



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 58 OF 2016

LOISE KANYOKORA WARUL.....1ST PLAINTIFF/RESPONDENT

JACKLINE WAMWIRUA.....2ND PLAINTIFF/RESPONDENT

VERSUS

GLADYS NJERI MURIUKI.....DEFENDANT/APPLICANT

RULING

Pursuant to the provisions of *Order 9 Rule 9 (A)*, *Order 42 Rule 6 (1) of the Civil Procedure Rules, Section 1A & 1B and 3A of the Civil Procedure Act* and all enabling provisions of the law, the Applicant approached this court through a Notice of Motion under certificate of urgency for a motion dated 25th March, 2021 seeking the following orders:

1. Spent

2. Spent

3. That the Honourable Court be pleased to grant an order for stay of execution of the judgment delivered on 12th March, 2021 pending hearing and determination of the Intended Appeal.

4. That the costs of this application be provided for.

The application is founded upon the following grounds:

1. That the applicant was dissatisfied with the orders of the court and filed and served a notice of appeal.
2. That the court ordered that plaintiffs had proved their case and ordered that Mwerua/Baricho/205 was being held in trust and yet it was not subject of litigation herein.
3. That the applicant has been in use and occupation of the land parcel No. Mwerua/Baricho/1408, 1412, 1416 and 1418.
4. That the applicant has built her home on the land parcel No. Mwerua/Baricho/1418 and she risks eviction from the suit land in the event that stay is not granted.
5. That the respondent live on the land parcel No. Mwerua/Baricho/1413 which they have been utilizing and which title is in the name of the applicant. They will not suffer any loss or damage if stay is not granted.
6. The respondent has not been utilizing the suit property hence will not suffer any loss or damage.
7. That if the suit properties are transferred to the names of the respondent the applicant risk being landless and without a home.
8. That if the orders of stay are not granted the appeal shall be rendered nugatory since the parcels of land shall have been transferred to the plaintiffs and possibly to other third parties.

In addition to the grounds, the applicant GLADYS NJERI MURIUKI has deposed to an 18 paragraphs supporting affidavit, of which the

following are her major averments:-

1. That the appeal has high chances of success.
2. That the applicant has built stores on land parcel number Mwerua/Baricho/1412.
3. That her late husband and parents in law are buried on the land parcel no. Mwerua/Baricho/1416 hence it has sentimental value.
4. The respondent has not been utilizing the suit property hence will not suffer any loss or damage.
5. That if the suit properties are transferred to the names of the respondent, the applicant risk being landless and without a home.
6. That if the orders of stay are not granted the appeal shall be rendered nugatory since the parcels of land shall have been transferred to the plaintiffs and possibly to other third parties.
7. That it is fair and just that the orders prayed for are granted.

The Plaintiffs/Respondents opposed the application vide a 17th paragraph replying affidavit sworn by JACKLINE WAMWIRU dated 9th April, 2021 of which the following are her major averments:

1. That the said application is without merit as the applicant has failed to disclose crucial material facts.
2. That the initial land parcel No. Mwerua/Baricho/208 and which the court has held correctly was held in trust. It was subdivided into 25 portions by the applicant, being numbers Mwerua/Baricho/1408 to 1432. The applicant sold 20 portions and was left with 5 portions being land parcel numbers Mwerua/Baricho/1408, 1412, 1413, 1416 and 1418 and the court directed the same to be transferred to the respondents.
3. That at no one time did the respondents seek for substantive orders over land parcel No. Mwerua/Baricho/208. The applicant misinterpreted the orders of the court.
4. That the court in its judgement did not award the respondent with land parcel No. Mwerua/Baricho/208 but the remaining 5 portions being land parcel numbers Mwerua/Baricho/1408, 1412, 1413, 1416 and 1418.
5. The applicant has not met the conditions in **Order 42 Rule 6(2) of the Civil Procedure Rules** for stay of execution.
6. That the respondents still live on land parcel No. Mwerua/Baricho/208 and do not have title document.
7. That the applicant sold substantial part of the original land and is likely to sell the 5 portions whose titles she possesses.
8. That the applicant has not offered security for costs.
9. That the application be dismissed with costs.

Applicant's submissions

The applicant submitted that the application is based on **Order 42 Rule 6(2) of the Civil Procedure Rules** which provides as follows:

‘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 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’

The courts have set out various principles that guide when granting stay of execution pending appeal.

In the case of **Kenya Tanzania Uganda leasing Limited v Mukenya Ndunda (2013) e KLR** the court held that:

“As I stated in the case of KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] e KLR:-In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced in a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal”.

The applicant proceeded to submit on the two principles for the grant of execution pending appeal as follows:

1. Substantial loss

The applicant deponed in her supporting affidavit dated 25th March, 2021 that she has been in use and occupation of the land parcel No. Mwerua/Baricho/1408, 1412, 1416 and 1418. She has built her home on the land parcel no. Mwerua/Baricho/1418. Further, she has built stores on land parcel number Mwerua/Baricho/1412 while her late husband and parents in law are buried on the land parcel No. Mwerua/Baricho/1416 hence it has sentimental value.

