



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E003 OF 2021

PETER MAOSA NYANGAU.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST RESPONDENT

SARAH HERSI MOGHE.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 25th June 2021, **PETER MAOSA NYANGAU** (the Applicant) approached this Court seeking the following remedies: -

1. Spent

2. Spent

3. That the Honourable Court be pleased to issue an order for stay of execution of the Decree and Judgment in BUNGOMA CM ELC CASE NO 6 of 2015 dated 6th October 2020 and all consequential orders pending the hearing and determination of the intended appeal against the ruling and decision dated 9th March 2021 in BUNGOMA CM ELC CASE No 6 o 2015.

4. That the Honourable Court be pleased to grant leave to the Applicant to file an appeal against the ruling and decision in BUNGOMA CM ELC CASE No 6 of 2015 dated 9th March 2021.

5. That costs of this application be in the cause.

Having heard the Applicant and **SAHRA HERSI MOGHE** (the 2nd Respondent) by way of their written submissions, I delivered a ruling on 20th December 2021 dismissing the application with costs to the 2nd Respondent.

2. The Applicant has now moved this Court by a Notice of Motion dated 10th January 2022 and filed on 11th January 2022 seeking the following orders: -

1. Spent

2. Spent

3. Spent

4. That the Honourable Court be pleased to issue an order for stay of execution of the Decree and Judgment in BUNGOMA CM ELC No 6 of 2015 dated 6th October 2021 and all the consequential orders pending the hearing and determination of the intended appeal against the ruling and decision herein delivered on 20th December 2021 in this case.

5. That costs of this application be in the cause.

3. The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit of even date. Much of what

the Applicant has deponed on is really the core of his previous application dated 25th June 2021 and which was determined by my ruling dated 20th December 2021.

4. I will however confine myself to what is relevant for purposes of this application now before me. For instance, averments about what transpired in the Subordinate Court are not really relevant for purposes of this ruling. That is because, the substantive order sought by the Applicant as far as I am concerned, is prayer No 4 which, if I may repeat, reads: -

4: “That the Honourable Court be pleased to order for stay of execution of the decree and Judgment in BUNGOMA CM ELC Number 6 of 2015 dated 6th October 2021 and all the consequential orders pending the hearing and determination of the intended appeal against the ruling and decision herein delivered on 20th December 2021 in this case.”

This Court must therefore confine itself to that particular prayer.

5. In paragraph (k) of the Notice of Motion and which is also repeated in paragraph 17 of his supporting affidavit, the Applicant has averred as follows: -

“That the ruling in respect to the application dated 25th June 2021 was delivered on 20th December 2020 through posting on the Counsel’s emails in which the applicant’s application for leave to appeal against the decision of the Subordinate Court dated 9th March 2021 out of time was dismissed by this Honourable Court.”

The Applicant goes on to aver in paragraphs 18, 19, 20 and 21 of his supporting affidavit that he was dissatisfied with this Court’s ruling delivered on 20th December 2021 and intends to appeal to the Court of Appeal and that he has already filed and served a Notice of Appeal and in the absence of an order of stay, the 2nd defendant will execute and attach his property for the sum of Kshs. 6,720,000/= and also evict him from the suit premises. That the intended appeal is not frivolous and raises substantial issues.

6. Annexed to the supporting affidavit are the following documents: -

1. **Judgment in BUNGOMA CMCC No 6 of 2015 dated 6th October 2020.**
2. **Ruling delivered in the case on 20th December 2021.**
3. **Ruling delivered in BUNGOMA CMCC No 6 of 2015 on 9th March 2021.**
4. **Notice of Appeal.**
5. **Certificate of delivery of ruling issued on 20th December 2021.**
6. **Memorandum of Appeal.**

The application is opposed by **SAHRA HERSI MOGHE** the 2nd Respondent who filed a replying affidavit dated 18th January 2022 in which she has deponed, inter alia, that the application is full of half-truths and mis – information and is frivolous, vexatious and an abuse of the process of this Court which should be dismissed. That the Applicant seeks stay of execution of the Decree and Judgment delivered on 6th October 2021 in **BUNGOMA ELC No 6 of 2015** yet that Judgment was actually delivered on 6th October 2020 and so the order sought is academic. That the application has not met the threshold of **Order 42 Rule 6** of the **Civil Procedure Rules**.

7. That the Applicant has not particularized what substantial loss he will suffer if a stay is not granted and he is not in occupation of the suit premises. That if a stay is granted, the 2nd Respondent will have to vacate the suit premises and will be prejudiced. This application should be dismissed with costs.

8. The 1st Respondent did not file any response to the application.

9. When the application was placed before me on 12th January 2022, I did not certify it as urgent but I directed that it be canvassed by way of written submissions. The matter was fixed for mention before the Deputy Registrar on 14th February 2022 to confirm filing of submissions.

10. On that day, only **MR ANWAR** Counsel for the 2nd Respondent attended Court and confirmed having filed his submissions. He stated that he had not been served with any submissions by Counsel for the Applicant. The record shows that Counsel for the Applicant did not file any submissions as directed. The Deputy Registrar therefore fixed the ruling dated as 22nd march 2022.

11. I have considered the application, the rival affidavits and the submissions by **MR ANWAR** instructed by the firm of **ANWAR & COMPANY ADVOCATES** for the 2nd Respondent.

