



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 411B of 2012**

**SAMMY SOME KOSGEI.....PLAINTIFF**

**VS**

**GRACE JELEL BOIT.....DEFENDANT**

***(Application for stay of execution pending appeal; land matter; principles to be applied in an application of stay pending appeal in a land matter; substantial loss; issue of substantial loss in land matter; application allowed on condition that vacant possession be given to respondent and title documents to remain in custody of court)***

**RULING**

1. I have before me the Motion dated 22 February 2013 filed by the defendant herein. It is an application for stay of execution of the decree pending determination of appeal to the Court of Appeal. The application is brought under the provisions of Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. The application is supported by the affidavit of the defendant and is opposed by the successful plaintiff.
2. Probably a little background to this application will bring to light the issues that arose in this suit and the context around which this application has been filed.
  1. The plaintiff filed this suit against the defendant seeking to be declared owner of two land parcels namely Eldoret Municipality Block 4/342 and Eldoret Municipality Block 4/343. The plaintiff also sought orders of specific performance to have the defendant compelled to execute the requisite transfer instruments to transfer these two parcels of land to the plaintiff. The plaintiff in his pleadings contended that these two properties had been sold to him by the deceased husband of the defendant, by name Abraham Kimitei Boit before he died and all that was pending was the transfer of the properties into the plaintiff's name. The defendant is the administratrix of the Estate of the late Boit and was sued in that capacity.
  2. After a full and contested hearing, I passed judgment on 6 February 2013 in favour of the plaintiff, and decreed that the plaintiff be declared the owner of the two suit lands. I also issued an order of specific performance directing the defendant to execute all necessary documents required to transfer the suit properties into the name of the plaintiff.
  3. The defendant being aggrieved by this judgment filed a Notice of Appeal on 13 February 2013 and later filed this application for stay of execution pending appeal. The application is opposed by the plaintiff.
  4. In her application, the defendant has averred that if the decree is executed, the appeal will be rendered nugatory. She has also stated that she stands to suffer irreparable loss and damage if the stay is not granted. She has also averred that the titles to the suit parcels are already deposited in

court and that they can continue to remain in the custody of the court as security till the hearing and determination of the appeal. She has also stated that she is ready and willing to comply with any reasonable condition that may be ordered by this court. The applicant has further contended that if the decree is executed and the properties transferred to the plaintiff, there is danger that the plaintiff may transfer the suit properties to third parties or charge the same which will then render the appeal an academic exercise if it were to succeed.

5. The plaintiff on the other hand has filed a replying affidavit in opposition to the subject application. It is his view that the applicant has not met the conditions to entitle her to a stay of execution pending appeal.
6. He has deponed that this application is made in bad faith and aimed at denying him the fruits of his judgment. He has contended that the aim of the applicant is to continue collecting rent from the suit premises. He has averred that the applicant has poor chances of succeeding in her appeal. He has deponed that he bought the suit properties in 2001 and has never enjoyed the same and he therefore ought not to be deprived of their use after judgment. He has averred that the two suit properties are valued at kshs.60 million and has annexed a valuation report to his affidavit. He has deponed that if this court is to allow the application then security in the sum of Kshs. 60 million ought to be given.
7. This application was canvassed before me on 6 May 2013. Mr. E.K. Maritim, learned counsel for the applicant urged me to allow the application. He relied on the supporting affidavit of the applicant and contended that the applicant has met the requirements of Order 42 Rule 6 to entitle her to a stay of execution pending appeal. He stated from the bar that the applicant is willing to give security of kshs. 200,000/= for the performance of the decree. To support this application, Mr. Maritim relied on the cases of ***Mukuma v Abuoga (1988) KLR 645***. He distinguished this matter from the case of ***Kenya Shell v Kibiru (1986) KLR 410*** relied upon by Mr. I.J. Onyinkwa, learned counsel for the respondent, as the latter case was in relation to a money decree.
8. On his part, Mr. Onyinkwa, urged me to dismiss the application. He asserted that the plaintiff having obtained judgment in his favour, he ought to be allowed to enjoy the same. He argued that the applicant has not satisfied the conditions in Order 42 Rule 6 as no security has been offered. He contended that a deposit of the title deeds cannot be regarded as security offered, because those titles no longer belong to the applicant, but actually belong to the respondent flowing from the judgment of the court. On the security of Kshs. 200,000/= offered from the bar, Mr. Onyinkwa was of the view that the same is far below the value of the two properties which is Kshs. 60 million. He argued that if stay is granted, the applicant will continue being in use of the suit properties and draw rent from the same yet it is the respondent who has judgment in his favour. He averred that there is no substantial loss which will be suffered by the applicant if the decree is executed.
9. He stated from the bar that the plaintiff is willing to give an undertaking not to dispose of the land pending appeal. To support his position, Mr. Onyinkwa relied on the cases of ***Kenya Anti Corruption Commission vs James Raymond Njenga & Another Eldoret HCCC No. 61 of 2008*** (unreported) and ***Kenya Shell vs Kibiru & Another (1986) KLR 410***.
10. I have considered the application, the depositions in support and in reply, and the arguments of counsel. This is an application for stay pending appeal. The relevant provisions in relation to stay pending appeal are contained in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 which provides as follows :-

*(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.*

1. It will be seen that the above provisions are couched in mandatory terms and three conditions must be satisfied before an applicant may succeed on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order

of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.

