



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E175 OF 2021

PURITY KATHOKI MAWEUAPPLICANT/RESPONDENT

VERSUS

HEZEKIAH NJUKI MWANGIRESPONDENT/APPLICANT

HYPAC INVESTMENTS LIMITED.....INTERESTED PARTY

RULING

1. Through a Notice of Motion Application dated 9/12/2021, brought under **Order 1, Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1 Section 3 A**, Article 159 of the Constitution and all other enabling provisions of the Law. The correct provision under which the Notice of Motion should have been brought is actually Order 42 of the Civil Procedure Rules but that is not fatal to the application. The Applicant/Appellant sought the following orders;

1. Spent

2. That the Honorable Court be pleased to grant stay of Execution of the Order issued on 25.11.2021 by Hon. Justice pending the hearing and determination of the applicant's appeal.

3. That the Costs of this Application be provided.

2. The Application is premised on the grounds on the face of the application supported by the Affidavit of **Hezekiah Njuki Mwangi**. He averred that the Judgement was delivered on the **25.11.2021**, allowing the Plaintiff's suit and prayers. That he was dissatisfied with the outcome to which, he instructed his current advocates who have lodged a Notice of Appeal dated 9/12/2021 with a view of preferring an Appeal at the Court of Appeal.

3. He contended that he is apprehensive that unless an order of Stay of Execution is granted, the Plaintiff/Respondent will proceed with execution and he stands to suffer irreparable damage and loss. That he believes that he has a good and arguable Appeal on merits with high chances of success.

4. The Application is opposed by **Purity Kathoki Maweu**, who filed her Replying Affidavit dated 22/12/2021, and averred that application is frivolous and vexatious and an abuse of the court process. She further avers that the applicant has not annexed a draft Memorandum of Appeal to the application and neither has the applicant provided security. Further that being a bonafide purchaser of the suit property she stands great prejudice if the order of stay is granted.

5. The Court directed that the Application be canvassed by way of written submissions and the Respondent/Applicant filed his submissions dated 24/01/2022, through the **Law Firm of Paul Ndung'u & Co. Advocates**, while the Applicant /Respondent filed her submissions dated 8/02/2022 through the **Law Firm of Farrah Munoko & Company Advocates**.

Respondent/Applicant's Case

6. Mr Paul Ndung'u stated that the application is anchored on the supporting affidavit dated 9/12/2021 sworn by Hezekiah Njuki Mwangi; if the orders sought are not granted the appellants/applicants would suffer irreparable loss and the appeal would be rendered nugatory. Further that the suit property is the only home the appellant has and that is where he lives with his family.

Applicant/Respondent's Case

7. In reply the respondent stated that the application should not be allowed because the it is frivolous and vexatious. Further that the applicant has failed to annex a draft Memorandum of Appeal to the application and therefore it is hard to know if the application has a chance of

success. That the Applicant also has not provided security as is required and that if the Court will consider the application then the appellants/applicants should provide security for the due performance of the decree.

8. She contends that she is the bonafide purchaser for value of the suit property and will suffer greater prejudice if the stay of execution is granted.

Analysis and determination

9. The Court has considered the Application, the Replying Affidavit and the Submissions thereto. The application is for stay of execution pending appeal and applications of this nature are governed by the provisions of **Order 42 Rule 6 (2)** which provides as follows :-

(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.

10. Rule 1 above contemplates that such an application should be made at the trial Court in the first instance. Whether the application will be allowed or not, the appellate Court shall be at liberty to hear an application for stay of execution and order the same **as it may deem just**. This provision is augmented by the holding in the celebrated case of **Butt v Rent Restriction Tribunal [1979] eKLR**. That the power to grant or deny stay of execution is discretionary power, to be exercised in favour of a deserving party. Stay of execution is therefore not an absolute right and a party pursuing this relief must demonstrate to the Court that they merit it.

11. In the recent case of **Bonito Hotels v Denise Kibisu [2021] eKLR** the Learned Judge held that substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. That the Applicant having failed to prove such, the application for stay of execution was dismissed.

12. In the case of **Macharia T/A Macharia & Co. Advocates vs East Africa Standard [2002] eKLR** cited by the Respondent Kuloba J. (as he then was) held that an Applicant's ground for substantial loss must be specific and detailed as it is not enough merely to state that substantial loss will result or that the appeal will be rendered nugatory. It is clear that for the Court to grant stay of execution of the Judgment, the Applicant/Appellant needs to satisfy the Court that he will suffer substantial loss. In the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** the Court stated;-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.

