



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & LC. NO.172 OF 2017

ROBERT LUMASAI AMALEMBA.....PLAINTIFF/RESPONDENT

VERSUS

JOHN KIPROTICH KETER.....1ST DEFENDANT/APPLICANT

ROSE CHEPKEMOI.....2ND DEFENDANT

RULING

[NOTICE OF MOTION DATED THE 28TH MAY 2021]

1. The 1st defendant approached the court through the application dated the 28th May, 2021 seeking for orders that “*there be temporary stay of execution of the judgment and decree in the Environment and Land Court at Eldoret, E & L Case No. 172 of 2021 pending the hearing and determination of the intended appeal.*” The application is based on the two grounds on its face and is supported by an affidavit sworn by Amos K Songok, the 1st defendant’s advocate, on the 28th May, 2021. It is the 1st defendant’s case that the firm of Rioba Omboto & Company Advocate that represented him during the trial had consented to the firm of Songok & Company Advocates to take over and prosecute the appeal. That the advocate has filed the notice of appeal, applied for certified copies of the proceedings and prays for enlargement of time to enable him file an appeal against the judgement delivered on the 19th May 2021, out of time.

2. The application is opposed by the Plaintiff through the ten (10) grounds of opposition dated the 24th September, 2021, among them that the application was frivolous, defective, vexatious, an abuse of court process; that the application was meant to delay the implementation of the judgment in order to deny the Plaintiff the fruits of his suit; that the Notice of Appeal was fatally defective and incapable of raising an appeal; that the application is an afterthought and that even without delving into the appeal’s merits, the plaintiff stood to win something in appeal stage; that the plaintiff was a man of means capable of refunding the 1st defendant the entire sum and compensation in the event their appeal succeeded; that the 1st defendant had not demonstrated that he stood to suffer substantial loss should the application not be granted; that there was no impending risk of execution as the costs were yet to be taxed, decree drawn or issued; that the application has not satisfied the threshold under Order 42 Rule 6 of the Civil Procedure Rules; that should the court find merit in the application, then it should require the 1st defendant to pay him half the decretal sum, and deposit the other half in an interest earning account in the joint names of the parties’ advocates within thirty (30) days of the date of the order.

3. The court issued directions on filing and exchanging submissions on the 5th October, 2021. The learned counsel for the 1st defendant filed their submissions on the 21st December, 2021, while that of the plaintiff filed theirs dated the 5th November, 2021 on the 15th November, 2021.

4. The 1st defendant submitted that he had satisfied the grounds required under Order 42 Rule 6 of the Civil Procedure Rules for grant of stay of execution. That the court had erroneously ordered him to pay the plaintiff Kshs. 1,000,000 received under the sale agreement dated the 19th March, 2012, yet the plaintiff has developed two acres of land. He also stated that the court had erroneously found the plaintiff had proved a payment of Kshs 816,000 to the 1st defendant, above the purchase price and that he was to refund that sum with interests, yet there was no sale agreement. He therefore urged the court to allow the application and costs.

5. The plaintiff submitted that the 1st defendant had to show the substantial loss to be suffered and sufficient cause for stay order to be issued. That he has also to show that he was ready to deposit security, and that the application was made without unreasonable delay. The plaintiff questioned the assertion that the 1st defendant would suffer substantial loss, stating that it was not simply an issue of the decretal sum being a lot of money. He urged the court to note that he had indicated during the trial that he was employed in Somalia, and was therefore a man of means capable of refunding the decretal sum. He brought it to the court’s attention that the Notice of Appeal had been filed 29 days after judgement, contrary to section 75(2) of the Appellate Jurisdiction Rules, which require that an appeal should be filed within 14 days. He

stated the 1st defendant had not explained the delay and urged for the dismissal of the application. He also urged the court to require payment of security for costs in the event the application was allowed.

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

a. Whether the 1st defendant's application was for stay of execution or enlargement of time to file an appeal, or both.

b. Whether the 1st defendant has met the threshold for the order(s) she seeks to be issued.

c. Who pays the costs of the application.

7. That after carefully considering the grounds on the application, affidavit evidence, submissions, the superior courts decisions cited, the court has come to the following findings;

a. That an application for stay of execution pending determination of an intended appeal is governed by Order 42 Rule 6 (2) of the Civil Procedure Rules which provides:

“(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.”