1. In our instance, it is easy to dispose of the second limb, that of unreasonable delay. The judgment herein was delivered on 6 February 2013. Immediately upon delivery of judgment, counsel for the defendant made an oral application for stay of execution. I allowed a stay of execution of the decree for a period of 30 days. This is permitted pursuant to the provisions of Order 42 Rule 6(3) which allows a stay of execution pending the filing of a formal application. This application, which is the formal application, was filed on 22 February 2013 before the 30 days granted informally had lapsed. There is therefore no unreasonable delay in the filing of this application. Indeed Mr. Onyinkwa did not contend that this application had been filed belatedly.
1. The more critical issues herein are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal.
1. I therefore need first to interrogate if the applicant really will suffer substantial loss if stay is not granted. But even in this interrogation, I must be alive to the tenet that a successful party is entitled to the fruit of his judgment and there must be demonstrated good reason why he ought not to consume the fruit of his judgment, at least just yet. In ***Machira t/a Machira & Co v East African Standard No.2 (2002) 2 KLR 63***, It was stated as follows" *It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. 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 award or decree or order , before disposal of the applicant's business (eg appeal or intended appeal)" (at P 67).*
2. I will need to be convinced that the applicant herein stands to suffer substantial loss if stay is not granted.
3. The essence of a stay pending appeal is to preserve the subject matter of litigation. If it can be demonstrated that the subject matter of the appeal will no longer be available, so as to render victory in the appellate court of no value, then, that would, in my view, be a demonstration of substantial loss. Thus for a money decree, it is settled, that if the appellant can demonstrate that the respondent is impecunious, and that if he is to be seized of the monies in the decree, he will be unable to refund if the appeal is successful, then a stay pending appeal will usually be granted.
4. This was indeed the principle in the case of ***Kenya Shell vs Kibiru*** cited by Mr. Onyinkwa. In the said case the court of appeal held that in the instance of the case, the refusal of a stay of execution pending appeal would not render the appeal nugatory as it was demonstrated that the subject matter being a money decree was capable of being repaid by the respondent, if the appellant succeeded on appeal. I agree with Mr. Maritim, that the case of ***Kenya Shell*** is distinguishable to the circumstances of this suit as the decree herein is not a money decree but a decree inter alia for specific performance.
5. Probably the case of ***Mukuma vs Abuoga (1988) KLR 645*** relied upon by Mr. Maritim is more relevant to our circumstances. In the said case, the appellant lost at trial and was ordered to vacate the suit premises or be evicted. The court of appeal took note that the appeal was not worthless and since the suit premises comprised the home of the appellant, then he stood to suffer substantial loss if he was to be evicted.
6. I have also read the decision in ***Kenya Anti-Corruption Commission vs James Raymond Njenga & Another***. In the said case, the plaintiff had filed suit for recovery of certain land claimed to be public land from the defendants. The plaintiff was successful and the defendants appealed. They sought a stay of execution pending appeal. In denying the stay, Azangalala J (as he then was) was of the opinion that since the land would remain available, and was not at risk of being disposed of,

then no substantial loss had been demonstrated by the applicant.

7. The two cases of *Mukuma v Abuoga* and *KACC v Njenga* of course reached different conclusions. In the former case, the court considered that the suit land comprised the home of the appellant and eviction would cause the appellant substantive loss. In the latter case, the land was open land and any loss could be compensated by an award of damages equivalent to rent lost. There could not have been substantive loss that would be suffered by the appellant.
8. In matters related to land, the nature of the land, and its user is therefore important in determining whether substantial loss would be occasioned. There would be an inclination to grant stay, with conditions, where the subject matter is the home of the applicant, or the suit land is so utilized in a way that would cause hardship to the appellant, or to members of the public, if stay is not granted, subject of course to the issuance of security.
9. Where the suit premises is business premises, and there is a decree for recovery of the same, any loss suffered by the appellant is quantifiable and so long as the premises is left intact, or the respondent offers some security, then there would be no substantial loss to be suffered by the appellant.
10. I have seen from the valuation report annexed to the affidavit of the respondent, that the suit land is more or less vacant. It does not appear developed. Probably it is rented out for users that do not require the premises to be substantially developed. I do not see what substantial loss the applicant will suffer if she is to give vacant possession of the premises to the respondent. The only loss that may be suffered is loss of rent, which in the circumstances of this case, does not appear to be substantial.
11. If I am to preserve the subject matter of the decree herein so that no dispositions can be made, then the appeal will not be rendered nugatory if it were to succeed. The premises will still be intact.
12. I am not therefore convinced in the circumstances of this case that the appellant stands to suffer any substantial loss if she were to give vacant possession to the respondent.
13. There is however a probability of substantial loss if the premises were to be transferred to the respondent as there would be danger that the respondent may deal with the same in a manner as to have the premises unavailable if the appeal were to succeed. I am therefore of the view that the aspect of the decree that compels the appellant to convey the property to the respondent ought to be stayed pending appeal.
14. This brings me to the issue of security. The court has discretion to order security commensurate to the circumstances of the case. In the circumstances of this case, if the certificates of lease to the suit properties remain in the custody of the court with a further order barring the plaintiff from disposing of the suit properties, then the subject matter will remain intact. I do not think it is necessary for the defendant to provide security to the sum of Kshs. 60 Million as suggested by Mr. Onyinkwa. I would probably have considered asking a monetary security if the properties were going to remain in the hands of the defendant and if the defendant was to remain with the title documents. But since I have allowed the plaintiff to have possession of the property I do not think that this is necessary.
15. Taking the above into consideration, I make the following final orders.
  - (i) The defendant shall give vacant possession of the suit properties to the plaintiff.
  - (ii) The plaintiff shall be free to utilize the suit properties but shall not sell, charge, or in any other way dispose of the suit properties.
  - (iii) The title deeds to the suit properties which are in the custody of court shall remain in the custody of the court until the determination of the appeal or until such other orders are made in respect of the same.
  - (iv) The costs of this application shall be costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF MAY 2013.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Miss J.J. Ngelechei present for the defendant/applicant***

***Mr. I.J. Onyinkwa present for the plaintiff/respondent***