12. I have already referred to the substantive order sought by the Applicant. With regard to the order for stay of execution of the Decree and Judgment in **BUNGOMA CMCC ELC Number 6 of 2015** dated 6th October 2021, as **MR ANWAR** Counsel for the 2nd defendant has

rightly pointed out in his submissions, **“there is no Judgment that was delivered on 6th October 2021 and thus the orders sought are academic annexing the Judgment that was delivered on 6th October 2020 as annexure SHM – 3.”** And if the Applicant meant the Judgment delivered on 6th October 2020, that would render that prayer res – judicata because it was the subject of my ruling delivered on 20th December 2021 where it was dismissed. A Court cannot stay orders which do not exist. To do so would be acting in vain. Courts do not act in vain. A party seeking the stay of any Decree or Judgment of a Court must identify with clarity the particular Order, Decree or Judgment which is sought to be stayed pending appeal or any other further action.

13. The second limb of that prayer seeks the stay of execution of the Decree and Judgment delivered on 6th October 2021 and all consequential orders pending the hearing and determination of any appeal against the ruling and decision of this Court delivered on 20th December 2021. That ruling simply dismissed the Applicant’s application for stay of execution of the Judgment of the Subordinate Court in **BUNGOMA ELC CASE No 6 of 2015**. It was a negative order. It was not a positive order directing any of the parties to do anything. Such an order is not amenable by an application for stay of execution pending appeal. In the case of **KANWAL SARJIT SINGH DHIMAN .V. KESHAUJI JIVRAJ SHAH 2008 eKLR** the Court of Appeal stated as follows while considering an application for stay of execution of a negative order: -

“The 2nd prayer in the application for stay (of execution) of order of the superior Court made on 18th December 2006 merely dismissed the application for setting aside the Judgment with costs. By the order, the superior Court did not order any of the parties to do anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only.”

On that basis alone, this application is for dismissal.

14. That notwithstanding, under the provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, it is stated thus: -

“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.” Emphasis added.

Substantial loss, as **PLATT Ag J A** (as he then was) observed in the case of **KENYA SHELL LTD .V. BENJAMIN KIBURU & ANOTHER 1986 KLR 410**, is the **“cornerstone”** for the grant of an application for stay of execution pending appeal. There is no doubt in my mind that the Applicant moved to this Court expeditiously following the ruling delivered on 20th December 2021. He has also stated in paragraph 23 of his supporting affidavit that he is willing to abide by any conditions which this Court may impose. He has also filed a Notice of Appeal. He had therefore satisfied three (3) out of the four (4) conditions set out in **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules** which are: -

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order for stay is granted.
3. Offer security for the due performance of any decree or order as may ultimately be binding upon him.
4. File the application without unreasonable delay.

On the issue of substantial loss, the Applicant has deponed in paragraph 20 of his supporting affidavit as follows: -

20: **“That in the absence of stay, the 2nd defendant is likely and has threatened to execute the decree dated 6th October 2020 which directed for my eviction from the suit premises and attachment of my property to recover a whopping sum of Kshs. 6,720,000/= plus costs and interest in a case which has never been heard on merit and in such an eventually, I am is likely (sic) irreparable loss as I will permanently loss (sic) my property which I lawfully purchased from the 1st Respondent.”**

However, as I stated earlier in this ruling, the Applicant appears to be re - agitating the same application which was the subject of my ruling delivered on 20th December 2021. If, as is clear from his Notice of Appeal and Memorandum of Appeal annexed to his application, the order which he wants to be stayed pending appeal is my ruling dated 20th December 2021, what the Applicant should be telling this Court is what **substantial loss**, if any, he is likely to suffer if that ruling, which is a negative order, is not stayed.

15. On the issue of substantial loss, **GACHUHI Ag J.A** (as he then was, said the following in the case of **KENYA SHELL LTD .V. BENJAMIN KIBIRU** (supra): -

“It is not sufficient by merely stating that the sum of Kshs. 20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of the nature, the applicant should show the damages it

would suffer if the order for stay is not granted.”

In the case of **MACHIRA t/a MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD (No 2) 2002 2 KLR, KULOBA J** captured the requirement of substantial loss in the following words: -

“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 awarded decree or order, before disposal of the applicant’s business (e.g. appeal or intended appeal).”

The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of prosecuting the appeal or intended appeal. So, really, stay is normally not to be granted, save in exceptional circumstances.”

That Applicant has deponed in paragraph 21 of his supporting affidavit as follows:-

21. “That in the event the 2nd Respondent proceeds to evict me from the premises, my intended appeal will be rendered nugatory.”

In response to that, the 2nd Respondent averred in paragraph 16 of her replying affidavit that the Applicant “*is not in occupation of the suit premises.*” That was not rebutted through any supplementary affidavit. A Court cannot stay execution of what has already happened. And with regard to the recovery of Kshs. 6,720,000/=, the Applicant has not suggested that the 2nd Respondent is so impercunious as to be unable to refund it should any appeal succeed.

16. It must be remembered, nonetheless, that the Judgment delivered in **BUNGOMA CMCC No 6 of 2015** on 6th October 2020 can only be appealed firstly to this Court and not directly to the Court of Appeal. Leave to appeal that Judgment out of time to this Court having already been declined vide this Court’s ruling delivered on 20th December 2021, it follows that there is no appeal pending before me. And with regard to that ruling, it was a negative order which cannot be stayed and even then, the threshold set out in **Order 42 Rule 6(1) and (2)** has not been met.

17. The up – shot of all the above is that the Notice of Motion dated 10th January 2022 is devoid of merit. It is accordingly dismissed with costs to the 2nd Respondent.

BOAZ N. OLAO.

J U D G E

22nd March 2022.

Ruling dated, signed and delivered at **BUNGOMA** on this 22nd day of March 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

22nd March 2022