



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ELC CASE No. 1 OF 2014

WESLEY RUTO.....PLAINTIFF

VERSUS

JAMES TALAM.....DEFENDANT

RULING

By a Notice of Motion dated 26th September 2016 and brought pursuant to Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules, the Plaintiff applied for a stay of execution of the judgment delivered on 2nd September 2016 pending appeal. The application is based on the grounds stated on the face of the Notice of Motion and is supported by the applicant's affidavit. The gist of the application is that the applicant has filed a Notice of Appeal against the decision of this honourable court and if execution is not stayed then the applicant shall suffer substantive loss and the appeal shall be rendered nugatory.

The application is opposed by the Respondent through his Replying affidavit sworn on 18th November 2016 in which he avers that the applicant has merely filed a Notice of Appeal but has not yet filed an appeal within the requisite period of 30 days after delivery of judgment. The application is therefore not anchored on anything and thus lacks merit.

A brief background of the case is that the plaintiff filed suit to enforce an agreement for sale of land entered into with the defendant in 1978. No consent of the Land Control Board was obtained and the defendant filed a counterclaim for eviction of the plaintiff from the suit land. The plaintiff had earlier on obtained an award of the Land Disputes Tribunal but the said award was quashed by the court. The court dismissed the Plaintiff's suit and entered judgment for the defendant on the Counterclaim thereby ordering that the plaintiff vacates the suit land which had since been subdivided into two parcels; KERICHO/KAPSUSER/ 5156 and KERICHO/KAPSUSER 5157. He further revoked the two titles and ordered that the land reverts to the original title no. KERICHO/ KAPSUSER/ 933.

This is the judgment in respect of which the Plaintiff has filed a Notice of Appeal but apparently no Memorandum of Appeal has been filed to date.

It has been alleged that the plaintiff well aware of the above-mentioned judgment has further sub-divided the suit land and sold it to third parties but this is neither here nor there. What the court is called upon to decide is whether the Plaintiff/applicant is entitled to the order for stay pending appeal.

The parties opted to canvass the application by way of written submissions. The matter was mentioned on 3 occasions in April, May and June 2017 when counsel asked for time to file their submissions with the last mention being on 20th June 2017 when a Ruling date was fixed. By the time of writing this Ruling only the Defendant had filed his submissions.

In his submissions the defendant maintains that the applicant has failed to demonstrate the basis of his application since he has not filed any appeal seven months after the judgment was delivered. He further submits that the applicant has not satisfied the grounds for granting a stay of execution pending appeal as set out under Order 42 rule 6 of the Civil Procedure Act. He has not demonstrated that he stands to suffer substantial loss if a stay is not granted. He has also not shown that he is willing to provide security for costs. Lastly he has not demonstrated that he has an arguable appeal with high chances of success.

The principles for grant of an application for stay of execution pending appeal are set out in the case of Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000 cited in Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi 2014 eKLR where Ringera J (as he then was) stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.. the sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

The court must therefore consider the following principles

- a) Whether the applicant has established that he has an arguable appeal
- b) Whether the application was filed without undue delay
- c) Whether the application has established sufficient cause that it is in the interest of justice to grant the orders sought.
- d) Whether the applicant is willing to furnish security for costs

An analysis of the instant application from the above perspective shows that the application was filed expeditiously as judgment was delivered on 2nd September 2016.

The point of contention is whether the applicant has established that he has an arguable appeal. From the record what we have so far is merely a Notice of Appeal and no indication that a Memorandum of Appeal has been filed more than seven months from the time the judgment was delivered. It is therefore not possible for the court to determine whether or not there is an arguable appeal.

On the question as to whether the applicant has established sufficient cause, it is difficult for the court to make such a finding since no such affidavit evidence has been presented.

Regarding the issue of security for costs, the applicant makes no mention of the same in his supporting affidavit.

I have considered the application herein, the rival affidavits, pleadings, judgment of my brother judge Munyao and the submissions of learned counsel for the respondent. From the material placed before the court it is clear that the only condition that the applicant has satisfied is the one regarding the timeous filing of his application. In the absence of a substantive appeal, I agree with counsel for the respondent that this application is anchored on nothing and therefore lacks merit. I consequently dismiss it with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 22ND DAY OF SEPTEMBER 2017.

J.M ONYANGO

JUDGE

IN THE PRESENCE OF:

Miss Kitur for the Defendant/Respondent

Kiprono for Mutai Joshua for the Applicant

C/A; Rotich