In the case cited by the 1st defendant of ***RWW vs EKW [2019] eKLR*** the court held that:

“8. 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.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary...”

b. Indeed, the grant of stay of execution pending appeal is an exercise of discretionary power intended to preserve the subject matter such that an appeal is not pursued in vain. However, there is equally a need to recognize that the subject matter being preserved is a right that has accrued to the other party who is being stayed from executing judgement and therefore, there is a need to balance the competing interests in each suit. I am persuaded that to this end, the Civil Procedure Rules, Order 42 Rule 6 capture the most important considerations in granting stay, to wit, that substantial loss that will occur to the applicant, who has to have approached the court without unreasonable delay. This means that there needs to be a subject worth preserving, such that the court can weigh the balance of convenience in granting the order. In this suit, the 1st defendant has argued that he is liable to refund Kshs 1,000,000 over property that the plaintiff occupies. The 1st defendant has also stated that he is liable to refund Kshs 816,000 as payment obtained above the purchase price and for these reasons, he stood to suffer substantial loss.

c. The plaintiff asserts that the value of the decretal amount is not indicative that substantial loss will be suffered by the 1st defendant. He cited the decision in the case of ***Equity Bank Limited vs Taiga Adams Company Limited [2006] eKLR*** where the court was of the view that substantial loss was concerned with whether the Applicant would not be able to recover the decretal sum and costs if the appeal is successful, thus rendering it null as he would have lost the sums already paid out. He brought it to the Court's attention that he had indicated during the trial that he had a job in Somalia and that he was capable of refunding the decretal sums and costs if the appeal was successful. I have taken into account the foregoing arguments. Indeed, the decretal sum to be paid out is not indicative of substantial loss to be suffered as it is a payment that is rightfully owed under a lawful judgment of the court. What would constitute a substantial loss is the existence of circumstances that show that should execution be carried out, it would put the 1st defendant in a worse off position in the event he succeeded in his appeal. The conventional understanding of this is to consider whether the 1st defendant would recover the sums executed against him and interest thereon, in view of the means of the plaintiff. In this suit, the 1st defendant has not challenged the plaintiff's assertion that he is a man of means, employed in Somalia and capable of repaying the decretal sums. This implies that he is not worried about recovery of the decretal sums in the event he wins his appeal.

d. That the parties herein have cited superior court decisions that take the position that the grant of stay of execution is a discretionary power of the court. It is not simply a mechanical consideration and to this end, the court cannot be blind to the nature of the appeal filed. The 1st defendant has advanced arguments to demonstrate double jeopardy in losing both land, and the purchase price therein in a refund. The possibility of the 1st defendant suffering double prejudice would if true, probably amount to substantial loss.

e. The record confirms that the judgement was delivered on the 21st April 2021. The Notice of Appeal dated the 19th May, 2021 was filed on the same date by the 1st defendant through M/S Rioba Omboto & Company Advocates. The instant application dated the

28th May, 2021 was filed on the 8th June, 2021. The heading of the said application shows it is based on “.. sections 1A, 1B and 3A of the Civil Procedure Act, and Order 50 Rule 6 and Order 42 Rule 6 (1), (2), (3) and (4) and Order 51 of the Civil Procedure Act [sic] Rule 3 (2) of the High Court (Practice and Directions) Rules)”. That Order 50 Rule 6 of the Civil Procedure Rules provides for power to enlarge time for “doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court” while Order 51 makes provisions for applications. That the time for filing of Notices of Appeal is as guided by Rule 75 of the Court of Appeal Rules 2010, that provides that;

“75. Notice of appeal

- (1). Any person who desires to appeal to the Court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior court.
- (2). Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
- (3).....”

That section 7 of the Appellate Jurisdiction Act chapter 9 of Laws of Kenya provides for the power of High Court to extend time as follows;

“The High Court may extend the time for giving notice of intention to appeal from the judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided”

That the Environment and Land Court is one of the two Courts with the status of the High Court that were established under Article 162 of the Constitution of Kenya, and therefore has the power to equally extend time under section 7 of the Appellate Jurisdiction Act. That the Notice of Appeal herein was filed outside the fourteen (14) days prescribed by Rule 75 (2) of the Court of Appeal Rules as it was filed on the 19th May 2021, which is about twenty-eight (28) days from the date of the judgement. There is no evidence that the court’s leave to enlarge time has been sought through the instant application, as the prayer in the notice of motion dated the 28th May 2021 is only for stay of execution. There is also no evidence that such enlargement of time application has already been sought and obtained from any other court with jurisdiction.

f. That had the 1st defendant sought for enlargement of time to file the notice of appeal, and explained the delay possibly to have been caused by the time it took him to engage another counsel, and the process of that counsel taking over from the previous one, then the plaintiff’s assertion that there was delay would have been taken to be reasonably explained. In the absence of a notice of appeal filed within the time required, the plaintiff’s claim that the application was filed late purely to deny him the fruits of the judgment whose execution is being stayed cannot be brushed off.

g. The plaintiff has asserted that the Notice of Appeal in question is fatally defective, incapable of raising an appeal, and that the intended Appeal is a non-starter. He has cited the decision in the case of **Thomas K’bahati...K/Bahati & Co Advocates v Janedra Raichand Shah [2021] eKLR**, where the court held that;

“...the Notice of Appeal is clearly out of time. The ruling was delivered on 25th February, 2020. The Notice of Appeal was filed on 20th March, 2020 way outside the 14-day period provided for in Rule 74 (sic) of the Court of Appeal Rules. I do not see how it can be said that the Notice of Appeal is competent for it is out of time. Since there is not on record a competent notice of appeal, there can be no basis upon which to issue a stay pending appeal, and on that ground alone, this application must fail.”