The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

13. With the above in mind, the Court must then determine whether the Applicant has established that he will suffer substantial loss and/or has presented special circumstances that will warrant the Court to exercise its discretion and grant stay of Execution.

14. The Applicant/Respondent has stated that he will be occasioned injustice if the orders sought are not granted as the suit property is where he stays with his family. It is important to note that requirement of proof of substantial loss does not only mean monetary terms but also the inconvenience of having to be evicted and later having to evict the Applicant/Respondent in case the applicant is successful.

15. It is the Applicant's averment that he will suffer substantial loss if stay of execution is not granted as the Court ordered the eviction of the Applicant/Respondent from the suit property since the Respondent/Applicant was found to be the *bonafide* purchaser of the suit property.

16. The Applicant contends that the suit property is the only home he has where he stays with his family and if orders of stay are not granted, he stands to suffer irreparable loss. **However, there is no evidence placed in this court to show how the Applicant will suffer irreparable loss.** The Court in making its finding also takes into account that it has a duty as the Court to ensure that it does not deny a successful litigant the fruits of his/her Judgment.

17. In his submissions, the Applicant/Respondent expresses that he stands to suffer should execution of the judgment proceed. He avers that he and his family have occupied the house where he is and it is their home they have made developments on the suit property through construction of the family home. The fact of the occupation is confirmed by the prayers in the plaint and the judgement of the Court. The Court has noted the averment that the Respondent/Applicant is keen in evicting the Applicant and occupy the house which is rightfully hers by the din of the judgment.

18. As already stated it is to be appreciated that in an application for stay of execution, the Court must also balance the two competing rights as noted by Gacheru J. in **John Gacunja Njoroge vs Joseph Njoroge** (supra). Also see **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR**, **Ombwayo J Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** Mabeya, J and **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** where the Court set out thus

“.....in an application for stay, there are always two competing interests that must be considered. These are that a

successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal.”

19. As regards security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the Applicant/Respondent. This is to ensure that the discretion bestowed on the Court is not fettered. I note that the Applicant/Respondent has not addressed the issue of cost in his pleadings nor submissions. The Respondent/Applicant has made a proposal of Kesh 1,000,000.

20. There is really only one issue for determination, and that is whether the order of stay of execution should be granted.

21. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in **Order 42 Rule 6(2)**, aforementioned: namely (a) 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. See **Antoine Ndiaye vs. African Virtual University [2015] eKLR**.

22. The court, in **RWW vs. EKW [2019] eKLR**, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

23. With regard to security for costs, the court in **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, stated:

“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...”

24. In **Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR**, the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor..... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

25. While in **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another [2018] eKLR**, it was stated that:

“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.”

26. From the above decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Looking at the circumstances of the case and the fact that the Applicant/Respondent never addressed this issue, I will cushion the Respondent/Applicant by making an order for security so that she enjoys the security of knowing that the judgment of 25/11/2021 is not in vain. It is in the interest of justice that security is imposed on the appellant.

27. The Respondent/Applicant has drawn the court’s attention to the issue of the Applicant/Respondent not having filed a Memorandum of Appeal. It should be clear, from Order 6 Rule 4 of the Civil Procedure Rules, that a notice of appeal is required for appeals to the Court of Appeal from the High Court. The Applicant/Respondent filed a Notice of Appeal dated 9/12/2021 this was lodged through the Deputy Registrar of the ELC Court.

28. In the upshot, I find that the application, dated 9/12/2021 is meritorious and I grant conditional stay on the following terms;

a) The Applicant’s/Respondent’s Application dated 09/12/2021 is granted

b) The Applicant/Respondent to provide security for the due performance of the decree in the sum of Kshs. 1,000,000/- (One million only) within 90 days from the date of the ruling which sum should be deposited in an interest earning account in the joint

names of both advocates of the parties or a bank guarantee of a similar amount.

c) If the Applicant/Respondent fails to comply with (b) the stay lapses and the Application stands dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF MARCH 2022

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MOGENI J

JUDGE

In the Presence of:

Mr. Farah for the Applicant

N/A for the Respondent

Mr. Vincent Owuor.....Court Assistant