



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & LC. NO.105 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF ADVERSE POSSESSION**

**AND**

**IN THE MATTER OF LAND PARCEL NO. KEIYO/MARAKWET/IRONG/KAPKONGA/117**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES OF KENYA**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**COSMAS CHERONO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**WILLIAM CHERONO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**BRIAN RONO.....3<sup>RD</sup> PLAINTIFF/ APPLICANT**

**VERSUS**

**VERONICAH CHERONO.....DEFENDANT/RESPONDENT**

**RULING**

**[NOTICE OF MOTION DATED 15<sup>TH</sup> NOVEMBER, 2021]**

1. The Plaintiffs moved the court through the notice of motion dated the 15<sup>th</sup> November, 2021 seeking for an order of stay of execution of the judgment given on 3<sup>rd</sup> November 2021, pending the hearing and determination of the intended appeal and costs. The application is based on the seven (7) grounds on its face marked (a) to (g) and supported by the affidavit sworn by Cosmas Cheron, the 1<sup>st</sup> Plaintiff, on the 15<sup>th</sup> November, 2021.

2. The application is opposed by the Defendant through the replying affidavit sworn by VERONICA CHERONO on the 22<sup>nd</sup> November, 2021.

3. The learned counsel for the Plaintiffs and the Defendant filed their submissions dated the 15<sup>th</sup> January, 2022 and 18<sup>th</sup> January, 2022 respectively.

4. The following are the issues for the court's determinations;

a. Whether the Plaintiffs have met the threshold for the grant of an order of stay of execution.

b. Who pays the costs of the application.

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by both counsel, superior courts decisions cited thereon and come to the following conclusions;

a. The court delivered its judgment on the 3<sup>rd</sup> November, 2021, and aggrieved by the aforesaid judgment, the Plaintiffs filed the Notice of Appeal dated the 3<sup>rd</sup> November, 2021. Then vide the notice of motion dated the 15<sup>th</sup> November, 2021 the Plaintiffs sought for an order of stay of execution pending the hearing and determination of the appeal that the Plaintiffs intend to file. The Defendant opposed the aforementioned application vide his replying affidavit.

b. The Plaintiffs submitted that they have proved substantial loss as they are in occupation of the suit land, and they have developed it. In the case of **SILVERSTAIN VS CHESONI (2002) KLR 867** the court held that:

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

The Plaintiffs urged the court to exercise its discretion to grant an order of stay, since they have already filed an appeal to the Court of Appeal. In the case of **TASSAM LOGISTRIC LTD VS DAVID MACHARIA & ANOTHER (2018) eKLR**, the court held that:

*“in a bid to balance the two competing interests, the Court usually makes an order for suitable security for the due performance of the decree as parties wait for the outcome of the appeal.”*

The Plaintiffs argued that they are willing to abide with the conditions set out under Order 42 of the Civil Procedure Rules.

And in the case of **TABRO TRANSPORTERS LTD VS ABSOLOM DOVA LUMBASI (2012) eKLR**, the court ascertained that the requirement to furnish security was considered as a just thing to do when balancing the two competing interests.

c. The Defendant submitted that the Plaintiffs have not satisfied the requirements for the grant of an order of stay of execution. The Defendant cited the decision in the case of **ABALOM DOVA VS. TARBO TRANSPORTERS [2013] (sic) eKLR** where the court stated that:

*“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his 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...”*

The Defendant also argued that the Plaintiffs did not prove that they will suffer substantial loss. In the case of **NAIROBI CIVIL SUIT NO. 1029 OF 1982, JOACKIM NGUGI KIARIE V UI- YATE & OTHERS** the court at page 5 held that:

*“I am not satisfied that the defendants have demonstrated the substantial loss they would suffer. They are not the registered owners of the suit property and their claim for adverse possession was dismissed by the court while the plaintiff's claim was upheld and therefore until the judgment of the plaintiff is reversed he is entitled to the benefits that it bestows on him unless it occurs to Court that the judgment was patently wrong on the basis of the record.”*

And in the case of **JAMES WANGALWA ANOTHER VS AGNES NALIKA CHESETO [2012] eKLR** the court held thus:

*“The applicant must establish other factors which show that the execution will create a state of affairs that will create an irreparable affect...”*

d. The court has to remind itself that in as much as the Plaintiffs have a right to have the subject matter of the appeal that they intend to file maintained, the Defendant also has a right to enjoy the fruits of the judgment. In the case of **MOHAMMED SALIM T/A CHOICE BUTCHERY V NASSERPURIA MEMON JAMAT [2013] eKLR**, the court cited the decision in the case of **M/S PORTREITZ MATERNITY -VS- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997**, where the court stated as follows:

*“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”*

e. That the stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010 which 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 appeal case of 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 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.”

