REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 1017 of 2010

JOSEPH PAUL MWANGOVYA ……..……..…… PLAINTIFF

VERSUS

KEWAL CONTRACTORS LIMITED ...…….…….... DEFENDANT

RULING

This is an application by the objectors seeking a stay of execution of the ruling made on 2nd March, 2012 and all consequential orders thereof until the hearing and determination of the Applicants' intended appeal. In support of the application Gerald Kinyumu Muthiga swore an Affidavit on 16th March, 2012.

Mr. Muthiga swore that he is aggrieved by the decision of 2nd March, 2012 which dismissed the 3rd objector's application dated 14th November, 2011 objecting to the execution of a warrant of sale of LR Nos. 209/14047 and 14046, respectively. That there was a Notice of Appeal in the matter which was produced as "GK1", that the ruling being impugned disregarded the submissions of the 3rd objector and took account to matters deposed in the Affidavits of Stephen Owino which had been expunged thereby visiting the 3rd objector grave injustice, that the 3rd Objector would have been denied its natural right to be heard if the sale were to proceed.

A second Affidavit by Baljinder Kaur Manku was also filed for and on behalf of the 1st and 2nd objectors. They also supported the application.

Mr. Kinyanjui, learned Counsel for the Objectors submitted that the application was filed expeditiously as it was filed within 14 days of the ruling, that a Notice of Appeal had been filed, that it is the Objectors' constitutional right to be heard on appeal and it was therefore imperative that that right be safeguarded by an order of stay, that any execution will cripple the business of the objectors, that even conditional stay will suffice. Counsel urged that the application be allowed.

The Plaintiff opposed the application relying on Grounds of Opposition field in court on 11th April, 2012. Mr. Owino, learned Counsel for the Plaintiff submitted that the application was bad in law and incapable of being granted as what the court had done was to dismiss the applications by the objectors, that save for an order of stay, the order given on 2nd March, 2012 was not a positive one in that it did not

require the doing of anything and was therefore incapable of being stayed. Counsel referred to the case of **David Andaja –vs- Nakuru Water & Sanitation Services Ltd HCCA No. 171 of 2009 (UR**) in support of that proposition. That the objectors had not shown sufficient cause for the grant of the orders sought, that under order 42 Rule 6(1) of the Civil Procedure Rules and that the objectors had not shown the substantial loss if any they were to suffer. Mr. Owino was of the view that since the order of 2/3/12 did not require them to do anything, there was nothing to give security on. Counsel urged that the application be dismissed.

Mr. Kinyanjui in reply submitted that since what was dismissed were objection proceedings, there was an automatic stay which was not a negative order, that the interests of justice under Article 159 of the Constitution was sufficient cause and that the Plaintiff had waived the right for security under Order 42 Rule 6 of the Civil Procedure Rules.

I have considered the Affidavits on record and the submissions of Counsel.

The Principles under which courts exercise the discretion to grant a stay under Order 42 Rule 6 of the Civil Procedure Rules are well known. Under Rule 6(2) thereof, the application should be made without undue delay, that the applicant will suffer substantial loss and the giving security for the due performance of the decree that may be found to be binding upon the applicant.

The order sought to be appealed against was made on 2nd March, 2012. The present application was filed on 19th March, 2012. That is a period of 17 days. The application does not seem to have been filed immediately after the order of 2nd March, 2012 was made. Be that as it may, I am inclined to hold that the application was filed timeously in the circumstances of this case. The application therefore satisfies the first principle.

The objectors contended that if the stay was not granted, yet they were desirous of exercising their constitutional right to appeal, they will suffer substantial hardship in that they were not parties to the suit yet the execution will proceed against them and that their business will be crippled. The Plaintiff however, submitted that it had not been demonstrated that the objectors would suffer substantial loss.

In Kenya **Shell Ltd –vs- Benjamin Karuga & Anor (1982 – 1988)** at 1022 it was held:-

"Substantial loss in its various forms is the corner stone of jurisdiction for granting a stay. That is what is to be prevented. Without this evidence, it is difficult to see why the Respondents should be kept out of their money."

In **Joseph Muya T/A Flamingo Stables –vs- Mbugua Ngure NKR HCCA No. 105 of 2002 (UR)** Visram J (as he then was) held:-

"By substantial risk meant that the Appellant will be unable to recover the sum paid under the decree from the Respondent were he to succeed on his appeal."

