



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC APPEAL NO. 19 OF 2020**

**ANTHONY MWAURA.....APPELLANT**

**VERSUS**

**ANTON LEVITAN.....RESPONDENT**

**RULING**

1. The appellant on 10<sup>th</sup> July 2020 lodged an appeal against the judgment of the Hon. F, Munyi Principal Magistrate delivered on 10<sup>th</sup> June 2020 in Nakuru CMCC No. 214 of 2018. The appellant applied before the subordinate for stay of execution of the judgment delivered by the court. The subordinate court vide a Ruling delivered on 22<sup>nd</sup> September 2020 allowed the application for stay of execution of the judgment on terms that the applicant deposits a sum of Kshs1,764,000/= within a period of 30 days from the date of the ruling failing which the respondent would be at liberty to proceed with the execution of the decree.

2. The appellant did not satisfy the conditions pursuant to which stay was ordered. Instead the appellant filed before this court the Notice of Motion dated 26<sup>th</sup> October 2020 and sought the following substantive orders:-

*3. That pending the hearing and determination of the appellant's appeal to the High Court this Honourable Court do issue an order of stay of Execution of the judgment delivered on 10<sup>th</sup> June, 2020, the Decree arising therefrom and the subsequent ruling delivered on 22<sup>nd</sup> September 2020.*

3. The appellant's application was premised on Order 42 Rule 6(a) Rule 22 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The application was grounded on the grounds set out on the body of the application and on the affidavit sworn in support of the application by the Appellant dated 15<sup>th</sup> October 2020. It was the appellant's assertion that being dissatisfied with the judgment delivered on 10<sup>th</sup> June 2020 he had appealed against the judgment and that if the Respondent proceeded to execute the decree, the appellant's appeal, even if successful, would be rendered nugatory as the appellant would have been evicted from the suit property. The Appellant's contention is that he would suffer substantial loss if he is evicted in execution of the decree and his appeal is successful. He contends his appeal could turn out to be an academic exercise and/or an exercise in futility as the land the subject matter may have been disposed of to third parties and/or altered irretrievably.

4. The respondent filed grounds of opposition to the application dated 12<sup>th</sup> November 2020 on 14<sup>th</sup> December 2020. Interalia the Respondent contends that the appellant's application is misconceived as it implies the provisions of Order 42 Rule 6 of the Civil Procedure Act, do not necessarily apply to land matters which is not the case. The respondent further avers the appellant/applicant is guilty of delay in bringing the instant application as he waited until the period of complying with the condition attached to the grant of stay had lapsed before making the present application. The respondent further avers the applicant has not demonstrated he is prepared to give any security as required under Order 42 Rule 6 of the Civil Procedure Rules and neither has he demonstrated he would suffer substantial loss and/or the appeal would be rendered nugatory. The Respondent argues the application is not brought in good faith and avers it is merely intended to delay the realization of justice on the part of the respondent who has a valid judgment from the court. The respondent argues the appellant has equally not demonstrated he has an arguable appeal with a chance of succeeding.

5. The parties canvassed the application by way of written submissions. Both the applicant and the respondent filed their written submissions. The appellant/applicant's submissions were filed on 14<sup>th</sup> December 2020 as were those of the respondent.

6. The applicant submitted that the subordinate court granted the applicant stay of execution following an application for stay, save that the stay was granted on condition that the applicant makes the deposit of Kshs.1,764,000/= within the period of 30 days. The applicant was aggrieved by this order and did not satisfy the condition to deposit the money and has sought from this court the setting aside of the conditions attaching to the order of stay and that the Court grants an unconditional stay of execution. The applicant submitted that the subordinate court was satisfied that the applicant had met the conditions required for grant of stay under Order 42 Rule 6 but the conditions

attached to the grant of stay negated the order as it was onerous and difficult to meet. The applicant placed reliance on the case of **P J Dave Flowers Ltd -vs- David Simiyu Wamalwa (2018) eKLR** and on the case of **Superior Homes (Kenya) Ltd -vs- Musango Kithome (2018) eKLR** where the court considered the applicable principles in application for stay pending appeal.

7. The Court in the case of **Superior Homes (Kenya) Limited -vs- Musango Kithome** (supra) outlined the factors that an applicant for stay pending an appeal needs to satisfy before an order for stay is granted. The Court observed that the power to grant stay of execution under Order 42 Rule 6 of the Civil Procedure Rules is discretionary and that an applicant has to demonstrate;

- (a) That there is sufficient cause;
- (b) That the applicant may suffer substantial loss unless stay is ordered;
- (c) That the application has been made without unreasonable delay; and
- (d) That such security as may be necessary is provided.

8. The applicant submitted that he had exercised his right to appeal against the judgment of the lower Court and argues that he stands to suffer substantial loss unless the execution of the judgment is stayed. It is the Applicant's assertion that what is in issue is the beneficial ownership of the land which by the judgment was decreed to the Respondent and from which the applicant was ordered to vacate. The effect of execution of the decree would result in the eviction of the appellant. The applicant maintains the condition that he pays rent for the land (Mesne profits) that have been quantified at Kshs.1,764,000/= which the applicant was ordered to deposit was punitive and amounted to a denial of the order for stay. He seeks the order to be set aside.

