



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 743 OF 2015

(FORMERLY HCCC NO. 199 OF 2011)

PRISKA ONYANGO OJUANG'.....1ST PLAINTIFF

JANE MILDRED OJUANG'.....2ND PLAINTIFF

VERSUS

HENRY OJWANG NYABENDE.....DEFENDANT

RULING

The Judgment Debtor applicant has filed this application for orders that pending the inter partes hearing and determination of application dated 28.5.2021, there be an order for stay of the execution and/or enforcement of the judgment of this Honorable Court delivered on 3rd July 2019, the Decree and certificate of costs extracted thereon. That the costs of this application be provided for.

The application is based on grounds that the urgency of this Instant application is that, the Applicant is facing execution of the taxed costs of Kshs. 246,433.33 as he was on 20th September 2021 served with warrants of attachment of his movable property and proclamation notice, which notice lapsed on 27.9.2021. The Decree-holders on whose behalf the execution is being undertaken, have expressed themselves in writing to the Judgment debtor, and their advocates, that being that they are close relatives, who have since the date of delivery of judgment embarked on a process of amicable settlement for the sake of maintaining good relations, they would not wish to pursue the execution of the costs of this suit at all, which would jeopardize the negotiations.

The execution process is thus uncalled for, and would embarrass the negotiation process, and unless an order of stay of execution is granted while pending the hearing and determination of the application, the Defendant/Applicant's application would be rendered nugatory and reduced to a mere academic exercise, which would result into the Applicant's proclaimed property sold by public auction. It is in the interest of justice to grant the reliefs sought to the Applicant to avoid the embarrassment of execution.

In the Supporting Affidavit, the Judgment debtor states that on 20th September 2021 he was served with warrants of attachment of movable property and proclamation notice from Demigen Auctioneers, which notice lapses on 27.9.2021. That the Decree holders on whose behalf the execution is being undertaken, have expressed themselves in writing to the Judgment debtor, and their advocates, that being that they are close relatives, who have since the date of delivery of judgment embarked on a process of amicable settlement for the sake of maintaining good relations, they would not wish to pursue the execution of the costs of this suit at all, which would jeopardize he negotiations.

That the execution process is thus uncalled for, and would embarrass the negotiation process, and unless an order of stay of execution is granted while pending the haring and determination of the application, my application would be rendered nugatory and reduced to a mere academic exercise, which would result into the proclaimed property sold by public auction. That is in the interest of justice to grant the reliefs sought to avoid the embarrassment of execution.

The Decree Holder filed grounds of opposition whose gist is that the Defendant's application dated 27th September, 2021, is an abuse of the process of this Honourable Court in that there is already another Notice of Motion application dated 28th May, 2021 and filed in court by the Defendant/Applicant on 31st May, 2021, seeking similar remedies and which has not been heard.

That the application has not been "made without unreasonable delay" as required by the provisions of Order 42 rule 6 (2) (a) of the Civil Procedure Rules.

That the Defendant/Applicant has not demonstrated hat he has an arguable appeal, that is to say that his appeal is not frivolous as required by

the provisions of Order 42 rule 6 (1) of the Civil Procedure Rules.

That the Defendant/Applicant has not presented anything which could satisfy the court that substantial loss may result to him if stay is not granted as required by the provisions of Order 42 rule 6 (2) (a) of the Civil Procedure Rules.

That the Defendant/Applicant has also not demonstrated that if the order of stay of proceedings is not granted then his appeal, if it were to succeed, would be rendered nugatory.

That the Defendant/Applicant's application is contradictory in so far as he seeks stay of execution pending appeal and in the same breadth he wants to withdraw or compromise the two appeals pending before the Court of Appeal.

That Whether the application seeks (a) stay of execution pending appeal or (b) stay of execution pending the formal withdrawal or compromise of the two appeals pending before the Court of Appeal, it was incumbent upon the Defendant/Applicant to offer security for the due performance or the decree as envisaged by the provisions of Order 42 rule 6 (2) (b) of the Civil Procedure Rules, and the application is therefore incompetent to that extent.

That in view of the fact that Party and Party costs have already been taxed in this suit on 38th April, 2021, and further in view of (a) the e-mail letter dated 21st September, 2021 by one Patrick Audi annexed to the Defendant's affidavit as HON/2, and (b) the express statement by the Defendant/Applicant that they intend to settle the dispute amicably, and further (c) in view of the fact that there are two appeals pending before the court of Appeal arising from the present suit, being (i) Kisumu court of Appeal Civil Appeal No. 164 of 2019 (an appeal from the ruling and orders made on 21st February, 2019) as well as (ii) Kisumu Court of appeal Civil Appeal No. 45 of 2020 (an appeal from the judgment and decree made on 3rd July, 2019), the Defendant/Applicant and the said Patrick Audi should have considered and agreed on how the Advocate/Client costs as well as the Auctioneer's fees are to be paid.

That the Defendant/Applicant's application in its totality does not satisfy the conditions for the grant of stay of proceedings as set out under the provisions of Order 42 rule 6 of the Civil Procedure Rules.

I have considered the application and the submissions on record and do find that the application was made more than 2 years after Judgment.

Order 42 Rule 6 provides:-

“(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 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.

I do find that there is inordinate delay in making the application and the same is not explained as judgment was made on the 3rd Day of July 2019 and the application is being made on 22nd September 2021 more than 2 years. Moreover, the applicant has not demonstrated that he is likely to suffer substantive loss if stay is not granted. The application appears an afterthought and has no merit the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23rd DAY OF FEBRUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.