To my mind therefore, the law is that where it is shown that execution will render an appeal nugatory thereby subjecting the appealing party to substantial loss, then a stay can properly be granted. But parallel with that is equally the important principle that a successful litigant should not be deprived of the fruits of a judgment in his favour without a just cause.

In both the Affidavits of Gerald Kimunyu Muthiga and Baljinder Kaur Manku sworn on 16th March, 2012 in support of the motion, the deponents did not state the nature of substantial loss, if any, they will suffer if the stay was not granted. The nearest they did was by Mr. Muthiga's averment in paragraph 9 wherein he stated:-

"9. I vehemently oppose the judgment and aver that I will suffer prejudice and I will be deprived my natural justice right to be heard if the sale proceeds."

Mr. Baljinder Kaur Manku never alluded to any substantial loss in his Supporting Affidavit.

As regards the natural right to be heard for the 3rd objector, I am of the view that the decision sought to be challenged was arrived at after an inter partes hearing. The 3rd objector was fully heard before the decision was made. The issue of natural right to be heard does not arise. If it is to be heard on appeal, the law is very clear, the party who applies for stay of execution of an order must demonstrate how he will suffer substantial loss. It has not been suggested that if the execution proceeds the objector cannot get another property of a similar nature. The 3rd objector has itself deponed that the properties were allegedly purchased for Kshs.20 million. It was not suggested that the 3rd objector cannot recover this amount from the Plaintiff if the stay is not granted and if the 3rd objector is successful on appeal.

Accordingly, since the objectors have not demonstrated how they will suffer substantial loss, the 2nd principle under Order 42 cannot be said to have been established.

On the 3rd principle as to giving of security, the Plaintiff submitted that there was no need of any such security for two reasons. That the order made on 2nd March, 2012 would not ultimately be binding on the objectors and that the order was not positive in nature.

In the case of **David Andanje –vs- Nakuru Water & Sanitation Services Ltd (Supra)** the court held that an application seeking to stay an order dismissing an application for injunction was incompetent since the order itself was incapable of execution. Further in the case of **Albert M'mbogo –vs- Co-operative Bank of Kenya (Supra)** the court held that an application for stay of execution of an order striking out a suit was incompetent as such an order was incapable of being stayed. In the case of William **Wambugu Wahome –vs- The Registrar of Trade Unions CA No. Nai 308 of 2008 (UR),** the Court of Appeal held that:-

"The order of 19/9/2005 did not grant the Respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and for order of stay and set aside the stay granted earlier. There is no judgment in favour of the Respondents which is capable of enforcement by execution save for costs."

The Court of Appeal in that case went on to hold that where there is no positive order given, an order for stay cannot be granted against such an order.

I have examined the order made on 2nd March, 2012 in this matter. That order dismissed the objectors' applications with costs. The application before me is for stay of execution.

According to **WORDS AND PHRASES LEGALLY DEFINED VOL.2 2nd Edition** Page 199 it is stated:-

"The word execution in its widest sense signifies the enforcement of or giving effect to the judgments or orders of the courts of justice."

The order made on 2nd March, 2012 is incapable of enforcement. It was a dismissal. In the same way as was in the **William Wambugu Wahome case**, it was a dismissal order of objector proceedings. There is no prayer to stay the order for costs. Neither is there any prayer to stay proceedings. Further, the objectors did not pray for the stay of the execution of the decree.

Accordingly, I agree with the Plaintiff that the application is incompetent and the orders therein are incapable of being granted.

It is for the foregoing reason that Mr. Owino, learned Counsel for the Plaintiff submitted that security was not necessary as there was no order binding upon the objectors. Mr. Kinyanjui was of the view that since

the Plaintiff had foregone security there was no need to grant any. On my part, I am of the view that, whether or not a Respondent asks or foregoes security in an application for stay of execution, the issue of security is a legal requirement. The objectors having failed to either give security or show their willingness to give security for the decree of Kshs.72,500,000/- plus interest, I am convinced that they are not entitled to the prayers sought under Order 42 Rule 6 (2) of the Civil Procedure Rules.

Accordingly, I am satisfied that the objectors' application dated 16/3/2012 is not meritorious and I dismiss the same with costs.

DATED and DELIVERED at Nairobi this 6th day of June, 2012.

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A. MABEYA

JUDGE