



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL CASE NO. 44 OF 2018

ALEXUS KHALUMBA.....APPELLANT/APPLICANT

VERSUS

HARRISON A ANUKUTSE.....PLAINTIFF/RESPONDENT

RULING

1. The appellant/applicant filed an application dated 2nd November 2018 under Certificate of urgency and prayer 1 was granted. The court granted a temporary stay to the magistrate's finding delivered on 10th April, 2018 and 30th October 2018 till the final determination of the same. What is before the court is determination of prayer 3 which states as follows:

“That this case court do allow the appellant to put in his title deed No. SOY/SOY/BLOCK 10(NAVILLAS) 1777 as security and or a condition of stay of the magistrate's judgment delivered on 10.4.2018 till when appeal No. 44 of 2018 is heard and determined”.

2. The application was supported by an affidavit in which he stated that his land is valued at Kshs.8,000,000/- and the court had rejected his request to have the same as security, and further apportionment of the decretal sum among the defendants. If put to civil jail, he would suffer irreparably. He urged the court to allow him furnish his title deed as security for condition of stay of execution. The value for the land keep appreciating and therefore by the time the appeal is determined it shall be of more value than the decretal sum.

3. The respondent filed his replying affidavit dated 19th December, 2018 and filed on the same date. He stated that since the trial magistrate had directed the defendants to deposit the decretal amount of Kshs.635,000 into an interest earning account in the names of the plaintiff's and the defendant's counsel the applicant had been granted stay of execution. The security which had been offered was not proper security since it was subject to court proceedings in Eldoret High Court E & L No. 337 of 2013 between Clement Odhiambo & others Vs Alice Jahenda & others.

4. The court had found the defendants jointly and severally liable thus the appellant could not raise an issue on apportionment of liability, which is also not a ground for staying a decree.

5. In addition, he was not a man of straw thus he shall be able to refund the decretal sum in the event that the appeal succeeds.

Appellant's/Applicant's submissions

6. The appellant/applicant had established the principles governing stay of execution as provided in Order 42 Rule 6, of the Civil Procedure Rules 2010 which are:

i. The application is brought without undue delay.

ii. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered.

iii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the applicant.

The power to grant or refuse an application for stay of execution is discretionary and the same should be exercised in such a way as not to prevent an appeal, as was held in **Butt v Rent Restriction Tribunal (1979) eKLR**. The court was also referred to **KCB v Sun City Properties Ltd & 5 others (2012) eKLR** AND **G.N Muema p/a Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Anor (2018) eKLR**.

7. The appellant/applicant had provided his title deed as security which was free from any encumbrances and urged the same be allowed. In **Pascal Obonyo Agwena & 3 others v Simon Juma Odiyo (2018) eKLR** the court allowed the use of title deed and the same was surrendered in court. The same position was held in **Margaret Mwihaki Wanjau v Joseph Muiruri Mugo (2015) eKLR**.

8. The trial magistrate had erred in delivering her ruling on 30th October 2018 without giving reasons as to whether the security was proper or not. Further the appeal raised weighty and substantial issues and grounds, which had a high probability of success. ***In Kenya Tea Growers Association & Anor v Kenya Planters and Agricultural Workers Union (civil application Nairobi No. 72 of 2011)*** the court in discussing what is an arguable appeal stated:-

“the applicant need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision.”

Respondent’s submissions

9. In addition to the replying affidavit, the respondent urged that order 42 Rule 6(2) of the Civil Procedure Rules ought to be adhered to. The same provides that, “no order for stay of execution shall be made under sub rule (1) unless, such security as the court orders for the due performance of such decree or order as maybe ultimately binding on him has been given by the applicant.”

10. The court was referred to **KCB Ltd vs Sun City Properties Ltd & 5 others (2012) Eklr** where the court held there are always two competing interests, and the successful litigant should not be denied the fruits of his judgment and also the unsuccessful litigant exercising his undoubted right to appeal should be safeguarded from rendering his appeal nugatory; the courts usually make an order for suitable security for the due performance of the decree as the parties wait the outcome of the appeal.

