



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 15 OF 2003

ARGOS FURNISHERS LIMITED.....PLAINTIFF

VERSUS

SAMUEL MUSILA & 37 OTHERS.....DEFENDANTS

RULING

By a Notice of Motion application dated 24th February, 2021 the Plaintiff seeks the following orders:

1. Spent

2. That interim orders be made for stay of execution of the judgement delivered on 30/10/2020 pending interpartes hearing of this application.

3. That orders be made for stay of execution of the judgement delivered on 30/10/2020 pending the hearing and determination of the Plaintiff's intended appeal.

4. That costs of this application be provided for.

The application is premised on the grounds on the face of it and supported by the affidavit of SUSHEEL R. SHAH where the Plaintiff explains that the court delivered its judgement on 30th October, 2020 dismissing the Plaintiff's suit with costs and allowing the Defendant's counterclaim. The Plaintiff being dissatisfied with the whole of the said judgement filed a Notice of Appeal on 5th November, 2020. That on 10th November, 2020, the Plaintiff applied for certified copies of the court proceedings which are not yet ready. Further, the Defendants have commenced the process of execution of the court judgement by serving the Plaintiff with a draft Decree.

The 30th Defendant LITHA KALUNDE MUEMA in opposition to the instant application filed a replying affidavit where she confirms that the Court delivered its judgement on 30th October, 2020 dismissing the Plaintiff's suit and allowing the Defendant's counterclaim. She contends that the Plaintiff failed to apply for stay of execution of the said judgement. Further, that although it filed a Notice of Appeal dated 5th November, 2020 which was subsequently served upon them on 12th November, 2020, no Appeal (Record of Appeal) has been filed in the Court of Appeal Registry as provided by law. She avers that the Plaintiff has not provided proof that it paid for certified copies of the proceedings applied for. She reiterates that the Plaintiff never filed an application for stay of execution pending the alleged appeal until its Advocates on record were on 25th January, 2021 served with a draft Decree for their approval. Further, that the Plaintiff has not provided any security for due performance of the Decree as required by law. She states that the Plaintiff has not demonstrated the existence of an arguable appeal and if its intended appeal if successful will be rendered nugatory. Further, if it will suffer substantial loss unless the orders sought are granted.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 24th February, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of stay of execution pending the appeal.

The Plaintiff in its submissions reiterated its averments, and contends that if an order of stay of execution is not granted, it will be prejudiced. Further, that its case is meritorious and clear cut for issuance of orders of stay. It reiterates that the application has been brought without undue delay and it is willing to abide by any directions issued by the Court. To support its arguments, it has relied on the following decisions: **Jaber Mohsen Ali & Another V Priscillah Boit & Another (2014) eKLR and Kiplagat Kotut V Rose Jebor Kipngok (2015) eKLR.**

The Defendants in their submissions insist the instant application is an afterthought intended on delaying the Defendants from using and enjoying their property. They deny the alleged disposal of the property belonging to the Plaintiff. They reiterate that they will suffer extreme prejudice, as interim orders had since been issued denying them, their ability to enjoy the fruits of the judgement which was delivered more than one year ago. To support their averments, they have relied on the following decisions: **Century Oil Trading Company Ltd Vs Kenya Shell Limited Nairobi (Milimani) HCMA No. 1561 of 2007; James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR; Jaber Mohsen Ali & Another V Priscillah Boit & Another (2014) eKLR and Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & 4 Others (2015) eKLR.**

I will proceed to highlight various legal provisions governing stay pending appeal.

Order 42 Rule 6(2) of the Civil Procedure Rules provides that: **‘No order for stay of execution shall be made under subrule (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.’**

Further, Rule 5 (b) of the Appellate Jurisdiction Act (Court of Appeal Rules) provides that’ **..... in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.’**

In the **Bungoma HC Misc Application No. 42 of 2011 Wangalwa & Another Vs Agnes Naliaka Cheseto** the Court held that: **“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect on negate the essential are of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”**

While in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while dealing with an issue of stay of execution pending appeal held thus:’

- “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.’**

See also the decisions of **Jaber Mohsen Ali & Another V Priscillah Boit & Another (2014) eKLR** and **Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & 4 Others (2015) eKLR.**

In the current scenario, a judgement was delivered on 30th October, 2020 dismissing the Plaintiff’s suit with costs and allowing the Defendant’s counterclaim. The Plaintiff being dissatisfied with the whole of the said judgement filed a Notice of Appeal on 5th November, 2020 and applied for certified copies of proceedings on 10th November, 2020. The Plaintiff has not denied that it is yet to file a Record of Appeal in the Court of Appeal. It however claims the Defendants have commenced the process of execution of the court judgement by serving it with a draft Decree. The Defendants insist the Plaintiff has not provided any security for due performance of the Decree as required by law. Further, it has not demonstrated the existence of an arguable appeal and if the intended appeal if successful will rendered nugatory.

I note in this instance, the court entered judgement allowing the Defendants’ counterclaim. In the said judgement, the court held that the Defendants who were on the suit land had acquired it through adverse possession. The Plaintiff in its supporting affidavit has not indicated what substantial loss its stand to suffer if the Decree is issued and or executed. I note the Plaintiff had never sought for stay of execution after the delivery of judgment and only did so, after four months when they were served with a draft Decree. Be that as it may, it is my considered view that since the Plaintiff had already lodged a Notice of Appeal in the Court of Appeal, the instant application for stay should have been filed in the said court. Based on the facts as presented while relying on Rule 5 (b) of the Appellate Jurisdiction Act (Court of Appeal Rules) cited above and associating myself with the decisions quoted, I find that the Plaintiff has failed to meet the threshold set for granting of stay of execution and will decline to grant the said orders.

It is against the foregoing that I find the Plaintiff’s Notice of Motion application dated the 24th February, 2021 unmerited and will proceed to dismiss it with costs.

I further set aside the interim orders that were in place.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE