



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1720 OF 2007

M.A. KOINANGE.....1ST PLAINTIFF

VERSUS

JOYCE GANCHUKU 1ST DEFENDANT

CITY COUNCIL OPF NAIROBI 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

R U L I N G

The 1st Defendant's Notice of Motion application dated 9th March 2015 brought under Order 42 Rule 6 (1) (2) of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act seeks an order for stay of execution of the judgment delivered in this case on 27th February 2015 pending the hearing and determination of the intended appeal.

The 1st Defendant's appeal is based on the grounds that appear on the face of the application and the affidavit in support of the application sworn by **Joyce Gachunku**. The grounds on which the application is based are that:-

- a. The 1st Defendant/Applicant stands to suffer substantial loss unless the stay is granted.
- b. The 1st Defendant/Applicant has lodged the Notice of Appeal.
- c. The intended appeal has overwhelming chances of success and should stay of execution be denied the appeal will be rendered nugatory.

The deponent in her supporting affidavit deposes that she was dissatisfied and aggrieved by the judgment of February 2015. That her Advocates have applied for certified copies of proceedings and have filed a notice of appeal as per the annexure marked "JG1". That the judgment ordered her title to be cancelled and for payment of damages of **Kshs.300,000/-** and vacation of the premises within 60 days of the date of judgment. The applicant deposes as regards the substantial loss she may suffer if stay is not granted under paragraph 7 of the supporting affidavit deposes thus:-

"7. That I stand to suffer substantial loss unless the stay of execution sought herein is granted as I have lived on the suit premises with my family since 2002, which property I have developed our

family home at a cost of over Kshs.8 million, I have also developed emotional attachment thereto, I have no other property save for this suit premises”.

The plaintiff filed a replying affidavit sworn on 17th March 2015 in opposition to the 1st Defendant’s application for stay of execution and states that the application does not satisfy the conditions/requirements under which stay of execution may be granted under Order 42 Rule 6 of the Civil Procedure Rules. The plaintiff/Respondent avers that the Applicant has not demonstrated she stands to suffer substantial loss if stay of execution is not granted and has not placed any or any sufficient material before the court that could aid the court in making an assessment whether the applicant stands the risk of suffering substantial if stay is not granted.

The plaintiff Respondent further depones that the applicant’s appeal even if successful cannot be rendered nugatory since the court of appeal can equally order that the property be restored to the applicant and any financial payments made be refunded. The respondent avers she is financially stable and would be in a position to make a refund if ordered to do so. The plaintiff additionally states that the Applicant has not furnished any security for the due performance of such decree as may ultimately be binding upon her. The Applicant has further not annexed a draft of the memorandum of Appeal to enable the court to ascertain whether the grounds advanced in the appeal raise arguable grounds and or it is not frivolous.

The parties canvassed the application by way of written submissions. The 1st Defendant’s submissions dated 30th March 2015 were filed on 1st April 2015 and the Plaintiff/Respondent’s submissions dated 14th April 2015 were filed on the same date. I have considered the application and the affidavit in support and in opposition and the submissions filed by the parties. This being an application for stay of execution pending the hearing and determination of an intended appeal the issues that stand to be determined is whether the applicant has satisfied the requirements for grant of an order of stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules 2010.

Order 42 Rule 6 of the Civil Procedure Rules, 2010 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, to consider such application and 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.

Thus in an application for stay of execution of a decree the applicant has to demonstrate:-

- i. Sufficient cause;
- ii. That substantial loss will ensue;
- iii. Such security as the court may require is available;
- iv. That the application has been brought without unreasonable delay.

In considering an application for stay of execution pending appeal the court must always bear in mind the competing interests of the applicant on the one hand and the successful litigant on the other hand who has a judgment and is entitled to enjoy the fruits of his judgment. The applicant for his part, it has to be borne

in mind has a right to appeal from the decision of the court appealed from and therefore there is always the need to balance the competing interests of the decree holder and the applicant. The judgment once pronounced is valid and enforceable unless the execution of the same is stayed and/or set aside by the appellate court. Until a decision by the appellate court is rendered the decision of the court appealed from remains valid and lawful and the decree holder entitled to execute the same. The appellate court can affirm or reverse the decision of the court appealed from and it is on that account that Order 42 Rule 6 remains pivotal in determining when and in what circumstances to grant or not to grant stay and where stay is granted on what terms.

In my view the principal consideration whether to grant stay of execution or not should be whether or not the applicant is likely to suffer substantial loss if stay is not granted and the appeal is successful. The court of Appeal in the case of **Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Another (1982-1988) IKAR 1018** underscored the import of establishing substantial loss in applications for stay. **Platt, JA** in the case observed:-

“it is usually a good rule to see if Order 41, rule 4 of the Civil Procedure Rules can be substantiated if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay”.

As the decree that sought to be stayed in the court of Appeal in the above matter was a monetary decree, the learned Judges did not see how paying the money awarded in the decree would render the appeal nugatory and they proceeded to refuse the application for stay of execution observing that if the money is paid and the applicant was successful in the appeal the Respondent would dutifully refund any money paid pursuant to the reversed decree.

In the present application, it is stated and it is not denied, that the Applicant and her family her residing on the suit property as their matrimonial home having developed the property way back in 2002. The judgment requires the applicant to vacate and deliver vacant possession of the suit property. The court takes cognizance of the fact that since the applicant has resided on the suit property since 2002 as her matrimonial home it can be inferred that she has gotten sentimentally attached to it and that execution of the decree would of necessity result in substantial loss as the applicant would need to relocate and seek alternative residence elsewhere. Relocating from a residence which she had known as her matrimonial home for over 10 years in my view would entail substantial loss particularly when it is not by choice but pursuant to a decree that is the subject of appeal. Were the appeal to be successful, the applicant would have been subjected to substantial loss if the decree was executed.

The applicant having lodged and served the Notice of appeal on the Respondent has demonstrated a cause to apply for stay of execution. In my view I am not expected to form a view whether or not the intended appeal has reasonable chances of succeeding as I cannot sit on appeal on my own judgment. The Court of Appeal would be the appropriate forum to consider whether the applicant has an arguable appeal and/or the applicant’s appeal has any chances of succeeding.

Judgment in the present case was delivered on 27th February, 2015 and the applicant filed the instant application on 10th March 2015 and thus without doubt the application was filed without unreasonable delay.

The decree issued in this matter was partially monetary in the sense that the court awarded the plaintiff damages in the sum of **Kshs.300,000/-** with interest from the date of judgment. There is ample judicial authority that the courts usually will not grant stay of execution in as far as monetary decrees are concerned (see **Kenya Shell Ltd –vs- Benjamin Karuga (supra)**). The Respondent in her affidavit in support of her application under paragraph 8 states that she is not in a financial position to pay the sum of **Kshs.300,000/-** ordered as damages. This averment is curious in the sense that the court has decreed the amount. The applicant cannot say she is not in a position to pay and then seek stay. What if the stay is not granted and/or the appeal is unsuccessful?. What security is the applicant offering for the due performance of the decree in case her appeal is unsuccessful?.

While I will exercise my discretion to grant a stay of execution to prevent the Applicant from being evicted and/or forced to vacate from the suit premises and/or her title cancelled in terms of the judgment the stay will be on terms that the Applicant do within the next **thirty (30)** days from the date of this ruling deposit the sum of **Kshs.300,000/-** in a interest earning account in a Commercial Bank in the joint names of the plaintiff's Advocates and the 1st Defendant's Advocates failing which the order for stay will lapse and the plaintiff will be at liberty to proceed with the execution of the entire decree notwithstanding the pendency of any appeal from the decree.

It is so ordered.

Ruling date, signed and delivered this **19th** day of **June**, 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendants