



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC APPEAL NO. 16 OF 2021

MOHAMED IDAH MBARAKAPPELLANT

- VERSUS -

AHMED ALI SAID

SALWA ALI SAID.....RESPONDENTS

RULING

I. Introduction.

1. What is before the Honorable Court for determination is the Notice of Motion application dated 20th December 2021 by the Appellant/Applicant. It is brought under the provisions of Order 42 Rule 6 (1), (2), (6), Order 22 Rule 22, and Order 51 of the Civil Procedure Rules, 2020.

II. The Appellant/Applicant's case.

2. The Appellant/Applicant seeks the following orders:-

a) Spend.

b) Spend.

c) **THAT** pending hearing and determination of the Appeal at the Court of Appeal, this Honourable court be pleased to stay the following orders of the court issued vide its ruling dated 1st December 2021:-

i. **THAT** the Appellant/Applicant is directed to deposit a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00) as security for Costs in an escrow joint bank account of both the law firm firms of Messrs. Khalid Salim & Company Advocates and Messers Stephen Odiaga Advocates within the next thirty (30) days from today;

ii. **THAT** failure to comply with any of the above conditions then the Notice of Motion application dated 9th August, 2021 will automatically stand dismissed thereof.

iii. **THAT** the costs of this application be provided for.

3. The application is premised on the grounds, facts and averments in the 21 Paragraphed Supporting Affidavit of MOHAMMED IDHA MBARAK, the Appellant/Applicant himself sworn and dated on 20th December 2021. He deposed that he was dissatisfied with the ruling of this court dated 1st December 2021, in particular the orders to deposit a sum of Kenya Shillings One Million Five Hundred (Kshs. 1,500,000/=) in an escrow bank account of both the Advocates for the Appellant/Applicant and the Respondent within thirty (30) days from the date of the ruling on 1st December, 2021 failure to which the stay of proceedings of the lower court would be vacated. He intended to appeal against the said ruling in the Court of Appeal, which is evidenced in his Notice to Appeal filed in this court on 8th December 2021 and a draft Memorandum of Appeal dated 17th December 2021.

4. The Appellant/Applicant urged the Honorable court to grant stay of the orders of court granted on 1st December 2021, in order to prevent the hearing of the lower court suit Mombasa CM ELC 12 of 2020, while his appeal was being heard before the Court of Appeal. He

deponed that he stands to suffer substantial irreparable loss if the said orders are not stayed for the reason that the lower court suit would proceed and the Respondent would be granted eviction orders before the determination of his appeal. He argued that his appeal has high chances of success and the same would be rendered a mere academic exercise if the orders of 1st December 2021 were not stayed. He further deponed that the Respondents are not likely to suffer any prejudice that could not be monetarily compensated if the appeal fails.

III. The 1st Respondent's Case

5. On 24th January 2022, the 1st Respondent filed a 11 Paragraphed Replying affidavit in response to the application. The Replying Affidavit was sworn by AHMED ALI SAID, who deponed that the court ought not to disturb its ruling of 1st December 2021 that directed the Appellant to pay security for costs as a condition to proceed with the appeal. He also deponed that the court was right in balancing the interest of both parties herein and it's the Appellant who should show good faith by depositing the security as ordered by court. He urged court to dismiss the application with costs as it was abusing the court process.

IV. Submissions

6. On 25th January, 2022 while all the parties were present in Court, they were directed that the application dated 20th December, 2021 to be canvassed by way of written submissions. Pursuant to that they all obliged and court reserved a day for delivery of ruling.

A. The Appellant/Applicant's written Submissions.

7. The Learned Counsel for the Appellant/Applicant, the law firm of Messrs. Khalid Salim Company Advocates filed their written submissions in support of the application on 31st January 2022. Mr. Khalid Counsel commenced by giving a brief history of the suit and the facts that led to the filing of the said application. He submitted that the Respondent filed the **CM. (Mombasa) No. 12 of 2020 - Ahmed Ali Said & Salwa Ali Said – Versus - Mohamed Idha Mbarak** against the Appellant/Applicant allegedly for non-payment of rent for the past fifteen (15) years. While at the lower court, the Appellant/Applicant objected to the suit for being time barred vide a Preliminary Objection dated 1st October, 2020. On 12th February 2021, the Objection was dismissed by the learned magistrate. Being aggrieved by the said Ruling and the said dismissal, it prompted the Appellant/Applicant filing of this Appeal vide a Memorandum of Appeal filed on 4th March 2021, where the Appellant sought to set aside the orders of the trial Learned Magistrate. The Learned Counsel further submitted that after filing the appeal before this court, the Appellant made a separate application to this court on 9th August 2021 seeking to stay the lower court proceedings pending this hearing and determination of the said appeal.

