



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ENVIRONMENT AND LAND CASE NUMBER 59 OF 2021

EVALYNE MANDE OLOO.....1ST PLAINTIFF

EDWIN ODHIAMBO SIALA.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF SIAYA.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

RULING

Introduction

1. By a plaint dated 16/09/2014, the 1st plaintiff filed suit against the defendants claiming to be the registered proprietor of SIAYA/TOWNSHIP BLOCK 1/541 (*the suit property*). The 2nd plaintiff was allegedly a beneficial owner having purchased the suit property from the 1st plaintiff. The plaintiffs averred that the defendants had unlawfully trespassed onto the suit property. By a defence dated 10/12/2014, the 1st defendant denied the contents of the plaint and averred that the plaintiffs had obtained the suit property by fraudulent means. After hearing the parties, the court by its judgment dated on 30/01/2020, issued a permanent injunction against the defendants restraining them from interfering with the suit property and directed the 1st defendant to remove structures it had built on the suit property.
2. By an order dated 1/10/2021, the O.C.S Siaya Police Station was ordered to execute eviction orders against the 1st defendant. It is common ground that the orders were executed on or before 1/11/2021. Aggrieved and dissatisfied by this order and judgement of the court, the 1st defendant filed the instant motion dated 25/10/2021. This motion is the subject of this ruling.

The applicant's case and submissions

3. Pursuant to the provisions of **Article 159** of the **Constitution**, **Section 18** of the **Government Proceedings Act**, **Sections 1A** and **3A** of the **Civil Procedure Act** and **Orders 42 Rule 6** and **51 Rule 1** of the **Civil Procedure Rules**, the 1st defendant filed the motion under a certificate of urgency together with a supporting affidavit. Prayers number 1 and 2 of the motion are spent. The substantive prayer pending determination is that of stay of execution of the judgement and subsequent eviction orders pending the hearing and determination of the appeal.
4. The motion is supported on the following grounds; **(i)** It has preferred an appeal against the judgement of the court **(ii)** there is sufficient cause **(iii)** the 1st defendant and plaintiff (*sic*) shall suffer substantial loss if orders sought are not granted and thus the appeal will be rendered nugatory and, **(iv)** It is willing to abide with any orders that maybe issued by the court.
5. The 1st defendant filed written submissions dated 1/11/2021. It averred that it has a plausible appeal which touched on public property and it had demonstrated the existence of an imminent eviction and if eviction is allowed, the appeal will remain a pure academic exercise. It averred that if the eviction was to proceed, it would suffer loss of over Kshs.10,000,000/=. The 1st defendant contended it would abide by any conditions set by the court. In support of its case, the 1st defendant placed reliance on the Court of Appeal decision of **Reliance Bank Limited (in liquidation) versus Norlake Investments Limited, Court of Appeal at Nairobi, Civil Application Number 93 of 2002 (50/2002 UR)** which set out the principles for stay of execution as thus; **(i)**the applicant must satisfy that the appeal or intended appeal is an arguable one and not frivolous and, **(ii)** if an order for stay is not granted, and the applicant succeeds, then the appeal will be rendered nugatory.

The plaintiffs' case and submissions

6. The plaintiffs' filed a replying affidavit dated 12/11/2021 in which they contended that; **(i)** execution had been overtaken by events **(ii)** the orders sought could not be granted because there was no appeal and, **(iii)** the 1st defendant had failed to meet the laid down principles for grant of stay of execution. They urged the court to dismiss the motion with costs to them.

7. The plaintiffs filed written submissions dated 12/11/2021, they identified one issue for determination: whether the 1st defendant had in consonance with **Order 42 Rule 6** of the **Civil Procedure Rules** met the conditions necessary to warrant grant of stay of execution. They submitted that the 1st defendant had failed to meet the pre-requisites for grant of an order for stay of execution. The plaintiffs' placed reliance in the case of **Samvir Trustee Limited versus Guardian Bank Limited, Nairobi (Milimani) HCCC 795 of 1997** which held that an applicant has to adduce evidence that he will suffer substantial loss and **Masisi Mwita versus Damaris Wanjiku Njeri [2016] eKLR** which set out the principles for grant of stay of execution pending appeal. **Analysis and determination**

8. This court has had a chance to look at the motion, supporting affidavit, replying affidavit and written submissions and the only issue falling for determination is whether the 1st defendant's motion is merited.

