



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 512 OF 1998

PAUL NJUNGE.....PLAINTIFF

VERSUS

SAMUEL GATONYE ROBERT.....1ST DEFENDANT

PALMDAM HOLDINGS LTD.....2ND DEFENDANT

PAUL KIPKEMBOI MELLY.....3RD DEFENDANT

RULING

This is an application by the plaintiff made under **Order XLI rule 4, Order L rule 15(2)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. The plaintiff seeks to stay the execution of the judgment delivered by this court on the 22nd of September 2006 whereby this court dismissed his suit and entered judgment for the 2nd defendant as prayed in its counterclaim. The plaintiff was aggrieved by the said decision of this court and has filed a notice of appeal indicating his intention to appeal against the said decision of this court to the Court of Appeal. The grounds in support of the application are stated on the face of the application. The plaintiff contends that if stay of execution is not granted, the plaintiff and the members of his family would be evicted from the suit land and therefore render the intended appeal to be filed nugatory. The plaintiff swore a supporting affidavit in which he deponed that his appeal had an overwhelming chance of success. He further deponed that if stay is not granted, he would suffer irreparable loss and damage. The plaintiff further deponed that he was sentimentally attached to the suit land which he had resided for over thirty years with the members of his family. He therefore pleaded with this court to grant the stay of execution pending the hearing of the said intended appeal. The plaintiff did not offer any security. However, during the hearing of the application, Mr. Kariuki for the plaintiff submitted that this court should take into account the impecunious state of the plaintiff and make no order for the deposit of security that the plaintiff would be unable to fulfil.

The defendants opposed the application. The 3rd defendant, Paul Kipkemboi Melly swore a replying affidavit in opposition to the application. He deponed that the defendants should not be denied the fruits of their judgment because the intended appeal to be filed by the plaintiff had no merit. He deponed that Palmdam Holdings Limited was the registered owner of the property and had been so registered since 1998. He deponed that the defendants have been denied access to the suit land yet they had paid valuable consideration for the same. He deponed that this court should dismiss the application for stay of execution and if it was inclined to grant the same, then the plaintiff should be ordered to provide security

equivalent to the sum of Kshs 6 million.

Mr. Kariuki for the plaintiff and Mr. Chacha-Odera for the defendants basically reiterated the contents of the application and the replying affidavit in their opposing submissions in support of their clients' cases. I have carefully considered the said rival submissions made. I have also carefully read the pleadings filed by the parties to this application. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant him the order of stay of execution of the judgment and the decree of this court as sought in this application. **Order XLI rule 4(2) of the Civil Procedure Rules** is clear on the principles to be considered by this court when deciding whether or not to grant stay of execution pending the hearing of an appeal. This court must be satisfied that the applicant would suffer substantial loss unless stay of execution is granted. The application for stay of execution must be made without unreasonable delay and further the applicant must provide such security as the court may order for the due performance of such decree or order.

In the present application, the issue in dispute is land. This court has entered judgment in favour of the defendants. It has declared the 2nd defendant to be the lawful owner of the suit land. It gave an order for the plaintiff to vacate the suit land within sixty days of the delivery of the said judgment. The plaintiff is dissatisfied with the said decision of this court and has filed a notice of his intention to appeal to the Court of Appeal. An appeal is a constitutional right of a litigant. A litigant has a right to ventilate his case to the highest court in the land. However, it is not automatic that when an aggrieved litigant files an appeal he will be entitled to be granted stay of execution. As was held by Madan JA in **Butt –vs- Rent Restriction Tribunal [1982] KLR 417** at page 419:

“It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful from being nugatory, per Brett LJ in Wilson –vs- Church (No. 2) 12 Ch D (1879) 454 at p. 459. In the same case, Cotton LJ said at p. 458:

‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see the appeal, if successful, is not nugatory’.”

In the present application, judgment has been delivered in favour of the defendants. They have a legitimate expectation to enjoy the fruits of their judgment. This court can only deprive them such joy of enjoying the fruits of their judgment if it is satisfied that the plaintiff has convinced this court that he would suffer substantial loss and therefore deserves to be granted stay of execution pending the hearing of the appeal. Having carefully considered the submissions made, it is clear that the plaintiff would suffer substantial loss because he would be evicted from a parcel of land which he has occupied for a long period of time. On the other hand, the 2nd defendant has been denied occupation since it purchased the said parcel of land in 1998. This court has sympathy with the 2nd defendant but it is imperative that the plaintiff be granted his wish to exercise his right of appeal to the Court of Appeal. The 2nd defendant will have to wait a little bit longer to take occupation of the said suit land.

The plaintiff will however have to provide security for this court to grant him stay. The plaintiff has pleaded that he is impecunious. He has urged this court not to impose such terms as to security as to render the appeal to be filed nugatory. Unfortunately for the plaintiff, the fact that a person intending to appeal is impecunious is not a matter for consideration by this court. As was held by the Court of Appeal in the case of **Jethwa –vs- Shah t/a Supreme Styles [1989] KLR 198**, the fact that a litigant is impecunious is not a factor to be put into consideration by a court when deciding whether or not to grant stay of execution.

In the circumstances of this case therefore, I will grant the application by the plaintiff dated the 16th of November 2006. This court stays the execution of its judgment dated the 22nd of September 2006 pending the hearing and determination of the appeal intended to be filed by the plaintiff to the Court of Appeal. The plaintiff will however deposit the sum of Kshs 500,000/= in a joint interest earning account

in the names of the counsels for the plaintiff and the 2nd defendant within twenty one (21) days of today's date. If the plaintiff defaults in depositing the said amount as ordered by this court, the stay of execution granted herein shall automatically lapse.

It is so ordered.

DATED at NAKURU this 1st of December, 2006.

L. KIMARU

JUDGE