REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 53 OF 2016

THE FAITH HOMES OF KENYA.....PLAINTIFF/RESPONDENT

VERSUS

ROBERT CHERUKWO.....DEFENDANT/APPLICANT

RULING

(On Stay of Execution Pending an Intended Appeal)

THE APPLICATION

1. The Defendant/Applicant brought a Notice of Motion dated **27/9/2021** and filed on the same date which generally sought for an order of stay of execution pending Appeal. It was brought under **Sections 1A, 1B, 3** and **3A** of the **Civil Procedure Act, Order 42 Rule 6** of the **Civil Procedure Rules.** The Applicant sought for the following specific orders:

> **(1) ….spent**
>
> **(2) That this Honourable Court be pleased to issue order for stay of execution of the court's judgment pending hearing and determination of the intended appeal.**
>
> **(3) …spent**
>
> **(4) Costs be provided for.**

2. The Application was supported by an affidavit sworn by the Defendant on **27/9/2021**. The grounds of the application are that the defendant/applicant has preferred an Appeal from the judgement of this Court that was delivered on **10/09/2021**, and the Respondent is likely to effect the court's judgment and evict him from the disputed parcel of land. He alleged further that he is likely to suffer substantial loss and damage unless the orders sought are granted hence in the interest of justice the orders should be granted.

3. In the affidavit he deponed further that he and his son reside on and utilize the suit land, and his appeal shall be rendered nugatory if the orders sought are not granted. Lastly, he deponed that he shall abide by the conditions set out by the court for the grant of stay of execution.

THE RESPONSE

4. The Plaintiff/Respondent filed Grounds of Opposition together with a replying affidavit in opposition. Noteworthy is that **Order 51 Rule 14** of **the Civil Procedure Rules** permits the filing of either or a combination of both documents. The plaintiff's deposition was that the application was brought in bad faith and that the defendant did not demonstrate that he stood to suffer substantial loss if the application was declined. He countered the Plaintiff's deposition about residence on and utilization of the land stating that it is not the true position. He then stated that the position was that prior to the judgment the defendant had a goat house, goats and an agent on the suit land but he removed them from the suit land after delivery of the judgment herein. He stated that the defendant's son has never resided on the suit land since it is he who is in full occupation thereof. He summed it up that the defendant does not stand to suffer any substantial loss because he is no longer on the suit land hence the application was made in bad faith and lacked merit.

SUBMISSIONS

5. The Applicant filed his written submissions on **12/10/2021**. The Respondent has filed none despite the court having given directions for the parties to theirs if they so wished. That does not impact the decision of the Court in any way because, submissions are only a "*marketing*

language" by parties for their arguments or views which they wish the court to pay attention to. See the Court of Appeal case of ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR***. It matters little whether or not the parties carry out their marketing to the Court. What is important is the existence of what is to be marketed.

DETERMINATION

6. This court carefully considered the Application, the affidavits both in support and opposition to it, the grounds of opposition, Defendant's submissions as well as the law. It found two issues for determination. These were:

> ***(a) Whether the court can issue stay of execution* orders *against declaratory and injunctive orders the applicant.***
>
> ***(b) Whether the Applicant has satisfied the criteria for grant of stay of execution pending appeal.***

7. I start by analyzing the second issue, that is to say, **whether the Applicant has satisfied the requirements for grant of an order for stay of execution pending appeal.** The law on stay of execution of judgment is now well settled. For a court to grant the orders of stay of execution pending appeal, the party seeking such orders must satisfy the court that he has placed himself within the legal requirements of **Order 42 Rule 6** of the **Civil Procedure Rules.** The provision states 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.**

8. This Court shall not reinvent the wheel on the import and interpretation of this provision. There are a number of decided cases that lay the basis for and expound on the conditions to be satisfied by an Applicant of this nature. In Civil Appeal No.107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR, the Court held that:-

> **"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs…Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-**
>
> **"The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.**
>
> **"In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo…Vs…Straman EA Ltd (2013) as follows:-**
>
> **"In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."**
>
> **These twin principles go hand in hand and failure to prove one dislodges the other"**

9. The question that then comes to mind is: has the applicant satisfied the conditions for stay of execution pending appeal?