That though the above decision is not binding to this court, I am in agreement with the finding thereof, and has relevance in the instant matter before the court for determination. The Notice of Appeal herein was also filed outside the 14 days and likewise there is no basis upon which the stay of execution pending appeal prayer, when there is no evidence of a pending competent appeal.

h. The 1st defendant has annexed to his application a Memorandum of Appeal wherein several issues of law and fact have been set out. When the Court of Appeal is faced with an application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules, it is supposed to consider whether an arguable appeal exists. I find that this is what the Defendants’ challenge pertains to, and despite the fact that it is not a ground for consideration for grant of stay of execution before this court, it is nevertheless a valid concern. In the case of **Kenya Power & Lighting Company Ltd v Eunice Nkirote Ringera [2020] eKLR** the Court of Appeal discussed the concept of an ‘arguable appeal’ stating that:

“In the case of Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR this Court stated inter alia:

“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the

threshold that an intended appeal is arguable.”

For this application to succeed the applicant, **must demonstrate that it has an arguable appeal which is not frivolous**. Upon satisfying that condition, **it has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay**. (See: Trust Bank Limited & Another v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999 (unreported)).

In determining whether the appeal is arguable or not, **it is trite that by arguable it does not mean the appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court**. (See Dennis Mogambi Mang'are v Attorney General & 3 others, (supra)).” (emphasis added)

That as already shown herein above, the issue of whether the 1st defendant memorandum of appeal discloses an arguable appeal is definitely a matter to be determined by the Court of Appeal when he gets audience there.

i. That the final orders in the judgement delivered on the 21st April, 2021 directed as follows;

“9. That flowing from above, the court finds that the Plaintiff has partially proved his claim against the Defendants and enters judgement in his favour in the following terms;

(a) That the completion of the transactions over the 2 (two) acres of L.R.106/N.Kap Kangani based on the sale agreement dated 19th March, 2012 pursuant to which the whole purchase price of Kshs. 1,000,000 has been paid by the Plaintiff and acknowledged by the 1st Defendant, is hereby left upon the two parties for reasons that specific performance orders cannot issue as the Defendants are not the suit land's registered proprietors. That should the parties fail to complete the transaction, the Defendants do refund the Kshs. 1,000,000 received under the sale agreement dated 19th March 2012 to the Plaintiff with interests at court rates from the date of filing the suit until payment in full.

(b) That the Plaintiff has proved that he had paid the 1st Defendant Kshs. 816,000 over and above the purchase price in the sale agreement dated the 19th March 2012 and is entitled to a refund of the same with interests at court's rates from the date of filing the suit till payment in full.

(c) That the Plaintiff is entitled to half the costs of the suit.”

That when one considers the prayers sought by the plaintiff in the application against the above orders in the judgment, then it is apparent the contention by the 1st defendant that the orders amount to double jeopardy, as they will make him refund the purchase price to the plaintiff for the land he was already in occupation and developing is erroneous. That it is clear that order (a) of the judgment left the completion of the transaction to the parties, upon finding the defendants were not the registered owners of the land. The implication is that, if the defendants completed the transaction and transferred the two acres to the plaintiff, they would not be required to refund Kshs. 1,000,000 to the plaintiff. However, if the defendants were to fail to transfer the two acres to the plaintiff, then they would be required to return the purchase price received which is Kshs. 1,000,000. That the amount in order (b) of the judgment is to be refunded to the plaintiff by the 1st defendant irrespective of how order (a) is settled. That the foregoing being the orders issued through the judgement of the 21st April 2021, then the 1st defendant has failed to establish before the court how the alleged substantial loss would be occasioned to him if execution took place. That in case the defendants are to fail to complete the transaction of transferring the two acres to the plaintiff, the total amount to be paid to the plaintiff under orders (a) and (b) of the judgment is Kshs.1,816,000, plus interests at courts rates from date of filing suit until full payment and half costs of the suit. The 1st defendant has failed to show how the payment of that amount would occasion him substantial loss, especially considering the plaintiff assertion that he is a person of means with capacity to refund the value of the decree if he was to be defeated on appeal that has not been challenged.

j. That the 1st defendant application dated the 28th May, 2021 was filed on 8th June, 2021, which was about forty-eight (48) days from the date of the judgement, and he has not attempted to explain that delay. That further, he has not offered to provide security for the due performance of the decree as required, which would have worked against him had he succeeded in his prayer.

k. That as it is apparent the 1st defendant's application is without merit, he is to pay the plaintiff's costs pursuant to section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya, that costs follow the event.

8. That flowing from the foregoing the court finds that the 1st defendant's notice of motion dated the 28th May, 2021 and filed on the 8th June 2021 is without merit, and is hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 23RD DAY OF MARCH, 2022.

S.M.Kibunja,J.

ELC ELDRET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: Absent.....

DEFENDANTS: Absent.....

COUNSEL: Ms. Ndambuki for Lagat for Respondent and...

Mr. Songok for Applicant/Defendant.....

COURT ASSISTANT: ONIALA

S.M.Kibunja,J.

ELC ELDORET