8. On 1st December 2021, the Court then delivered its ruling whereby the Appellant was granted a conditional stay of proceedings of the lower court trial but upon the Appellant depositing a security for costs of Kenya Shillings One Million Five Hundred (Kshs 1,500,000/=) within 30 days failure to which the stay of the proceedings at the lower court would be vacated. The Learned Counsel argued that, the Appellant was dissatisfied with these orders made, and intends to appeal at the Court of Appeal. He maintained that the court issued conditional orders on the assumption that the Appellant was seeking stay of a judgement, yet the suit is yet to be heard and determined by the sub - ordinate court. He also argued that the order to deposit a sum of Kenya Shillings One Million Five Hundred (Kshs 1,500,000/=) which was the alleged arrears, was a preemption that the lower court would determine against the Appellant.

9. The Learned Counsel argued that the Appellant/Applicant has fulfilled the requirements of Order 42 Rule 6 of the Civil Procedure Rules, 2010 for seeking stay of execution of the orders issued on 1st December 2021. He argued that the Appellant stood to suffer substantial and irreparable loss if the lower court proceedings were to proceed for hearing and determination; and render his appeal nugatory should the Court of Appeal reverse the decision. He relied on the case of **“Joseph Kariuki T/A Jofoco Contractors – Versus - P Mbogo Karanja (Chairman) & 2 others (2021) eKLR**, to submit that the Appellant/Applicant has sufficiently established that stay ought to be granted to prevent irreparable loss and the appeal being rendered a nugatory.

10. On the second requirement of security for costs, the Learned Counsel submitted that, court allowed the same on the presumption that its staying an execution of a judgment yet the matter is yet to be heard and determined. He argued that the court misinterpreted the Provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010 by allowing the application for stay of proceedings pending appeal while at the same time imposing an unreasonable and harsh condition of payment of security as a condition for the stay. The Learned Counsel argued that it was impractical and illogical for the Appellant to provide security for costs, yet the same security was a subject of the intended appeal. The Learned Counsel urged court to allow the application and give the Appellant/Applicant a chance to move the Appellant court to determine his appeal against the decision of this court.

B. The Respondent's Written Submission

11. On 9th February 2022, the Learned Counsel, the law firm of

Messrs. Stephen Oddiaga & Company Advocates for the Respondents filed their written submissions dated 7th February, 2022. He submitted that the court rightfully balanced the rights of the Appellant to prosecute his appeal and those of the Respondents in proceeding with the hearing of his case. M/s. Mwainzi Counsel submitted that there can be stay of execution of an order emanating from a ruling and stay of execution emanating from judgement. The Learned Counsel contended that court relied on the provisions under Order 42 Rule 6 of the Civil Procedure Rules, 2010 to order for stay of proceedings of the lower court hearing and the security for costs pending the determination of an appeal, meaning that there was a pending appeal. That the security for costs demanded by court was reasonable since the Respondent submitted a value of the suit property to be a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000.00), while the Appellant failed to submit any value if at all.

12. The Learned Counsel argued that court applied its mind well on the Provisions of Order 42 of the Civil Procedure Rules, 2010 and

balanced the conflicting interests when granting the orders on 1st December 2022. That stay of proceedings of the lower court was a serious interruption of the right of a party to proceed with their matter, and court was right to exercise this discretion minimally in the interest of justice. It was further submitted that if the security for costs was not deposited the Respondents would be highly prejudiced, as innocent litigants who have approached court for justice but are now tied down by the Appellant who is bent well on dragging the matter with appeals after appeals.. The Learned Counsel argued that the Appellant could not continue residing on the Respondent's suit property without paying rent and at the same time prosecute their appeal at this court and now the Appellate court. To support their point they relied on the case of **"Kenya Wildlife Services –versus- James Mutembei Civil Appeal No. 40 of 2018 (2019) eKLR**. The Honorable Court was urged to allow the Respondent proceed with the case at the lower court for final determination and dismiss the suit with costs.

V. Analysis and Determination

13. After carefully reading through the pleadings and submissions made by the parties herein and taking in consideration the law applicable the issue, before this Honorable Court for determination is whether the Appellant is entitled to the order sought of stay of execution of the Ruling delivered by this court on 1st December 2021 pending the hearing of the Appeal intended to be filed at the Court of Appeal.

A brief history of the events that led to this court granting orders on 1st December 2021. The Appellant/Applicant filed an application dated 9th August 2021 was brought under Order 42 Rule 6 of the Civil Procedure Rules, and sought a stay of proceedings in the sub-ordinate Court Mombasa CM ELC No. 12 of 2020 pending the hearing and determination of this appeal. On 1st December 2021, this court allowed the application inter alia providing a conditional stay of the Lower Court proceedings upon the Appellant making a deposit a sum of Kenya Shillings One Million Five Hundred (Kshs. 1,500,000/=) as security for costs within thirty (30) days from the date of ruling. It stayed the proceedings in the subordinate court. The Honorable Court has noted that the afore stated this amount resonates with the already accumulated outstanding rental arrears owed by the Appellant/Applicant to the Respondent. The stay was conditional subject to him being on compliant, failure to which it would lead to automatic dismissal of the application.

