



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL CASE NO.79 OF 2009

DAVID KIPKEMOI KOSKEI.....PLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK.....1ST DEFENDANT/RESPONDENT

J. OSORO T/A VIGILANT AUCTIONEERS....2ND DEFENDANT/RESPONDENT

RICHARD BENGAT.....3RD DEFENDANT/RESPONDENT

R U L I N G

1. The Application coming for consideration in this ruling is the one dated 16/6/2020 seeking the following orders:-
 - (i) THAT the Application be certified urgent and heard on priority basis (SPENT).
 - (ii) THAT pending the hearing and determination of the Application interparties, there be a stay of Execution of the Orders given by this Court on 4/6/2020(SPENT).
 - (iii) THAT this Court grants stay of Execution pending the intended appeal against the orders issued in the ruling dated 4/6/2020.
 - (iv) THAT costs of the Application be provided for.
2. The Application is based on the ground on the face of it and it is supported by the Affidavit of DAVID KIPKEMOI KOSKEI sworn on 16/6/2020.
3. The Plaintiff/Applicant deposed in the said Affidavit that the Court delivered a ruling in favour of the 3rd Defendant/Respondent on 4/6/2020 to the effect that he vacates the suit property.
4. The Plaintiff/Applicant further stated that he has filed a notice of Appeal to challenge the said Orders.
5. The Plaintiff/Applicant also stated that he has been in occupation of the suit property since 1964 and he has no other place to go.
6. THAT if the orders granted are executed he will suffer irreparable loss.
7. THAT this Application has been made without unreasonable delay and further that he is willing to comply with such reasonable conditions as may be imposed by the Court.
8. The 3rd Defendant/Respondent opposed the Application and filed a Replying Affidavit dated 22/6/2020 in which he deposed that he purchased the LR. Kericho/Cheptalal/623(hereafter referred to as the suit property) from the 1st Defendant/Respondent on 10/4/2001 and the same has since been transferred to him but the Plaintiff/Applicant has refused to vacate the suit property.
9. The 3rd Defendant/Respondent further stated in the Replying Affidavit that the Plaintiff/Applicant has been manipulating the Legal Process to continue in unlawful occupation of the suit property and this has caused the 3rd Respondent mental anguish.

10. The 3rd Defendant/Respondent said the Plaintiff should be asked to deposit a sum equivalent to the value of the property.

11. The parties filed written submissions in the Application dated 16/6/2020 which I have duly considered. The Plaintiff/Applicant filed written submission dated 2/7/2020 in which he stated that if he is evicted before his appeal is heard the said appeal will be rendered nugatory and further that this Application was brought without undue delay.

12. The 3rd Defendant/Respondent filed submissions dated 23/7/2020 in which he stated that the Plaintiff/Applicant has been enjoying the suit property at the expense of the 3rd Defendant/Respondent who is the registered owner and further that it is the 3rd Defendant/Respondent who will continue to suffer consequences of being denied his legal rights and further that the 3rd Defendant/Respondent is an innocent purchaser for value holding a valid title.

13. The issue for determination in this Application are as follows:-

(i) Whether the Plaintiff/Applicant will suffer substantial loss unless the order of stay is granted.

(ii) Whether the Application was made without unreasonable delay.

(iii) Whether the Plaintiff/Applicant should give security for the due performance of the decree.

14. . The principles guiding the grant of a stay of execution pending appeal 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.”

15. In the case of **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 42 rule 6 of the Civil Procedure Rules is fettered by three conditions as follows;

(i) establishment of a sufficient cause,

(ii) satisfaction of substantial loss and the furnishing of security.

(iii) That the application must be made without unreasonable delay.

16. On the issue as to whether the Application was made without unreasonable delay, the order of the court herein was delivered on 4/6/2020 and the Plaintiff/Applicant proceeded to file this application for stay of execution on 16/6/2020. I find that the applicant filed application timeously and without delay.

17. As regards the issue of whether substantial loss will occur if the stay pending appeal is not granted, the same depends on the balancing act between the rights of the parties.

18. The applicant’s right to his appeal and the right of the Respondent to the fruits of his judgment must be weighed.

19. The onus of proving that substantial loss would occur unless stay is issued rests upon the Applicant. It is not enough to merely state that loss will be suffered, the Plaintiff/Applicant must show the substantial loss that he is likely to suffer in the event the orders sought are not given.

20. The plaintiff/Applicant said he has no other place to go to, however, the Respondent has the title documents to the suit property. The Plaintiff/Applicant has offered to comply with such reasonable conditions as may be imposed by the Court and the Court has a duty to order reasonable security for costs in order to balance the interests of the parties.

21. On the said issue of security for costs, the Court stated in the case of **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018]eKLR** as follows;

“...Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay...”

22. The Court also stated in **Civil Appeal No. 5 of 2016 - Patrick Mwenda vs. Evans Omari Mwita [2016]eKLR** as follows;

“...In my view this rule gives the court unfettered discretion to issue any orders pending the hearing of the appeal. I have no doubt therefore that I have power to order such security for the due performance of decree or order and that the appellant did not have to furnish such security upfront before arguing the application for stay pending appeal. In any event where the court orders for security deposit and there is default then the orders for stay are rendered useless for a defaulting party...”

23. I grant Stay of Execution on condition that the Plaintiff/Applicant deposits Ksh. 3,000,000 in an interest earning account held jointly by the Counsels for the Plaintiff/Applicant and the 3rd Respondent within 60 days of this date.

24. In default the order of stay of execution to be discharged and execution to issue.

25. The Plaintiff/Applicant to pay costs of this Application and any costs coincidental to this Application.

Delivered, signed and dated at Kericho this 23RD day of October 2020.

A. N. ONGERI

JUDGE