10. As to whether the Application has been brought without unreasonable delay, this court notes that it was filed on the **27/9/2021** whereas the judgment had been delivered on **10/9/2021**. The Application was therefore filed **17 days** from the date of delivery of the judgment. In addition, the Applicant filed a Notice of Appeal which has been attached to the Affidavit and the original thereof is in the Court file. This was filed on **15/09/2021**. That was only five days after the delivery of the judgment. Based on the two steps by the Applicant, I find that for the purposes of this application he satisfied this court that there is an appeal in place and that the application was filed without unreasonable delay. I hold so because in terms of Rule 2(2) of the Appellate Jurisdiction Act/ Court of Appeal Rules an ""appeal", in relation to appeals to the Court, includes an intended appeal;…". And as stated in ***Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR***, an appeal is deemed to have been filed once a notice thereof has been filed in the appropriate registry.

11. Will the Applicant suffer substantial loss if the orders sought are not granted? To answer this question, this court had to compare the judgment of this court with the prayers sought. The prayers sought in the Plaint and which were granted in favour of the plaintiff were, in summary: ***declaratory orders, a permanent injunction against the defendant and costs of the suit***.

12. The applicant averred that he would suffer substantial loss and the appeal will be rendered nugatory if the orders of stay of execution was not granted. He stated that the Respondent was likely to ***execute the decree*** of the court and prevent him from utilizing the parcel of land. According to the Respondent, he is the only one in occupation of the land at the moment after the Applicant removed his goats, the goat house and his agent from the suit land after the delivery of the judgment. The averments contained in the respondent's replying affidavit. They were not controverted by the Applicant in any manner, whether by way of supplementary affidavit or otherwise. With such a strong deposition on oath standing unchallenged, the Court is left with no option but to believe it. If the Defendant is not on the suit land, what is there to be executed? In my view, the Application herein is a mere academic exercise which no one should engage in.

13. The onus of proving a fact lies on the person alleging the existence of that fact. In the instant application, it is upon the Applicant to prove the substantial loss he would suffer if the court declines to issue the orders sought. As things stand, he is not on the disputed land. The Court only declared that the Respondent is the owner of the parcel of land. It also issued an injunction against the respondent. It did not issue a positive order such as eviction. In my view, the two orders issued are negative. In **Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto that:**

> **"The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.''**

14. The applicant has not demonstrated to this court the nature of the substantial loss he would suffer. This limb of the Application fails. Thus, I need not consider whether or not the Applicant has offered security in the event of a stay of execution being granted.

(b) Can the court issue stay of execution orders against declaratory and injunctive orders?

15. This court having found that the orders issued are of a declaratory nature and injunctive ones, there is, in my view, nothing the Plaintiff shall execute, at this stage, as against the Applicant. I find no reason to grant orders of stay of execution for the state of affairs remains as it was. There is nothing to be altered on the ground as the Plaintiff is the one who was in occupation of the suit land and the court declared that he has rights over the suit land.

16. In the case of **Johana Nyokwonyo Buti vs. Walter Rasugu Omariba & 2 Others (2011) eKLR** the Court of Appeal held thus:

> **"....a declaration/declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force, that is, it does not require anyone to do anything."**

17. Similarly, in the case of **Katiba Institute v President of Republic of Kenya & 2 Others; Judicial Service Commission & 3 others (Interested Parties) [2020] eKLR** the court had this to say:

> **"The issues raised in this petition, therefore, fall squarely within the doctrine of a fresh cause of action arising out of a declaration as was stated in *the Chief RA Okoya* case, quoted with approval in the *Okiya Omtata* case, where the court said:**
>
> ***"First: (i) Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, e.g. to pay damages or refrain from interfering with the plaintiffs' rights, such order being enforceable by execution if disobeyed.***
>
> ***Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.***
>
> ***Second: A declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it."***

18. Form the analysis above as compared with the authority cited, it follows that there is nothing which the court ordered the respondent to do to effect the judgment. Therefore, there is nothing to be stayed until he decides move the Court or other proper forum for the enforcement of his rights so declared.

19. In the case of **Kaushik Panchamatia & 3 Others…Vs…Prime Bank Limited & Another [2020]eKLR** *the Court stated thus:*

> ***"…that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants."***

20. I agree in entirety with the holding. The upshot is that this court cannot issue the orders prayed for by the Applicant since the judgment contained negative orders. Consequently, the applicant's application dated **27/9/2021** lacks merit and is hereby dismissed with costs to the Respondent.

21. To clear any doubt, this Court directs that the interim orders of stay issued earlier in favour of the Applicant should be and are hereby vacated.

It is so ordered.

Dated, signed and **delivered** at **Kitale via electronic mail** on this **30th** day of **November, 2021.**

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.