14. The Appellant being dissatisfied with the decision of this court, of 1st December, 2021 preferred a Notice of Appeal on 8th December 2021 to notify the court and the Respondents of his intention to appeal against the decision at the Court of Appeal. Other than the afore stated Notice, the Appellant filed this application dated 20th December 2021, under Order 42 Rule 6 (1), (2), (6) of the Civil Procedure Rules, 2010 seeking to stay the orders that were granted on 1st December 2021 pending the hearing and determination of the appeal at the Court of Appeal. The Respondents opposed the application. The 1st Respondent deponed in his Replying Affidavit sworn on 24th January 2022 that the court was right in granting stringent timelines and conditions to be met by the Appellant as pre condition for the stay of proceeding orders to prevail. The Respondent submitted that the court was right in balancing the rights of the parties herein, that is the right of the Appellant to appeal so long as he met the conditional stay orders and the right of the Respondent to proceed with the proceedings at the lower court.

15. This application is essentially asking court to exercise its discretion by favoring one party and ignoring the other party. I say so because, the Appellant seeks to stay the proceedings both in the lower court and in this court without consequences on his part. Time and time again the Honorable court has been called to always exercise its discretion judicially and consider all material circumstances of the case and never shutting its eyes on the interest of any party. **Kuloba J in "Machira t/a Machira & Co Advocates – Versus - East African Standard [2002] eKLR**, held that:- **"To be obsessed with the protection of an Appellant or intended appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle of the exercise of a judicial discretion.**

The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. it is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal."

16. The parties in a suit have to litigate on a level ground and equal footing. In the instant case, it is where the Respondent was made to give up his immediate right to prosecute his suit, as the Appellant has to give something in return in exchange of him exercising his right to appeal and staying those proceedings that the Respondents want to dispose off. At this court had expected that same would have been fairly balanced if the Appellant/Applicant had obliged by depositing the security of costs as ordered but which the court surprised it's not willing to do so. Gikonyo J stated in **Christopher Ndolo Mutuku & another – Verus - Cfc Stanbic Bank Limited [2015] eKLR** that:-

"The court is aware of the Defendant unfettered right to appeal, which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of law is informed by the principle of justice in Article 159 of the Constitution which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

17. In order for the Appellant/Applicant to obtain a suspension of further proceedings in this court and in the lower court, he has to satisfy to court through affidavit and annexures that he stands to suffer substantial loss if the stay is not granted. It is not enough merely to state that substantial loss will result or that the appeal has high chances of success and will be rendered nugatory, the Appellant has to specify and demonstrate with empirical and documentary evidence to court what would happen if the stay orders were not granted. In **the case of Machira t/a Machira (supra)**, the court held that:-

"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 of stay is ordered, must be satisfied that such loss will really ensure 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 remain to be done or in execution of an awarded decree or order, before disposal of the applicant's business."

18. This Court has perused the affidavit in support of the application; it has not come across any specific particulars raised by the Appellant/Applicant that would warrant court to be persuaded that he stands to suffer substantial loss. Therefore, the Honorable Court do not find any evidence that the Respondent is changing the status quo of the suit premises. The Appellant has not demonstrated that he is facing any evictions. Besides, the Honorable Court finds the Appellant/Applicant rather self-centered where he does not bother to even offer to pay the already accumulated outstanding rent arrears but only wants all aspects to suit him, being granted stay while continue enjoying living in the suit property without any charges payable. That is extremely unfair, unreasonable and unjust. It is a case of eating the cake and continue having it. As the Learned Counsel for the Respondent submitted, the Appellant could not be in physical occupation of the suit land and still preclude the Respondent from prosecuting the suit.

VI. Conclusion & Disposition

19. The upshot of all this, the Honorable Court finds that the Appellant has not shown to the satisfaction of court that he stands to suffer substantial loss. For these reasons, therefore, I will not order stay upon mere speculations, there must be clear and precise set of facts supported by evidence annexed in supporting affidavit.

20. The Honorable Court finds it not necessary to disturb the orders granted on 1st December 2021, the Appellant has not given the Court any reason to do so. I find no merit in the application dated 20th December 2021 and I dismiss it with costs to the Respondents.

IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF MARCH 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumnah Hassan, Court Assistant

M/s. Nafula holding brief for Mr. Khalid Salim Advocate for the Appellant/Applicant.

M/s. Mwainzi Advocate for the Respondent.