



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

ELC APPEAL E010 OF 2021

FRANCIS K. CHABARI..... 1ST APPELLANT

TERESIA KARAUKI KATHENYA.....2ND APPELLANT

VERSUS

MWARANIA GAICHURA KAIRUBI.....RESPONDENT

RULING

1. This is a ruling in respect of an application dated 15.10.2021 filed under certificate of urgency and wherein the applicants seek for orders of stay of execution of the Ruling and the consequential orders of Hon. Nyaga S. M. SRM in Marimanti Miscellaneous Civil Case No. E001 of 2021 delivered on 23.09.2021 pending the hearing and determination of the intended appeal.

2. The grounds set out in the application are that:

i. That the Hon. Nyaga S.M, SRM delivered a Ruling that the Land Registrar and District Surveyor do visit Land Parcel No.1478 Ciakariga 'A' adjudication section and put beacons as per the alleged minister's order.

ii. That if a stay of execution is not granted substantial loss may result to the appellants as once the said survey is done, the Applicants herein may lose their land.

iii. That the appeal herein has a reasonable chance of success and if execution is carried out it will render the appeal nugatory.

iv. That there has been no delay in bringing this application.

v. That the defendant is willing to abide by any conditions and terms as to security as the court may deem fit to impose.

vi. That the respondent is likely to execute the decree herein at any time.

3. The application is supported by the affidavit of TERESIA KARAUKI KATHENYA, the 2nd Appellant sworn on 15th October, 2021 and supplementary affidavit sworn on 20th December, 2021.

4. The application is opposed by way of a replying affidavit sworn by the respondent herein on 11th December, 2021 and wherein he deposed that after the adjudication process in Ciakariga 'A' adjudication section was completed and appeal heard and finalized by the minister, the minister wrote to the county surveyor asking him to implement his ruling in respect to the sub-division of P/NO 1478 Ciakariga 'A'.

5. The respondent avers that the surveyor was unable to do the implementations without help from the court due to the hostility of the applicants and their relatives, and as such he approached the court vide Misc. Application No.1 of 2021 and after the court heard all the parties it granted the orders. That the orders were favorable to all the parties and none is prejudiced.

6. The respondent contends that by the applicants opposing the implementation of an award which they never appealed against it shows that the applicants are not genuinely seeking justice and that their quest to oppose the implementation of a regular award is not founded on sound legal basis and that the balance of convenience is to reject the application.

7. In the supplementary affidavit dated 20th December 2021 it is stated that the Replying Affidavit by the Respondent does not address issues

raised by the application dated 15th October, 2021 requesting the Honourable Court for an interim order for stay of Execution of the decree passed vide CM Marimanti Misc. Civil Vide No. E001 of 2021 pending the hearing and determination of the appeal.

8. The Appellants aver that they have appealed against the Ruling made by Hon Nyaga S.P.M on 23rd September, 2021 before the Honourable court and it is important that they wait for the outcome of the appeal.

9. The Appellants contend that in response to paragraph 3 of the Respondent's Replying Affidavit the Appellants would like to aver that after the Adjudication process, in Ciakariga "A" Adjudication section was completed and Appeal heard and finalized by Minister, the surveyor visited the land on the ground and prepared a sketch Map on how they have occupied the land on the ground.

10. The Appellant contends that the minister's decision held that Land Parcel No.1478 CHIAKARIGA "A" Adjudication be subdivided into three (3) portions and be registered as follows:

- a. MWARANIA GAICHUA KARIUBI (the Respondent herein) to retain one portion under PLOT NO.1478 CHIAKARIGA 'A' Adjudication.
- b. TERESIA KARAUKI to be given a new Number on the portion she already developed.
- c. FRANCIS K. CHABARI to be given a new parcel Number on the portion he has developed and as shown on the tracing paper attached.

11. The Appellants contend that the Minister's decision intended that the applicants be given the land parcels where they have been using and that it is according to the sketch Map Marked TTK1. That later on the Respondent interfered with the sketch map to suit his own convenience by using his influence as an officer at the County Government of Tharaka Nithi where he was working as Minister of Land at that level. The Appellants further aver that it is ridiculous for the Respondent to allege that they are hostile to the implementation of the award which was delivered on 16th January, 2005, 16 years ago.

12. The Appellants aver that the respondent wants to use short cuts to interfere with the decision of the Minister for his benefit.

13. The Appellants concluded by stating that the Honourable court can only do justice if it grants the application dated 15/10/2021 and stay execution of the Ruling passed by Hon. Nyaga SM SPM vide Misc. Application on E001 of 2021 on 23rd September, 2021.

