



**Njuguna v Ndirangu & 4 others (Environment & Land Case
83 of 2017) [2022] KEELC 15250 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 83 OF 2017
YM ANGIMA, J
DECEMBER 8, 2022**

BETWEEN

BERNARD KAMAU NJUGUNA PLAINTIFF

AND

NEHEMIA GITAHI NDIRANGU 1ST DEFENDANT

REUBEN MICHIRE MUGO 2ND DEFENDANT

DISTRICT LAND REGISTRAR 3RD DEFENDANT

THE DISTRICT SURVEYOR NYANDARUA 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

RULING

A. The Plaintiff's Application

1. By a notice of motion dated February 17, 2020 expressed to be brought under sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* (cap 21), order 42 rule 6 and order 51 rules 1 of the *Civil Procedure Rules*, 2010 (the Rules), and all other enabling provisions of the law, the plaintiff sought a stay of execution of the decree of this court dated February 4, 2020 together with all consequential orders pending the hearing and determination of an appeal to the Court of Appeal.
2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the plaintiff on February 17, 2020 and the singular exhibit thereto. The plaintiff contended that being aggrieved by the said decree he had lodged a notice of appeal intimating his intention to appeal to the Court of Appeal against the entire decree. It was contended that the intended appeal had good prospects of success and that unless a stay of execution was granted the outcome of the appeal might be rendered nugatory should it be eventually successful. The plaintiff



further contended that he was willing to abide by any conditions which the court may impose for due performance of the decree should his appeal ultimately fail.

B. The Defendants' Response

3. The 1st and 2nd defendants filed a joint replying affidavit sworn on July 11, 2022 in opposition to the application. They contended that the application was brought in bad faith in order to deny them the fruits of their judgment. It was contended that the plaintiff had failed to demonstrate what substantial loss he might suffer if the decretal amount was paid. They further contended that the plaintiff had not demonstrated that the intended appeal shall be rendered nugatory in the event that a stay was not granted.
4. The 1st and 2nd defendants further contended that although a notice of appeal was filed more than 2 years ago the plaintiff had not demonstrated the steps he had taken to pursue his intended appeal. They prayed that in the event that the instant application is allowed then the plaintiff should be ordered to provide adequate security for due performance of the decree as required by law.
5. The 3rd and 4th defendants did not file any response to the application and neither did they participate in the application in any manner.

C. The Plaintiff's Rejoinder

6. The plaintiff filed a further affidavit sworn on August 18, 2022 in reply to the 1st and 2nd defendants' replying affidavit. The plaintiff stated that he had since filed a record of appeal before the Court of Appeal. He further stated that the decretal amount was a lot of money hence he may be forced to get into debt to pay it in the event the stay is not granted. He further contended that, in any event, the defendants had not filed any affidavit of means to demonstrate that they shall be in a position to refund the decretal amount in the event of the appeal being successful.

D. Directions on Submissions

7. When the application was listed for *inter partes* hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the plaintiff's submissions were filed on August 22, 2022 whereas the 1st and 2nd defendants' submissions were filed on October 19, 2022.

E. The Issue for Determination

8. The court has considered the notice of motion dated February 17, 2020, the replying affidavit in opposition thereto, as well as the plaintiff's further affidavit. The court is of the opinion that the main question for determination is whether or not the plaintiff has satisfied the requirements for the grant of stay pending appeal.

F. Analysis and Determination

9. The court has considered the material and submissions on record on this issue. Whereas the plaintiff contended that he had satisfied the legal requirements for the grant of an order of stay of execution pending appeal, the 1st and 2nd defendants contended otherwise. The plaintiff relied upon the cases of *Kenya Shell Limited -vs- Kibiru & another* [1986] KLR 410; *Victory Construction -vs- BM (a minor suing through next friend one PMM)* [2019] eKLR and *Focin Motorcycle Co Ltd -vs- Ann Wambui Wangui & another* [2018] eKLR in support of his application. The 1st and 2nd defendants, on the other



hand, cited the case of Nicholas Stephen Okaka and another –vs- Alfred Waga Wesonga [2022] eKLR in opposition to the application.

10. The legal requirements for the grant of a stay of execution of a decree are contained in order 42 rule 6(2), of the Rules which stipulates as follows:

“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.”

11. In the case of Kenya Shell Limited –vs- Kibiru & another (*supra*) which was cited by the plaintiff, the Court of Appeal stated as follows:

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by any other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

12. So, what is the evidence before the court to demonstrate that the plaintiff shall suffer substantial loss if he paid the decretal amount? In the first place, the record shows that by the judgment dated February 4, 2020 the court dismissed the plaintiff’s suit with costs and awarded the 1st and 2nd defendants Kshs 100,000/= as general damages for trespass. The court has considered the plaintiff’s supporting affidavit sworn on February 17, 2020 on the issue of substantial loss. Apart from a bare statement that he shall suffer ‘irreparable loss’ which is ‘incapable of being compensated by damages’ there is absolutely no demonstration of the nature and extent of the alleged loss. It is really inconceivable that payment of costs and general damages of Kshs 100,000/= cannot be compensated in monetary terms. It was not averred in the supporting affidavit that the 1st and 2nd defendants were impecunious and that they would not be able to refund the decretal amount in the event of the appeal being successful. It was only when the defendants stated in their replying affidavit that substantial loss had not been demonstrated that the plaintiff stated in his further affidavit that the defendants had not filed an affidavit of means to demonstrate their ability to refund the decretal amount once paid. But how could the defendants do so when their financial ability had not been challenged in the application and supporting affidavit? The court is of the opinion that the plaintiff has failed to demonstrate that he stood to suffer substantial loss if he paid the decretal amount plus costs.

13. It is not sufficient for the plaintiff to assert that he might be forced to borrow some money or sell his assets in order to settle the decretal amount. That is an inconvenience which every debtor has to contend with. It is up to the debtor to choose the mode of setting his financial obligations and that burden should not be transferred to the creditor.



G. Conclusion and Disposal Order

14. The upshot of the foregoing is that the court finds and holds that the plaintiff has failed to satisfy the requirements for the grant of an order of stay pending appeal. Accordingly, the plaintiff’s notice of motion dated February 17, 2020 is hereby dismissed with costs to the 1st and 2nd defendants only.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 8TH DAY OF DECEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Kibet holding brief for the Otieno for the Plaintiff

Mr. Sigoina for the 1st and 2nd Defendants

N/A for the Attorney General for the 3rd – 5th Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