That from the aforementioned superior courts decisions and the provision of the Civil Procedure Rules, the court is enjoined to establish whether the Plaintiffs filed the application herein without unreasonable delay, whether they have established sufficient cause, or substantial loss, and willingness to offer security for due performance of the decree in order to be granted the order of stay of execution. The court in the case of **SAMVIR TRUSTEE LIMITED v GUARDIAN BANK LIMITED [2007] eKLR** said the following about substantial loss:

*“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”*

f. The Plaintiffs averred in their supporting affidavit that they are in occupation of the suit land, and they submitted that they will suffer irreparable loss and damage in the event that they are evicted from the suit land. That argument is however not sustainable as the court has already made a finding that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs did not prove that they were in occupation of the suit land. The judgment of the court was to the effect that among others, the 1<sup>st</sup> Plaintiff has rights over the 2 acres parcel of land that was in his possession, and that the same was to be excised from the larger parcel of land and transferred to him. That in the case of **SAMMY SOME KOSGEI V GRACE JELEL BOIT [2013] eKLR** the court rendered itself as follows as relates to the issue of proving the existence of substantial loss:

*“The more critical issues herein are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal.*

*I therefore need first to interrogate if the applicant really will suffer substantial loss if stay is not granted. But even in this interrogation, I must be alive to the tenet that a successful party is entitled to the fruit of his judgment and there must be demonstrated good reason why he ought not to consume the fruit of his judgment, at least just yet. In Machira t/a Machira & Co v East African Standard No.2 (2002) 2 KLR 63, It was stated as follows” It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order , before disposal of the applicant's business (e.g appeal or intended appeal)” (at P 67).”*

That having considered the facts in this application, the court finds that the Plaintiffs have not furnished the court with specified facts and details of the loss that will befall them, in the event that the order of stay sought is not granted. The half-hearted attempt by the Plaintiffs to just allege substantial loss will not suffice and I therefore find that the Plaintiff have not proved to the court that they will suffer substantial loss in the event that the order of stay of execution is not granted.

g. The Plaintiffs confirmed their willingness to abide by the orders of the court with regard to requirement to deposit a security for due performance at paragraph 7 of the supporting affidavit. In the case of **FOCIN MOTORCYCLE CO. LIMITED VS. ANN WAMBUI WANGUI & ANOTHER [2018] eKLR** the court held as follows:

*“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”*

That had the Plaintiffs succeeded in establishing the requirement of substantial loss, their willingness to offer security for due performance of the decree as is outlined in Order 42 rule 2(b) of the Civil Procedure Rules, would have been in their favour.

h. The court notes that the judgment herein was delivered on the 3<sup>rd</sup> November 2021, and the Notice of Appeal was filed on the 3<sup>rd</sup> November 2021. The application herein was filed on the 15<sup>th</sup> November, 2021. It is trite that time is of the essence when it comes to applying for orders of stay of execution. Having considered the above and the decision in the case of **ELENA DOUDOLADOVA**

**KORIR V KENYATTA UNIVERSITY [2014] eKLR** where the court held that:

*“It is trite law that an application for stay of execution pending appeal is to be made timeously...”*

I have come to the finding that there was no delay in the filing of the instant application as it was filed only twelve (12) days after the delivery of the judgment.

i. Though the court has the discretion to grant the orders of stay of execution sought by the Plaintiffs, the discretion must be exercised judiciously. The court in the case of **SOLOME NALIAKA WABWILE V ALFRED OKUMU MUSINAKA [2021] eKLR** held as follows:

*“Whether or not to grant the remedy of stay of execution pending appeal is a matter of judicial discretion. Such discretion must therefore be exercised on sound basis, rationally and not capriciously or whimsically.*

*In so doing, the Court must bear in mind the need to balance between the two competing interests of a party who has a Judgment in his favour and another who is desirous of exercising his right of appeal. The onus is however on the party seeking a stay to prove that he has met the threshold set out in Order 42 of the Civil Procedure Rules.”*

The court takes cognisance of the fact that though the Plaintiffs have shown that they filed the Notice of Appeal within the 14 days prescribed, and that the instant application was filed without delay, and they are ready to offer security for due performance of the decree, they have failed to establish sufficient cause or the substantial loss that they are likely to suffer unless the stay order is granted. That as the Plaintiffs have not met the threshold for the grant of orders of stay of execution, the court cannot exercise its discretion in their favour. That in the event the Court of Appeal was to make a determination in favour of the Plaintiffs, any loss or damage that may be occasioned to them may adequately be compensated by way of damages, as the value of the land in issue can be ascertained at any moment in time and appropriate orders issued.

j. That as under section 27 of the Civil Procedure Rules, chapter 21 Of Laws of Kenya, the costs follow the events, the Plaintiffs will pay the Defendant the costs in the application.

6. The court finds that the Plaintiffs notice of motion dated the 15<sup>th</sup> November, 2021 lacks merit and it is hereby dismissed with costs to the Defendant.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 23<sup>RD</sup> DAY OF MARCH, 2022**

**S.M.Kibunja,J.**

**ELC ELDORET.**

IN THE VIRTUAL PRESENCE OF;

PLAINTIFFS:.....Absent.....

DEFENDANT:.....Absent.....

COUNSEL:.....Mr. Keter for Dr. Chebei for Plaintiffs/Applicant and...

...Mr. Chemok for Defendant/Respondent.....

COURT ASSISTANT: ONIALA

**S.M.Kibunja,J.**

**ELC ELDORET**