



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 700 OF 2016

CHAI HOUSING CO-OPERATIVE SOCIETY LTD.....APPELLANT/APPLICANT

VERSUS

HENRY MWANGI MUCHUKU.....RESPONDENT

RULING

This ruling seeks to determine a Notice of Motion dated 9th November, 2017 and filed under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act seeking orders that there be a stay of execution of the judgment delivered on 1st November, 2016 by the Cooperative Tribunal in CTC No. 110 of 2010 pending the hearing and determination of the Appeal and that the costs of the Application be provided for.

The Application is premised on the grounds on the body of the same and its supported by the Affidavit dated 9th November, 2017 sworn by **PETER WACHIRA** the Applicant's Chairman. The grounds advanced for the application are that the judgment required the Applicant to compensate the Respondent with a similar available plot or payment at the market value of not less than 1.9 Million. That the Applicant had sought a stay order from the tribunal which tribunal imposed a condition that the Applicants do deposit the whole of the decretal sum in a joint interest earning account within 30 days which condition, the Applicant deems unreasonable as the applicant relies on member contributions and the sum ordered would prejudice the membership of the Applicant. That the Respondent's means of income are unknown and they are apprehensive he might proceed and execute unless stay orders are granted.

The Respondent filed a Replying Affidavit dated 7th December, 2017 sworn by **HENRY MWANGI MUCHUKU**, the Respondent herein, who deponed that in the year 1997, he was allocated two plots described as C52 and C53 and paid in full for both plots but only one title was processed for plot No. C 52 and the Applicant refused to process the title deed for plot no. C 53. That the uncontested valuation he conducted in the year 2012 revealed that the market value of the plot C53 was Kshs. 1,900,000/= at the time. The Respondent avers that he is financially stable since he owns the two plots and other properties and he believes that the Applicant unlawfully grabbed his plot and sold it at a higher price since the demand went high after completion of Thika super highway.

This Application was canvassed by way of oral submissions in court which I have considered. After the judgment was entered, the Applicant also applied for stay orders in the tribunal which orders were granted on 23rd October, 2017 on the condition that the Applicant deposits the whole of the decretal amount being Kshs. 1,900,000 in a joint interest earning account to be operated between the parties' Advocates failure to which the stay lapses.

Although the instant application seeks an order of stay of execution of the judgment entered on 1st November, 2016, the Applicant has entirely dwelt on the demerits of the ruling of the tribunal delivered on 23rd October, 2017 requiring them to deposit the decretal sum as a condition for the stay orders issued by the Tribunal. The instant application ought to have been treated differently from the application in the tribunal unless the Applicant was seeking a stay of execution of the orders of 23rd October, 2017 which is not the case herein. That notwithstanding, I have considered the instant application on its merits together with the Affidavits of both parties.

Order 42 Rule 6 of the Civil Procedure Rules provides the conditions for granting an order of stay of execution which are;

- a. That the application has been made without unreasonable delay;
- b. That security for the decree or order has been given; and
- c. That substantial loss may result to the Applicant unless the order for stay is made.

What constitutes unreasonable delay varies from the circumstances of each case. The instant application was filed on 9th November, 2017 whereas the Judgment sought to be stayed was delivered on 1st November, 2016. The question of unreasonable delay was dwelt with in the case of Jaber *Mohsen Ali & another v Priscillah Boit & another E&L NO. 200 OF 2012[2014] eKLR* where it was stated:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”

Even though the application has been filed a year after the judgment was delivered, the Applicant had made an application for stay orders at the tribunal which application was heard and determined on 23rd October, 2017. It is after the determination of the application that the Applicant moved to the high court to seek similar orders. In light of the fact that there was a pending application in the tribunal it cannot be said that the instant application was filed after unreasonable delay.

On substantial loss, it has been deponed that the Respondent is not a man of means which allegation was denied by the Respondents who states that he has the two plots already plus additional other properties. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. See *JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO MISC APPLICATION No 42 of 2011 [2012] eKLR (Gikonyo J)*. The Applicant’s worry is that the Respondent may not be in a position to refund the decretal sum in case the Appeal is successful, and as a result, they will suffer substantial loss. That being the case, it was incumbent upon the Respondent to prove that he is a man of means and in this context, to evidentially prove so. The averment that the Respondent is a man of means because he owns the two plots issued by the Applicant plus other additional properties is not sufficient for the purpose of this tenet. I say so because one of the plots is the subject of this suit which therefore cannot be considered as the property of the Respondent before the Appeal is heard and determined and the ownership of the other said properties has not been proved. Since the decree being appealed has monetary consideration, the Respondent ought to have proved that he is financially capable of refunding the decretal sum of Kshs. 1,900,000 in case the appeal succeeds, no account statements have been tabled to show the financial standing of the Respondent.

The third tenet for granting an order of stay of execution is that the Applicant must provide security for the due performance of the decree which the Applicant has not offered. The Applicant offers to deposit at most Kshs. 108, 700/= which amount the Applicant depones to be double the amount the Respondent had partly paid for the said plot. The decree being appealed against is for the sum of Kshs. 1,900,000/= and therefore it is my considered view that the security offered by the Applicant is not sufficient for the due performance of the decree.

Both the Applicant and the Respondent have conflicting interests which they brought to this Court for determination. The Respondent has a decree which he would like to execute and on the other hand, the Applicant has a right of appeal against the decree. In dealing with the said conflicting interest, the Court of Appeal in the case of *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR* stated that,

“ In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”

Similarly justice Aburili dealt with the same issue in the case of *Selestica Limited v Gold Rock Development Ltd [2015]* where she held that -

“the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The power to grant an application for stay of execution pending appeal is a discretionary one on sufficient cause being shown, where the applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose.

To grant or refuse an application for stay of execution pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent. See *M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997*”

My finding is that even though no sufficient security has been offered for the due performance of the decree, the Applicant has nonetheless established sufficient ground to warrant the orders for stay. Therefore in the circumstances, this court will grant the Applicant a conditional stay on the terms that the Applicant will deposit one half of the decretal sum in a joint interest earning account to be operated by the parties’ Advocates. Such amount is to be deposited within 30 days from the date of this ruling failure to which the stay orders shall lapse.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 8th Day of March, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant/Applicant

..... For the Respondent