



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**ELC NO. 1B OF 2012**

**[Formerly HCCC No. 55 of 1989]**

**GRACE JELEL BOIT (*Suing as the Administrator of the Estate of***

***ABRAHAM KIMITEI ARAP BOIT DECEASED*).....PLAINTIFF**

**VERSUS**

**ZAKARIA ARAP KENY.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KIPLIMO MUTAI & SAFINA KIBET MUTAI**

***(Suing as the Administrators of the Estate of the late PHILEMON ARAP***

***SITIENEI DECEASED*).....2<sup>ND</sup> RESPONDENT**

**PHILIP ARAP SING'OEL.....3<sup>RD</sup> DEFENDANT**

**RULING**

**[NOTICE OF MOTION DATED 13<sup>TH</sup> SEPTEMBER 2019]**

1. The 2<sup>nd</sup> Defendant moved the court through the notice of motion dated the 13<sup>th</sup> September, 2019 seeking for orders “that there be stay of execution and/or further execution of the decree and judgment delivered on 9<sup>th</sup> August, 2019 and all other consequential orders incidental thereto pending the hearing and determination of the appeal filed by the 2<sup>nd</sup> Defendant/Applicant” and costs be provided for. The application is based on the eight (8) grounds on its face marked (a) to (h), and supported by the affidavit of Joseph Kiplimo Mutai, sworn on the 13<sup>th</sup> September 2019. It is his case that he was dissatisfied with the judgement delivered on the 9<sup>th</sup> August 2019 and has filed an appeal vide the notice of appeal dated and filed on the 9<sup>th</sup> September 2019. That he was apprehensive the plaintiff may extract the decree with the intention of execution and hence this application. That unless the stay order is issued, the plaintiff may deal with the portion awarded to her in a detrimental manner including destroying the temporary boundaries erected in the 1960’s.

2. The application is opposed by the 1<sup>st</sup> Defendant through the replying affidavit sworn by **ZAKARIA ARAP KENY** on the 2<sup>nd</sup> October, 2019. It is his case that the application has no merit, and has not met the threshold for granting of stay orders. That the application is a cover up for non-compliance of the judgement, and will cause injustice to him if granted, as he will be denied the opportunity to enjoy the fruits of the judgement.

3. The Plaintiff opposed the application through the seven (7) grounds of opposition dated 22<sup>nd</sup> October, 2019, inter alia that the application is misconceived and meant to prolong litigation; that the judgement resolved the parties dispute over the property and the 2<sup>nd</sup> defendant has not established sufficient cause contemplated by Order 42 Rule 6(2) of the Civil Procedure Rules; and that no security for due performance of the decree has been tendered.

4. The directions on filing and exchanging submissions were issued on the 31<sup>st</sup> October, 2019 and 25<sup>th</sup> May, 2021. The learned counsel for the 1<sup>st</sup> Defendant filed two sets of submissions dated the 10<sup>th</sup> March 2020 and 10<sup>th</sup> June, 2021. The counsel for the 2<sup>nd</sup> defendant and the Plaintiff also filed their submissions dated the 31<sup>st</sup> May, 2021 and 4<sup>th</sup> June, 2021 respectively.

5. The issues for the determination by the court are as follows;

- a. Whether the 2<sup>nd</sup> Defendant has met the threshold for an order of stay of execution to be granted, pending the determination of the appeal.
- b. Who should pay the costs in the notice of motion.

6. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions, the superior courts decisions cited therein and come to the following conclusions;

a. The threshold to be met for the grant of orders of stay pending appeal is provided in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which state 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 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.”*

In the case of **JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO [2012] eKLR** the court couched a definition of what constitutes substantial loss as follows:

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

And in the case of **SAMVIR TRUSTEE LIMITED v GUARDIAN BANK LIMITED [2007] eKLR** the court made the following observation as relates to 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.”*

That from grounds (c), (d) of the application and paragraph (10) of the supporting affidavit, the 2<sup>nd</sup> Defendant argues that unless the stay order is granted, the Plaintiff may deal with the portion of the land awarded to her in a detrimental manner, and destroy the temporary boundaries erected in the 1960's, and that may render the appeal nugatory. That having considered what the above provision and superior courts have said constitutes substantial loss, the court is not persuaded that the 2<sup>nd</sup> Defendant has sufficiently demonstrated that substantial loss shall befall him in the event that the court fails to grant the order of stay of execution. The 2<sup>nd</sup> Defendant has merely stated his apprehension that the Plaintiff is likely to consider dealing with the portion of land awarded to his detriment.

b. The Plaintiff and the 1<sup>st</sup> Defendant have contended that the 2<sup>nd</sup> Defendant has not offered to furnish security for the due satisfaction of the decree, and therefore he is not entitled to an order of stay of execution. In the case of **RWW vs. EKW [2019] eKLR** the court made the following pronouncement on the requirement for security for due performance of the decree:

*“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders. As to whether the application was made without, unreasonable delay, I find in the affirmative.” (emphasis mine)*

That noting that the judgment of the court delivered on the 9<sup>th</sup> August, 2019 declared that the suit land was being held in trust for the Defendants, and that the trust be dissolved and the land be share among the partners of Abraham K. Boit who are beneficiaries of the

trust and are family members, I find that the 2<sup>nd</sup> Defendant has not demonstrated the loss of a substantial nature that he is likely to suffer if the stay order is not granted.

c. The Plaintiff and the 1<sup>st</sup> Defendant have argued that there has been unreasonable delay in the prosecution of this matter noting that the 2<sup>nd</sup> Defendant filed the application on the 15<sup>th</sup> September, 2019 but was only set down for hearing approximately two (2) years later. The court is not persuaded by that argument as the record confirms that the application has been in court on various dates including on the 17<sup>th</sup> September, 2019, 31<sup>st</sup> October, 2019, 3<sup>rd</sup> February, 2020, 4<sup>th</sup> May, 2021, 25<sup>th</sup> May, 2021 and the 15<sup>th</sup> December, 2021 when the Court issued a date for the delivery of its ruling. That in any case, the application was filed within less than a month from the date of the judgement, and there was therefore no unreasonable delay. I therefore find that it cannot be justifiably argued that there was an unreasonable delay in the filing, and the prosecution of the application.

d. The court has the discretion to grant or to decline to grant the orders of stay of execution. In HGE v SM [2020] eKLR the court addressed itself as follows on its discretion to issue an order of stay of execution:

*“In Butt vs. Rent Restriction Tribunal [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

The court’s discretion is to be judiciously exercised where an applicant has established the threshold required as set out above. The though the 2<sup>nd</sup> Defendant filed his application without unreasonable delay, he has failed to convince the court that he stands to suffer any substantial loss, and or the decree is likely to be executed to their detriment before the appeal is heard and determined.

e. That though the 2<sup>nd</sup> Defendant did not make an offer for security for due performance of the decree in the notice of motion, the court would have issued the appropriate conditions to be met if the 2<sup>nd</sup> Defendant had been successful in the application.

f. That in view of the pending appeal, and the order on costs made in the judgement of the 9<sup>th</sup> August 2019, the costs in the application will abide the outcome of the appeal, notwithstanding the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya.

7. That the court finds the 2<sup>nd</sup> Defendant’s notice of motion dated the 13<sup>th</sup> September 2019 to be without merit and is dismissed with costs abiding the outcome of the appeal.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 16TH DAY OF MARCH, 2022**

**S.M.KIBUNJA,J.**

**ELC ELDORET.**

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: *absent*

DEFENDANTS: *absent*

COUNSEL: *Mr. Towett for Isiaho for 2<sup>nd</sup> Defendant...*

*Mr. Mathai for 1<sup>st</sup> Defendant*

COURT ASSISTANT: ONIALA

**S.M.KIBUNJA,J.**

**ELC ELDORET**