondent filed a replying affidavit dated **2nd March, 2021** sworn **Kennedy Kaunda Munala**. He averred that neither the application nor the supporting affidavit has disclosed or established any factors which show that the plaintiffs/applicants would suffer any substantial loss and this application was a ploy to delay the defendants/respondents from enjoying the fruits of their judgement; and if court deem fit to grant stay then the costs awarded be deposited in a joint account between the parties therein.

7. In a rejoinder, the applicants filed supplementary affidavit dated **20th April, 2021** and averred that following the application, the defendants/respondents have since filed a Party to Party Bill of Costs dated 29th January, 2021 vide a miscellaneous suit now serialized as **Nakuru Misc Civil Application No. 35 of 2021** and the matter had already been taken to court for mention on 13th April, 2021. That the same had been done in order to hide from this court the fact that there were ongoing taxation proceedings and eventually execution

proceedings.

8. The applicants aver that considering they had filed a Notice of Appeal and requested for certified copy of proceedings, it is imperative that this Honorable Court grants stay, especially in regard to taxation proceedings, in order to grant them a chance to pursue their appeal without the threat of execution.

9. The application was canvassed by way of written submission filed by both parties.

PLAINTIFFS/APPLICANTS SUBMISSIONS

10. The plaintiffs/applicants in their submissions filed on 20th April, 2021, submitted that the application had been brought under **Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010** which empowers this court to stay execution of its judgment and the conditions to be met before grant of stay of execution are provided by the Rule 6(2); the first condition being that the applicant must show that he/she shall suffer substantial loss if stay is not granted and submitted that defendants/respondents have not demonstrated to court that they were able to refund the costs payable upon taxation if and when the appeal was successful.

11. The plaintiffs/applicants further submitted that despite the fact that they had laid bare the fact that the defendants/respondents may not be in a position to refund the costs paid if and when the appeal succeeds, the defendants/respondents had not bothered to demonstrate that it was capable of repaying the monies paid in the event the appeal succeed and cited the case of **National Industrial Credit Bank Limited** as followed by the **High Court in Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** and **Equity Bank Ltd vs Taiga Adams Company Ltd [2006] eKLR**.

12. On whether the application was filed without unreasonable delay, the applicant submitted that Judgment in this matter was delivered on 30th January, 2020 and the application was filed on 18th March, 2020 and the delay of about one (1) month is attributed to the ensuing slow-down in court operations and eventual lockdown of the courts following declaration of the Covid-19 Pandemic.

13. On willingness and ability to deposit security, the applicant submitted that in their supporting affidavit, they have demonstrated willingness to abide by any conditions issued by this Honorable Court despite the fact that the imminent execution is in respect monetary subject matter which are yet to be determined by way of taxation proceedings.

14. The applicants submitted that there is no prejudice the defendants/respondents stand to suffer if they await determination of the appeal and urged court to allow the application with costs in their favor.

DEFENDANTS/RESPONDENTS SUBMISSIONS

15. The defendants/respondents in their submissions dated 7th May, 2021 submitted that the plaintiffs/applicants have not satisfied the conditions set down under **Order 42 rule (2) of the Civil Procedure Rules 2010** which are couched in mandatory terms and in particular on substantial loss and on security, the plaintiffs/applicants have not provided any form of security to show commitment towards execution of the decree.

16. The defendants/respondents further submitted that the plaintiffs/applicants have not shown how the intended appeal would be rendered nugatory if the orders of stay are not granted. They cited the cases of **Kenya Airports Authority v Mitu-Bell Welfare Society & Another [2014] eKLR**, **Silverstein vs Chesoni [2002] KLR 867** and **Otieno vs Ougo & Another (No.2) [1987]** where the Court of Appeal held that the object of granting an injunction pending an appeal is to safeguard the rights of the appellant and to prevent the appeal is successful from being nugatory.

17. The defendants/respondents submitted that it is a state corporation and was therefore in a position to repay any amounts if the appeal succeeded and drew the courts attention to the cases of **Equity Bank Ltd vs Taiga Adams Company Ltd** and **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 others – Civil Appeal No. 291 of 1997**.

18. In conclusion, the respondents submitted application lacks merit, meant to deny and delay them from enjoying the fruits of the judgment delivered on 30th January, 2020 and that the same should be dismissed with costs in their favor.

ANALYSIS AND DETERMINATION

19. I have carefully considered averments and submissions by the parties herein; what I wish to consider is whether the conditions for grant of stay of execution pending appeal as set for under **Order 42 rule 6(2) of the Civil Procedure Rules** have been met. **Order 42 rule 6(2)** provide 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”.

20. The Court of Appeal in **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365** stated as set out hereunder: -

“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 42 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.”

21. On whether the application was filed timeously, the averments clearly show that there was no unreasonable delay in filing the application.

22. In respect to substantial loss, the plaintiffs/applicants argued that in the event the defendants/respondents execute the judgment, it will result to the defendants/respondents taking over the suit properties from the plaintiffs/applicants and it is the said take over that the plaintiffs/applicants wish to stop.

23. In my view, takeover of the suit properties during the pendency of the appeal would result to eviction of the plaintiffs/application which would amount to substantial loss.

24. Lastly, on the issue of security, an applicant seeking stay pending appeal is required to provide such security as the court may find it fit to order for the due performance of the decree. The plaintiffs/applicants in their supporting affidavit indicated that they shall abide by the court’s directives in respect to security for due performance of the decree.

25. From the foregoing, I find the application is merited and proceed to allow conditional stay of execution Pending appeal.

26. FINAL ORDERS

- 1. Stay of execution do issue pending appeal on condition that that kshs 200,000 is deposited in court.**
- 2. Compliance with order 1 above within 30 days from the date of this ruling**
- 3. Failure to comply with order 2 above, execution may proceed.**

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 22ND DAY OF JULY, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Mrs. Morande holding brief for Kibet for Plaintiffs/Applicants

Ms. Kipruto for Defendants/Respondents