



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

JUDICIAL REVIEW APPLICATION NO.E001 OF 2020

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY IN CHARGE OF

LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

DIRECTOR OF ADJUDICATION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

NJERU KIRIRIKA.....INTERESTED PARTY/RESPONDENT

AND

DAGLAS KANGA SHADRACK

MBUNGU NKARI

M'KEA M'IBURURA

JEDIEL RWANDA NJUE.....EXPARTE APPLICANTS

RULING

1. Before me for determination is an application dated **10th November 2021** filed under certificate of urgency and wherein the applicants basically seek orders of stay of execution of the judgment delivered by this Honourable court on **28th April, 2021** by the Honourable Judge P. M. Njoroge pending hearing and determination of the intended appeal.

2. The application is premised on the following:

- a) That in a judgement delivered by this Honourable court on 28th April, 2021 by the Honourable judge P. M. Njoroge whereof he made a determination against the applicants.
- b) That the intended appeal is arguable and has overwhelming chances of success.
- c) That this application has been made diligently and without unreasonable delay.
- d) That the applicant is ready to abide with the conditions set by court.
- e) That unless the said ruling is stayed the applicant will suffer irreparably.

f) That accordingly, in the interests of justice and fairness, the said orders sought in this application ought to be granted as prayed.

3. The application is further supported by the Affidavit of Jediel Rwanda Njue sworn on **10th November, 2021**. The applicants aver that being aggrieved and dissatisfied with the said judgment, they intend to appeal against the same to the Court of Appeal. A copy of Notice of Appeal has been exhibited.

4. The application is opposed by way grounds of opposition dated **23rd November 2021**, by the interested party who avers that the decision sought to be stayed is a negative order thus incapable of being stayed. Secondly that there is no pending appeal at the court of appeal and therefore the application is legally incompetent as it seeks orders in a vacuum and lastly that in any event the Applicants have not met the conditions for grant of stay pending appeal.

5. The application was canvassed by way of written submissions. The applicants filed their submissions dated **10th January, 2022** on **18th January, 2022** while the Interested Party filed his dated **21st December, 2021** on **22nd December, 2021**.

6. In their submissions, the Applicants have cited Order 46 Rule 6(2) of the Civil Procedure Rules, 2010 relating to the conditions for the grant of orders of stay. It is their submissions that they are likely to be evicted from the suit properties and rendered destitute unless the stay orders are granted. The Applicants further submitted that the application herein has been filed without undue delay, adding that they are willing to meet any conditions that may be issued by the court as security. The Applicants relied on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto (citation not given) in support of their submissions that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. It is the Applicants submissions that the Respondents are in spree to excise the suit portions of land to the Applicants detriment, and that the court has full discretion to issue the orders sought to preserve the suit properties.

7. The Applicants submitted that there is an order capable of being executed in the event the prayers sought herein are not granted. The Applicants relied on the case of Milcah Jeruto vs Fina Bank Ltd [2013] eKLR and also cited section 2 of the Civil Procedure Act. It is the Applicants submissions that the discretion of this court to grant a stay is wide and unfettered. They also relied on the case of Halai & Another vs Thornton & Turpin [1963] Ltd [1990] KLR 365 and urged the court to allow the application herein.

8. On his part, the Interested Party submitted that it is settled principle in Law that there can be no stay of a negative order. He has also submitted that there is no pending appeal at the Court of Appeal and therefore the application is legally incompetent as it seeks orders in a vacuum. The Interested Party prays for the application to be dismissed. The Interested Party relied on the case of Western College of Arts & Applied Sciences v EP Oranga & 3 Others [1976] eKLR; Catherine Njeri Maranga –vs – Serah Chege & Another [2017] eKLR; Bernard Njoro Kibaki t/a Njowa Njemu Enterprises –v – Equity Bank Limited & Another [2020] eKLR; Salome Naliaka Wabwile –v- Alfred Okumu Musinala [2021] eKLR. The Interested Party cited Rule 75(1) & (2) of the Court of Appeal Rules and submitted that the Notice of Appeal was lodged by the Applicants out of time and without leave and therefore there is no basis of the orders sought, adding that the application is not merited and should be dismissed.

9. I have considered the application herein, the response and the submissions filed herein. As I have already noted, the applicant in his application of **10th November 2021** seeks stay of execution of the judgment dated **28th of April 2021**.

10. Stay of execution pending appeal is another discretionary power bestowed upon this court by the law. The Court of Appeal in the case of **Butt –vs- Rent Restriction Tribunal {1982} KLR 417** gave guidance on how a court should exercise the said discretion and held that:

“1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.

5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

11. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 1 gives the court discretionary powers to stay execution and provides 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.

(2) No order for stay of execution shall be made under sub Rule (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 undue 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.

12. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

13. As for the applicants having to suffer substantial loss, in the case of **Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018** the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”

(See also the case of **Machira T/A Machira & Co Advocates –vs- East African Standard (No.2) (2002)KLR 63**)

14. The applicants have a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of **Absalom Dora –v-Turbo Transporters (2013) (eKLR)**}

15. As F. Gikonyo J stated in **Geoffery Muriungi & another v John Rukunga M’imonyo** suing as Legal representative of the estate of **Kinoti Simon Rukunga (Deceased) [2016] eKLR** and which wisdom I am persuaded with;-

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

16. From the record, the Judgment appealed against was made on **28th April, 2021** and the application herein was filed on **10th November, 2021**. This was after a period of over six months. The application was therefore not made timeously.

17. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicants, I note that in the judgment herein, the honourable court declined to grant the Applicants the orders sought in their application for Judicial Review. The court dismissed the Applicants’ application. This was a negative order and means the situation remained as it was before the filing of the application, except on costs. I am therefore not persuaded that the applicants would suffer any substantial loss. The only execution which can flow from the said Judgment is with respect to costs since the court did not order any of the parties to do anything or refrain from doing anything or to pay any sum, except costs. If the applicants were to succeed in the intended appeal, I do not think that they would suffer any substantial loss if stay is not granted.

18. In the result, this court finds no merit in the Notice of Motion application dated **10th November, 2021**. The same has failed to meet the threshold laid down in Order 42 Rule 6 of the Civil Procedure Rules and is hereby dismissed with costs to the Interested Party.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 31ST DAY JANUARY, 2022 IN THE PRESENCE OF:

C/A: Martha

Gachuki for Interested Party

Mugambi for AG for 1st – 4th Respondents

N/A for Applicants’ advocate, though Applicants are present

C. K. YANO,

JUDGE.