



Machage v Kiruri (Sued on his capacity as the 1st Defendant and as the legal representative of the Estate of Eunice Wariara Ngigi (Deceased) who was the 2nd Defendant herein) (Environment and Land Case Civil Suit 438 of 2016) [2022] KEELC 15061 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15061 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 438 OF 2016
FM NJOROGE, J
NOVEMBER 24, 2022

BETWEEN

DOUGLAS MUSA MACHAGE PLAINTIFF

AND

SAMUEL NGIGI KIRURI DEFENDANT

SUED ON HIS CAPACITY AS THE 1ST DEFENDANT AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EUNICE WARIARA NGIGI (DECEASED) WHO WAS THE 2ND DEFENDANT HEREIN

RULING

1. This is a ruling with respect to the plaintiff's notice of motion application dated July 5, 2022. It has been brought under section 3A of the *Civil Procedure Act*, order 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* which seeks the following prayers:
 - a. Spent
 - b. Spent
 - c. That this honorable court be pleased to stay execution of the judgement and decree herein dated May 25, 2022 pending the hearing and determination of the intended appeal.
 - d. That costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the affidavit sworn by Douglas Musa Machage, the plaintiff herein. He deposed that the court delivered its judgement on May 25, 2022 where it held that the sale agreement dated March 12, 2011 was not enforceable and ordered the refund of the purchase price to him; that the court ordered him to vacate the parcels of land known as LR No 4815/5 and LR No 4815/6 within 90 days of the judgement and in default, the defendant



to be at liberty to evict him; that he was aggrieved with the said judgement and lodged a notice of appeal and filed a letter seeking for the proceedings; that even before the lapse of 90 days as ordered by the court, the defendant has written to his advocates on record stating their intention to commence eviction; that the intended appeal raises arguable points of law that include whether the sale agreement was unenforceable on account of lack of a signature of a co-owner of land even when the co-owner had knowledge of the said sale and had benefitted from the proceeds of the said sale, whether the court erred in making orders of eviction which were not sought by the defendants, whether the court erred in holding that there was no evidence that he paid Kshs 300,000/= for outgoings and yet the evidence of payment is on record and the same was not denied by the defendant; that unless the execution of the judgement and decree of the court is not stayed, his intended appeal, which has high chances of success will be rendered nugatory; that if he is evicted, his developments on the suit property will be pulled down and his trees cut down and he will therefore suffer substantial loss; that the defendant will not suffer any prejudice if the orders sought are granted and that he is willing to furnish security and fulfill any conditions the court may order for the due performance of the decree.

The response.

3. In response to the application the defendant filed a replying affidavit sworn on August 5, 2022 and filed on August 22, 2022. He deposed that the plaintiff was ably represented by his advocates on record and therefore the judgement of this court was proper and in accordance with the law; that the court in its judgement delivered on May 25, 2022, both parties had a measure of success as he was required to pay to the plaintiff a sum of Kshs 6,000,000/= plus interest at court rates from the date of filing of the suit until payment in full while the plaintiff on the other hand was required to vacate the suit premises within 90 days from the date of judgement and in default the defendant be at liberty to evict him; that after the judgment was delivered the plaintiff moved to the suit property and planted crops; that the defendant instructed his advocates who wrote the letter dated May 31, 2022 to the plaintiff's advocates informing him to advise the plaintiff to stop the said cultivation as the crops would not have matured by August 25, 2022 when he was expected to vacate the suit properties as per the judgement of the court; that in the same letter, he expressed his readiness to refund the decretal sum of Kshs 6,000,000/= plus interest at court rates and sought for the plaintiff's advocate to let him know of his computation on interest for his comparison; that in response to their letter the plaintiff wrote the letter dated June 8, 2022 whose contents were set out; that he has been advised by his advocates on record that the plaintiff's intended appeal is frivolous and has no chance of success; that he is further advised by his advocates on record that the plaintiff has not demonstrated any satisfaction with the conditions for stay of execution under order 42 rule 6 of the Civil Procedure Rules; that the plaintiff has not demonstrated in his application what prejudice he will suffer if the orders for stay of execution sought in the application are denied; that the plaintiff has also not demonstrated what substantial loss he would suffer if stay of execution orders are denied; that the plaintiff is at liberty to cut down his trees and in any event all the developments and trees were done during the pendency of the suit and that he has not furnished the court with any form of security to be considered in the grant of orders of stay pending appeal.

The plaintiff's supplementary affidavit.

4. In response to the defendant's replying affidavit, the plaintiff filed a supplementary affidavit sworn on October 5, 2022 and filed on October 7, 2022 where he reiterated that the defendant started interfering with his possession of the properties before the lapse of the 90 days granted by the court and before he exercised his right of appeal as evidenced by the letters annexed to his supporting affidavit; that as admitted by the defendant at paragraph 5 of his replying affidavit, both parties had a measure of success and while the defendant was satisfied with the outcome he was not; that the court stayed execution of its judgement but during the pendency of this application and during the subsistence of the court's



orders, the defendant on October 1, 2022 proceeded to the suit properties and cut down his fence and trees; that whether or not his appeal is arguable is not an issue for this court to determine but for the Court of Appeal and that he believes that the conduct of the defendant is calculated at protracting these proceedings unnecessarily thereby delaying the filing of the intended appeal since proceedings cannot be typed during the pendency of the proceedings herein.