9. The respondent in his submissions contends the applicant has not fulfilled the conditions upon which stay of execution may be granted under Order 42 Rule 6(1) of the Civil Procedure Rules and therefore an order of stay of execution pending the appeal is not merited. The Respondent further submitted that the Applicant has not demonstrated what substantial loss he would suffer and has argued that merely stating he stood to suffer substantial loss was not sufficient. He averred that substantial loss has to be demonstrated and/or proved. The Respondent placed reliance in the cases of **Equity Bank Ltd -vs- Taiga Adams Co. Ltd (2006) eKLR; Kiplagat Kotut -vs- Rose Jebor Kipngok (2015) eKLR; and Macharia t/d Macharia & Co. Advocates -vs- east African standard (No.2) (2002) eKLR**. In the above cases the courts were emphatic that substantial loss had to be demonstrated/proved in order for the court to grant stay pending appeal.

10. Order 42 Rule 6 (1) & (2) is on the following terms:-

*(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.*

11. It is clear from the above provisions of the law that grant of an order of stay of execution of decree pending appeal is at the discretion of the court. The case of **Antonice Ndiaye -vs- African virtual University (2015) eKLR** and **Prilscot Company Ltd -vs- Monica Heho (2015) eKLR** cited with approval by Ombwayo, J in the case of **Kiplagat Kotut -vs- Rose Jebor Kipngor** (supra) restated the principles/conditions applicable in an application for stay pending appeal. Gikonyo, J in the case of **Antoine Ndiaye -vs- African Virtual University** (supra) observed thus:-

*“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 Rule 6 of the civil procedure rules, that:-*

*(a) The application is brought without undue delay;*

*(b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and*

*(c) 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.*

12. Sergon, J equally in the case of **Priscot Company Ltd -vs- Monicah Heho** (supra) while placing reliance on the case of **Halai &**

*Another -vs- Thorton Turpin (1963) Ltd (1990) KLR 365* observed that Order 42 Rule 6(2) of the Civil Procedure Rules set out the conditions that an applicant must satisfy in an application for stay pending appeal. He stated that an applicant must establish that he stands to suffer substantial loss if the order is not granted; that the application must be filed timeously; and the applicant must offer security for the due performance of the decree or order.

13. I entirely agree with my brother judges in their exposition on the application of Order 42 Rule 6 of the Civil Procedure Rules as relates to applications for stay of execution pending appeal. In the present matter the issues for consideration is whether the applicant has satisfied the conditions for grant of stay as provided under Order 42 Rule 6. The applicant's contention is that the applicant had satisfied the conditions for grant of stay of execution before the trial court and it is for that reason that the court had granted stay, albeit, conditionally. It is instructive that the applicant did not furnish a copy of the judgment against which the appeal is preferred and in the absence of the record of appeal, this court is not placed in a position to evaluate the pleadings before the lower Court and/or the basis upon which the court reached the judgment now the subject of the appeal. What is apparent however, is that the learned trial Magistrate quantified mesne profit to be paid by the applicant at Kshs1,764,000/= and that was the amount the trial court ordered deposited into Court to act as security pending the hearing and determination of the appeal.

14. The trial court in its determination of the suit having found the applicant to be in unlawful possession of the suit property which it decreed to the respondent, and further having made an assessment of the Mense profits, it is my view that the trial court was perfectly in order to grant a conditional stay of execution. The amount was to be deposited in court so that it would have been available to the respondent if the applicant's appeal was unsuccessful and would equally have been refunded to the Applicant if he was to be successful in his appeal. The deposit was to act as security for the due performance of the decree in the event the appeal as unsuccessful. The learned trial magistrate in granting a conditional stay of execution exercised her discretion. This court will not interfere with the subordinate court's exercise of discretion unless it is clear that the learned trial magistrate was wrong and/or used the wrong principles in reaching the determination that she did. As observed above, this court has not had the benefit of perusing the pleadings and/or judgment of the lower court and therefore has no basis for holding that the trial Magistrate erred in her exercise of discretion. On my perusal of the copy of the ruling annexed to the affidavit in support of the application, I cannot fault the learned trial magistrate for granting the conditional stay of execution that she did. Had the applicant satisfied the condition, the status quo would have remained until the appeal was heard and determined. Justice cuts both ways. The respondent is entitled to feel confident that his success at the trial was not in vain while the applicant ought to be satisfied that his appeal would not be rendered nugatory if he was to succeed. That is the reason Order 42 Rule 6 places conditions to be satisfied by any applicant before stay of execution may be granted.

15. It is not clear why the applicant had to wait until the period for the compliance with the conditions for the grant of stay of execution had expired before making the present application. The condition was that the deposit of Kshs1,764,000/= was to be made in Court within 30 days from the date of the order failing which the respondent was to be at liberty to execute the decree. The present application was made on 28<sup>th</sup> October 2020 after the expiry of 30 days from 22<sup>nd</sup> September 2020 when the ruling was made. The application in my view was not without unreasonable delay considering the orders made on the ruling were to take effect after the expiry of 30 days from 22<sup>nd</sup> September 2020.

16. The lower court having properly entertained an application for stay for execution pending appeal and having granted stay albeit conditionally, I find no merit in the instant application. I will however incase the applicant is still intent in having the obtaining status quo preserved until the appeal is heard and determined do hereby extend the period within which the applicant is to make the deposit of kshs1,764,000/= to act as security by a further twenty one (21) days from today failing which the application for stay before this court will stand dismissed with costs and the respondent will be at liberty to execute the decree. In case the security deposit is placed, the costs of the application before the lower court and before this court will abide the outcome of the appeal.

16. Orders accordingly.

**Ruling dated signed and delivered virtually at Nakuru this 28<sup>th</sup> day of January 2021.**

**J M MUTUNGI**

**JUDGE**