I will proceed to analyze the legal and jurisprudential framework on this issue.

9. **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules** sets out the principles that guide courts in deciding whether or not to grant a stay of execution pending appeal and these principles are; **(i)** the Court is satisfied that the application will suffer substantial loss, **(ii)** the application is brought without undue delay and, **(iii)** 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. This provision of law has been applied in a line of court decisions including the case of **Masisi Mwita v Damaris Wanjiku Njeri (2016) eKLR, Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991** and **Joseph Kakomo Mbenga v Maingi Charles & another [2018] eKLR** and **Joseph Kakomo Mbenga v Maingi Charles & another [2018] eKLR** which quoted the Court of Appeal decision of **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**.

10. The question that then arises is whether the 1st defendant has met the criteria for grant of stay of execution pending appeal. The Court will now analyse each of the conditions in a sequential manner and juxtapose them against facts and evidence tendered in order to determine whether the 1st defendant is deserving of the orders sought.

11. On the 1st limb, the 1st defendant has contended that it will be greatly prejudiced if the stay is not granted because the suit property is a public market. In setting out such a ground, the 1st defendant is required to demonstrate that the execution will create such a state of affairs that will irreparably interfere with the outcome of the appeal. **In the case of Mukuma V Abuoga (1988) KLR 645** the court in defining substantial loss in an application for stay of execution pending appeal stated thus;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. It is the considered view of this court that a mere statement that it be greatly prejudiced or the suit property is a public market is not sufficient. The 1st defendant is required to go beyond that and particularize the loss and damage that it will suffer in the event the stay of execution is not granted. The attempt by the 1st defendant in its submissions to quantify the loss at kshs. 10,000,000/= does not cure the oversight in its application. The Court of Appeal held a similar view in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** when it held;

“Submissions cannot take the place of evidence... Such a course only militates against the law...Submissions are generally parties' “marketing language””

It is the finding of this court that the 1st defendant fails on this 1st limb.

13. On the 2nd limb, the instant motion was filed 21 months after the court rendered its judgement. The 1st defendant's application and supporting affidavit is bereft of material facts on the circumstances that led to delay in filing the instant motion. This court considers the period of 21 months to be inordinately long and consequently, the motion fails on this limb.

14. On the 3rd limb, 1st defendant has to furnish security for the court to determine its sufficiency. This position was upheld in the case of **Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR** where the court held thus:

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in ***Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others.***

15. **Order 42 Rule 6 (2) (b)** of the **Civil Procedure Rules** is couched in mandatory terms and a party who seeks stay of execution pending appeal must furnish security. In the instant motion, the 1st defendant has not furnished any security for the court's consideration and in the circumstances, the 1st defendant has failed on the third limb.

16. There is a fourth pertinent ground that is of importance in this motion: the motion has been overtaken by events. The order issued by the

court dated 1/10/2021 was executed and the 1st defendant has been evicted from the suit property and on this ground, the motion fails. This court is persuaded by the Court of Appeal decision in the case of **Jane Jeptoo Sawe v Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang [2016] eKLR** which held thus on a similar issue;

“...the order for stay of execution that the applicant seeks, has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose...”

17. The upshot is that it is my finding that the 1st defendant has failed to meet the criteria for stay of execution pending appeal and consequently, I make the following disposal orders;

- a) The notice of motion dated 25/10/2021 is hereby dismissed
- b) Costs to the plaintiffs.

It is so ordered.

RULING DELIVERED VIRTUALLY.

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

In the Presence of:

Mr. Mirembe for the defendant/applicant

Ms Mwangi for Plaintiff/respondent.

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

17/1/2022