11. It was his submissions that court orders should be obeyed even if they are unfavourable, he urged the applicant be ordered to make a sufficient security deposit.

Analysis and determination

12. The application before the court is for stay of execution of the orders issued in the lower court and for this court to allow the applicant to furnish his title deed as security. This court is guided by Order 42 rule 6(2) for grant or refusal of stay of execution orders. The litigants has to bring the application without undue delay, the court has to be satisfied that substantial loss may result if the order is not granted and that the litigant has furnished security.

13. This application was brought under Order 42 rule 6 (1) of the Civil Procedure Rules which provides for jurisdiction to stay execution pending appeal to both the trial court and the appellate court as follows:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

The applicant had already been granted temporary stay of execution which was in force.

14. The applicant has filed a memorandum of appeal dated 19th April 2010, he submits that being a money decree, he was willing to offer his title deed as security pending the hearing and determination of the appeal so that it is not rendered nugatory. The respondent had opposed the same indicating that it was a money decree and in the event the appeal succeeds he can be able to refund the decretal sum. The appellant says he is not able to raise the sum of Kshs.600,000/- considering the economic times, but since he had his land, he could use the same as security. The land was valued at Kshs.800,000/- by Highlands Valuers Ltd and the valuation report was annexed. On this the court is guided by the Court of Appeal decision in **Kenya Shell Ltd v. Kibiru & anor (1968) pg 410 KLR** where the court held:

i. “in an application for stay under rule 5 of the Court of appeal rules there is no requirement that the applicant gives security for the due performance of the decree, all that is required is that a Notice of appeal has been filed. (this does not apply to the high court conditions).

ii. In considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

iii. In application for stay the court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favor without just cause and secondly whether execution would render the appeal nugatory.

15. The above sentiments were echoed by Justice Kuloba in **Macharia v East African Standard (no.2) (2002) 2KLR 63** where he held:-

“in handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him a success at any stage. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result. He must provide specific details and particulars, where no pecuniary or tangible

loss is shown to the satisfaction of the court, the court will not grant a stay.”

The court has a duty to do justice to both the successful and unsuccessful party in order to prevent abuse of the process of the court.

On whether the title deed should be used as security for grant of stay of execution, I have considered that:-

The Respondent’s issue from the replying affidavit and submissions is that the title deed to the land parcel number SOY/SOY/BLOCK 10(Navilas) 1777 was the subject of court proceedings in Eldoret E&L Case No. 337/2013. One of the conditions for grant of stay of execution was the applicant had to furnish security.

In this case the applicant has offered his land, there is a valuation report prepared which puts the value of land at Kshs.800,000/-. This is way more than the decretal sum. The applicant was willing to have the title deposited in court as security. In Pascal Obonyo Agwena & 3 others v simon Juma Odiyo (2018) eKLR the court held that, “If an appeal is contemplated, security be furnished before or at the time of filing appeal or at the time of filing such an application as the one before this court or at the very least before the submission stage so that the contending respondent is properly informed.”

16. In addition to the above the court in **K.C.B Ltd v Sun City Properties Ltd & 5 others (2012) eKLR** on two competing issues the court has to make an order for suitable security for the due performance of the decree as the parties wait the outcome of the appeal.

17. The grant or refusal of stay of execution is discretionary and therefore should be exercised in such a way as not to prevent an appeal, as was held in the Court of Appeal decision in **Butt v Rent Restriction tribunal (1982) KLR 417**.

Having weighed all the foregoing considerations I do find that the offered Title deed is appropriate security for the decretal sum, pending hearing and determination of the appeal. The application is merited and is granted as prayed.

Costs will be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of May, 2019.

In the absence of;

Ms Andabi for the Appellant and

Ms Jeruto for the Respondent

Ms Sarah - Court assistant