



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 57 OF 2005

SAMUEL MUINDI.....PLAINTIFF/RESPONDENT

VERSUS

MALILI RANCH LIMITED.....DEFENDANT/APPLICANT

RULING

1. The Defendant/Applicant has filed a Notice of Motion dated 17/03/2020 principally seeking for an order of stay of execution of the decree consequent upon the judgement delivered on 18/09/2019 as well as all consequential orders pending the hearing and determination of the Appeal. The Applicant also seeks for costs of the application.

2. The application is supported by the annexed affidavit of **James Kituku Munguti** a Director and secretary of the Defendant/Applicant as well as the grounds on the face thereof wherein it raised several averments *inter alia*; that the Applicant is aggrieved by this court's judgement dated 18/09/2019 and has lodged a notice of intention of appeal against the same; that the intended appeal has high chances of success; that the Applicant will suffer irreparable and substantial loss if stay of execution is not granted as appeal will be rendered nugatory; that the Applicant is ready and willing to abide by any orders for security to be made by this court and that the application has been made without undue delay.

3. The application is opposed by the Plaintiff/Respondent who raised several grounds of opposition namely: that that application is an abuse of the court process; that no proper explanation has been offered for the undue delay; that the Applicant has not demonstrated that it will suffer substantial loss if the order sought is not granted; that the judgement ordered for transfer of some property to Respondent which could easily be reversed upon success of the appeal; that the application is meant to deny the Respondent the fruits of the judgement.

Applicant's submissions:

4. Learned counsel for the Applicant raised one issue for determination namely whether this court should grant orders of stay of execution of the decree and judgement dated 18/09/2019 pending the determination of the appeal. It was counsel's submission that the application is predicated upon Order 42 Rule 6 of the Civil Procedure Rules where **three conditions** must be satisfied by an applicant namely: that substantial loss will result if the order of stay is not granted; that the application is made without unreasonable delay; that the Applicant furnishes security for the due performance of the decree that may ultimately be binding on the Applicant. It was submitted that it was necessary for grant of stay pending appeal so as to preserve the subject matter of litigation and to ensure that the Appellant does not get only a paper judgement. Reliance was placed in several cases namely **Jaber Mohsen Ali & Another –v- Priscillah Boit & Another [2014]**, **Kenya shell limited –v- Kibiru [1986] KLR 40** and **Kiplagat Kotut -v- Rose Jebor Kipngok [2015] eKLR**.

Respondent's submissions

It was submitted that the Applicant failed to file the requisite Notice of Appeal within the stipulated period as per Rule 75 of the Appellate Jurisdiction Act in that the purported Notice of Appeal was filed on 20/01/2020 and served upon the Respondent on 24/02/2020 with no explanation for the delay and that the purported application at the Court of Appeal seeking extension of time is an afterthought by the Applicant. It was counsel's submission that since there is no appeal filed yet then the request for stay of execution pending appeal cannot be granted as it will be in vain and unenforceable. Reliance was placed in the case of **Speaker of the National Assembly –vs- Karume [2008] KLR 425** as cited in the approval in the case of **Abraham Lenauia Lenkeu –vs- Charles Katekeyo Nkaru [2016] eKLR**. Learned counsel urged this court to dismiss the application with costs.

5. I have considered the rival affidavits and the submissions plus the authorities cited. The issue for determination is whether or not the Applicant has convinced the court to warrant an order of stay of execution pending determination of an appeal at the Court of Appeal.

The guiding principles for the issuance of an order of stay of execution of decree are well settled and anchored upon Order 42 Rule 6 of the Civil Procedure Rules which provides three conditions to be met by an Applicant namely:- that the application is made without unreasonable delay; that the Applicant gives such security as the court may order for the due performance of such decree or order that may ultimately be

binding on the Applicant; that the court must be satisfied that substantial loss will result to the Applicant unless the order of stay is granted.

6. As regards the first condition, it is noted that the judgement of this court was delivered on the 18/09/2019 and thus any appeal ought to have been lodged within 30 days thereof starting first with the Notice of Appeal within 14 days upon delivery of the judgement as provided for under Rule 75 of the Appellate Jurisdiction Act which provides as follows:-

“Notice of Appeal –

(1) Any person who desires to appeal to the Court shall give notice in writing which shall be lodged in duplicate with the Registrar of the Superior Court.