Submissions

5. The application was canvassed by way of written submissions. The plaintiff filed his submissions dated October 6, 2022 on October 7, 2022 while the defendants filed his submissions dated October 18, 2022 on October 19, 2022.
6. The plaintiff in his submissions identified one issue for determination which is whether the court should stay execution of the judgement and decree herein pending the hearing and determination of the intended appeal. The plaintiff relied on order 42 rule 6(1) and (2) of the Civil Procedure Rules and the case of Michael *Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR* and submitted that the application was filed without unreasonable delay. This is because judgement was delivered on May 25, 2022, he filed the notice of appeal on June 6, 2022 and the present application was filed on June 7, 2022.
7. The plaintiff further submitted that regarding whether he stands to suffer substantial loss unless the order sought is granted, he has been in occupation of the suit property since the year 2011 where he has grown trees, crops and constructed a house thereon. He also submitted that the developments are admitted by the defendant in his replying affidavit at paragraph 18.
8. It was his submission that unless the orders sought are granted, the defendant will evict him, cut the trees and demolish his house. On the issue of security, he submitted that he is willing and will offer any security the court may order and that in any case, the defendant has a sum of Kshs 6,000,000/= arising from the disputed sale which he says he is ready and willing to refund which amount is sufficient security. The plaintiff concluded his submissions by seeking that his application dated July 5, 2022 be allowed as prayed.
9. The defendant in his submissions reiterated the contents of his replying affidavit and relied on order 42 rule 6(2) of the Civil Procedure Rules, the cases of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR*, *James Wangalwa & Another v Agnes Naliaka Cheseto [2012]* and submitted that from the notice of appeal dated May 27, 2021, it is clear that the plaintiff only intended to appeal to the Court of Appeal against part of the decision that found that the sale agreement dated March 12, 2011 was not enforceable, and that the court failed to award him Kshs 300,000/= for outgoings and an order for costs of the suit.
10. The defendant submitted further that the plaintiff does not intend to challenge the order requiring him to refund Kshs 6,000,000/= being the alleged purchase price plus interest at court rates from the date of filing of the suit until payment in full and therefore the plaintiff has not proved the substantial loss he will suffer if the stay orders are declined as he would have been paid the said money.
11. The defendant also submitted that the trees were planted during the pendency of this suit and that the plaintiff is at liberty to cut them down. He submitted that no evidence was tendered to prove the value of the trees planted on the suit land. He concluded his submissions by stating that the plaintiff has not furnished any security as a condition to the grant of the said orders and cannot rely on the award for refund of Kshs 6,000,000/= by the defendant to him as security.



Analysis and determination

12. After considering the application, affidavits and submissions, the only issue that arises for determination is whether the court should grant stay of execution pending appeal.
13. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules provides as follows:
 - (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 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.
14. The court in [*Civil Appeal No 107 of 2015, Masisi Mwita vs Damaris Wanjiku Njeri \[2016\] eKLR*](#) held as follows:

' The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another vs Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag JA) held that: -

'The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely; - sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.'

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in [*Hassan Guyo Wakalo vs Straman EA Ltd \(2013\)*](#) as follows: -

' In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.' These twin principles go hand in hand and failure to prove one dislodges the other.'
15. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject matter is not maintained before the determination of the appeal, then it would render the appeal nugatory.
16. On whether the application was lodged expeditiously, the present application was filed on July 7, 2022 while judgement in the matter was delivered on May 25, 2022. There is a notice of appeal on the court record lodged on June 6, 2022 and it is therefore my view that for the purposes of this application, there is an appeal in place and the application was filed without unreasonable delay.



17. On whether the plaintiff will suffer substantial loss if the orders sought are not granted, the plaintiff stated that the defendant is likely to evict him from the suit properties, cut down his trees and interfere with the developments that he has done on the property. The defendant on the other hand stated that the plaintiff is not likely to suffer substantial loss if the orders sought are not granted because he has not appealed against the decision for the refund of Kshs 6,000,000/= plus interest and further that the plaintiff is at liberty to cut down his trees. I have considered the circumstances of this case and the nature of the appeal intended to be filed.
18. Of great importance in the intended appeal the legal question as to whether the agreement dated March 12, 2011 is enforceable or not. The basis on which the plaintiff's suit was dismissed is section 3(3) of the Law of Contract Act. This court has pronounced its interpretation of those provisions of the law in the light of the admission by the plaintiff that one of the joint tenants to the property never signed the sale agreement dated March 12, 2011 and arrived at its conclusion regarding that default.
19. The other factor I have considered is the submission by the defendant, which is correct, that the intended appeal does not challenge the order of refund of Kshs 6,000,000/= to the plaintiff. The defendant on his part avers that he is not appealing against the said orders. It may be argued that the intended appeal against the finding that the agreement is unenforceable is impliedly an appeal against the order of refund. However, will be upon the Court of Appeal to pronounce itself on whether the appeal against the declaration of enforceability covers that point or not. In the meantime, it remains the impression on this court that the refund order is not being appealed. At the same time, this court notes that interest on principal sum was provided for in the judgment from the date of filing suit and the applicant may not suffer any loss even if prompt payment is not effected as interest compensates for it. In any event payment thereof can still be enforced by way of execution.
20. I am not persuaded that the plaintiff would suffer irreparable harm if the stay orders sought are not granted in these circumstances. This court's overall assessment of the instant application leads it to a conclusion that it lacks merit and therefore the application dated July 5, 2022 is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 24TH DAY OF NOVEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