14. The application was canvassed by way of written submissions. The Appellants' submissions are dated the 5th of January, 2022 and filed on even date while the Respondent's submissions dated 4th February, 2022 was filed on 7th February, 2022.

15. The Appellants submitted that per the ruling of the court an order was made for the Land Registrar and District Surveyor to visit Land Parcel Number 1478 Ciakaranga A' Adjudication sections and place beacons therein as per the alleged decision of the minister. That the decision of the minister was based on irregularities necessitating the appeal filed to correct the abnormalities. It is the Appellants' submissions that the decision by the minister and the subsequent orders were made using the wrong cadastral map that was attached and passed off as the original.

16. The Appellants submitted that it is trite law that before grant of orders for stay of execution of a decree or order pending appeal the Applicants are supposed to satisfy the requirement set under order 42 rule 6 (2). The said provision states that the applicant must satisfy court that substantial loss may result to the applicant unless the order is made (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. They relied on the case of **Antoine Ndiaye vs African Virtual University (2015) eKLR**.

17. The Appellants also relied on the case **RWW vs EKW (2019) eKLR** to demonstrate the purpose of a stay of execution order pending appeal. They also relied on the case of **Butt Vs Rent Restriction (1979)** wherein the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. That the power of the court is discretionary and the discretion should be exercised in such a way as not to prevent an appeal. Secondly that 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 the appeal court reverse the Judge's discretion. Thirdly, that 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. Finally, that the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements. The Applicants also relied on the case of **James Wangaiwa & Another -vs- Agnes Naliaka Cheseto [2012] eKLR** as to what substantial loss is.

18. The Appellants further submitted on the issue of whether security is required for grant of stay of execution and submitted that the court has the power and discretion to allow stay of execution without requiring deposit of security for the due performance of the orders as set out in **RWW V EKW**.

19. It was their submission that the issue of security is discretionary and it is upon the court to determine whether the same is necessary. They further submitted that it would be in the interest of justice for the Honourable court to hold that security under the circumstances should not be imposed.

20. On the other hand, the respondent submitted that the application for stay pending appeal lacks in merit and should be dismissed. He submitted that the application is just an academic exercise calculated to delay the implementation of a regular court order. He further contends that the appellants should not challenge a genuine court order.

21. The respondent submitted that he has incurred to the tune of Kshs. 100,000 in preparing for the visit to the Loqus Quo by the police, registrar and surveyor and he will suffer loss. That if the Applicants are serious to have the stay, they should deposit Kshs. 100,000/= in court as security.

ANALYSIS AND DETERMINATION

22. I have considered the application, the response and the submissions filed by the parties to buttress their assertions. What calls for determination in this matter is the issue for stay of execution by the appellants'/applicants pending the hearing and determination of the appeal.

23. Stay of execution pending appeal is a 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 appellant 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.”

24. 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.

25. 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.

26. 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 jurisdictions for granting stay.”

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

27. 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 Appellants to their 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)**}

28. 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...”

29. The applicants submitted that if the orders of the Lower court as delivered are not stayed and the survey is conducted, they would stand to suffer substantial loss. It is their contention that this would result in an injustice because the decision was made on reliance of a map that is not original and does not portray the correct position on the ground. The applicants have submitted that in the event that the stay is not granted substantial injustice may occur in that they may end up losing their land.

30. As already stated, Order 42 Rule 6 lays out the Law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub-rule 2 outlines the mandatory conditions that have to be met for the court to grant stay pending appeal. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Appellants.

31. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicants.

32. From the record, the ruling appealed against was made on 23rd September, 2021 and the application herein was filed on 3rd December, 2021. This was after about two months and nine days. In my opinion, the application was not made timeously and the Applicants have not even given an explanation for the delay in bringing the application herein.

33. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicants, the court has already referred the consideration to be made in the case of ***Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu (Supra)***.

34. In this case, the Applicants have stated that they will suffer substantial loss and the appeal rendered nugatory unless stay of execution is granted because the survey will be done and beacons put on the suit land as per the minister’s order. The Applicants fear is that this action may result in them losing their land. In my view, I do not see how the mere act of placing beacons can result in the applicants losing their land. If the Applicants were to succeed in the appeal, I do not think that the appeal would be rendered nugatory if the prayers sought are not granted because the beacons put can be removed and restore the land to its previous status.

36. In the result, this court finds no merit in the notice of motion dated 15th October, 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 Respondent.

36. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF FEBRUARY, 2022 IN THE PRESENCE OF:

C/A: Martha

Ms. Wahome for Appellants

N/A for Kimathi for Respondent

C. K. YANO,

JUDGE