(2) Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”

The judgement herein was delivered on 18/09/2019 and the notice of appeal was filed on 20/01/2020 and served upon the Respondent on 24/02/2020. The present application was lodged on 19/03/2020 about six months after the delivery of the judgement. The Applicants supporting affidavit does not furnish or disclose any reasons for presenting the Application quite late in the day. The Applicant is fully aware that an order for stay of execution of decree pending appeal is conditional. In the further affidavit sworn by the Applicant dated 8/06/2020 the Applicant seems to lay blame upon his former Advocates for failing to lodge the Notice of Appeal in time and has gone ahead to file an application before the Court of Appeal for leave to lodge the Notice of Appeal out of time. The said application is yet to be prosecuted before the said Superior Court. I find that it would have been appropriate for the Applicant to present the present application before the said court for consideration but not to present it here. This is so because as at present there is no appeal in existence and that in the event the Applicant’s application before the Court of Appeal is not successful then any orders made herein are likely to be in vain. The conduct of the Applicant in filing two simultaneous applications before different courts is akin to engaging in lottery. This is unacceptable. The least the applicant could have done was to withdraw or abandon the application now pending at the Court of Appeal and then concentrate on the present application. It is untenable for the applicant to pursue the present application with full knowledge of the presence of a similar application before the appellate court. I am not satisfied that the Applicant has given good reasons for filing the application quite late in the day. I find the period of six (6) months to be unreasonable delay. The first condition has thus not been fulfilled.

7. As regards the second condition, the Applicant in his supporting affidavit as well as the further affidavit has indicated that he is ready to offer any security as may be ordered by this court. Indeed, a prayer for an order of stay of execution of decree pending appeal is predicated upon the Applicant furnishing security for the due performance of the decree. This is meant to protect or assuage the interest of the judgement creditor who is entitled to enjoy the fruits of the judgement on the one hand and to enable the Applicant on the other hand ventilate his appeal in the end. I find the Applicant has duly satisfied the second condition but the same will be considered alongside the other conditions and not in isolation.

8. As regards the third condition, it is noted that the Applicant has averred that it stands to suffer irreparable loss if the Respondent executes the decree as the defendant’s other lawful members/shareholders will be affected. However, the Applicant has not demonstrated on a balance how the company’s shareholders are likely to be affected by the execution of the decree. In any event the Applicant vide a consent dated 21/07/2006 had agreed to include the Respondent’s name in its register/roll of shareholders and allocate him two. It is instructive that the said consent has never been set aside to date and which was duly adopted by this court in the judgement dated 18/09/2019. I am not satisfied that the Applicant has shown that it stands to suffer substantial loss if the order of stay is not granted. In the case of **Kiplagat Kotut–vs- Rose Jebor Kipngok [2015] eKLR** the court cited with approval the case of **Kenya Shell Limited –vs- Kibiru [1986] KLR 410** where it was held.

“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 jurisdiction for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

Being guided by the above authority, it is my considered view that the Applicant has not presented evidence of substantial loss if an order of stay is not granted. The judgement of this court had ordered the Applicant to reinstate and/or include the Respondent’s name in its register/roll of shareholders and allocate him the two plots set aside as per the consent dated 21/07/2006. The entry of the Respondent’s name in the Applicant’s register/roll of shareholders is not such a disastrous activity as to cripple the Applicant’s operations as the same could still be reversed upon the success of the appeal. Hence I do not see any substantial loss to be suffered by the Applicant if the request for stay of execution pending appeal is not granted. Further the Applicant’s claim that its appeal will be rendered nugatory if stay is not granted is not persuasive since the Applicant has not even availed a draft of its Memorandum of Appeal as a sign that it is indeed serious to prosecute an appeal. Again, as noted above, the applicant is yet to lodge its Notice of Appeal at the Court of Appeal.

9. The upshot of the foregoing observations is that the Applicant’s application dated 17/03/2020 lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated and Delivered in open court at Machakos this 21st day of September, 2020.

D. K. Kemei

Judge