The applicant submit that she will suffer substantial loss if the suit properties are transferred to the names of the respondents since there is risk that she will be evicted from her home and lose her business.

The Applicant further urged that the Respondent has not been utilizing the suit property hence will not suffer any loss or damage. She is apprehensive that if the orders of stay are not granted, the appeal shall be rendered nugatory since the parcels of land shall have been transferred to the plaintiffs and possibly to other third parties.

The applicant submitted that the application has been brought without unreasonable delay. The application was filed on 25th March, 2021 judgement having been delivered on 12th March, 2021. The notice of appeal was filed on 17th March, 2021, thirteen days from the date of the judgement.

2. Security for appeal

The plaintiff submits that the claim by the plaintiff is a non-liquidated claim as it calls for a declaration of customary trust.

The applicant stated that she is ready and willing to abide by any condition that the Honourable Court may grant.

The applicant urge the Court to be guided by the decision in **Jecinta Wanjiku Njuki v Jane Wambura Mugo & 3 Others [2021] e KLR** where the court granted stay of execution pending intended appeal.

Respondents submissions

The respondents in their submissions reiterated the averments in their Replying Affidavit dated 9th April, 2021. They submitted that the law governing stay of execution is **Order 42 Rule 6(2) of the Civil Procedure Rules**. They submitted that the said provision of the law is in the negative. No order for stay of execution is to be granted unless the conditions stated therein are met.

They relied on the decision in **Samvir Trustee Limited v Guardian Bank Limited Nairobi HCCC No. 795 of 1997**, where **Warsame J.** (as he then was) stated:

“I agree that every party aggrieved with a decision of this court has a natural and undoubted right to seek the intervention of the Court of appeal. And as far as this matter is concerned, I do not think this court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the court. I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss... The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors of the court. In my view justice and fairness requires this court to give an order of stay but with certain condition.

In **Machira T/A Machira & Co. Advocates v/s East African Standard (No. 2) (2002) KLR 16** it was held:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal. Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

The respondents submitted that the Applicant has not satisfied the requirement of substantial loss to benefit from the discretion of the court to order stay of execution.

The respondent further submitted that the applicant had sold 4.8 acres of the original land parcel No. Mwerua/Baricho/208 and the remaining 1.6 acres belonged to the plaintiffs. Hence, the applicant is not entitled to the remaining land. The authority cited by the applicant is clearly distinguishable. Whereas in that case being Kerugoya ELC 116 of 2017, the plaintiff was not in occupation, the plaintiff in this case are in occupation.

ANALYSIS

The law on stay of execution is provided for **under Order 42 Rule 6(2) of the Civil Procedure Rules** which states as follows:

“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 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”.

For an Applicant to succeed in an application for stay pending appeal, he must establish the following conditions:-

- a) *Substantial loss may result to him unless the order is granted*
- b) *The application has been made without unreasonable delay and*
- c) *Such security as the court orders for the due performance of the decree has been given.*

Substantial loss been defined by the courts in numerous decisions. In the case of **Samvir Trustee Limited v Guardian Bank Limited Nairobi HCCC No. 795 of 1997, Warsame J** stated:

“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention”.

In her supporting Affidavit, the Applicant has deposed that she is in use and occupation of Mwerua/Baricho/1408,1412,1413,1416 and 1418 and that she will suffer substantial loss if the same is registered in the names of the respondents hence stay of execution is necessary. Whether or not the Applicant is in use and occupation of the suit properties were issues in determination of the suit and cannot be conditions for stay pending Appeal. The grant of stay pending appeal is a delicate balancing act between the right of a successful litigant and the undoubted right of an intending appellant which is yet to crystallize. The applicant has not shown how she will suffer substantial loss if the suit properties are registered in the names of the Respondents. She has not demonstrated that the Respondents are likely to dispose them if they are registered in their names.

As regards whether the application has been brought without unreasonable delay, the applicant submitted in the affirmative and stated that whereas this application was filed on 25th March 2021, the judgement was delivered on 12th March, 2021 while the notice of appeal was filed on 17th March, 2021, thirteen days from the date of the judgement. To that extent, I am satisfied that this application for stay was filed timeously and without unreasonable delay.

On the issue of security, the Applicant submitted that the claim by the Plaintiff/Respondents is a non-liquidated claim as it calls for declaration of customary trust and stated that she was ready and willing to abide by any condition that the Honourable Court may grant. Whereas it is true that the plaintiffs/respondents claim was not a money decree, it is not right to keep away a successful litigant from the fruits of his judgment unless the proposed appeal will be rendered nugatory. Since the Applicant has not demonstrated that she is likely to suffer substantial loss if the orders are not granted, I find the application dated 25th march, 2021 lacking merit and the same is hereby dismissed with costs.

Ruling READ, DELIVERED and SIGNED in the open Court at Kerugoya this 21st day of January, 2022.

.....

HON. E.C. CHERONO

ELC JUDGE

In the presence of:

1. Miss Ndungu holding brief for Mrs Makworo for Defendant/Applicant
2. Miss Wambui holding brief for Mr. Maina Kagio for Plaintiff/Respondent

3. *Kabuta, Court Assistant.*