



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 2195 of 2007

MUGUGA GREEN APARTMENTS LIMITED.....PLAINTIFF

=VERSUS=

THE ATTORNEY GENERAL.....1ST DEFENDANT

SBM BANK (KENYA) LIMITED.....2ND DEFENDANT

RICHARDSON PROPERTIES LIMITED.....3RD DEFENANT

RULING

1. This is the notice of motion dated 10th August 2020 brought under article 159 of the Constitution of Kenya, 2010, section 3 and 13(7) of the Environment and Land Court Act, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all other enabling provisions of law.
2. It seeks orders: -
 1. *Spent.*
 2. *Spent.*
 3. *Spent.*
 4. *That stay of execution do hereby issue against the judgment of this honourable court delivered on 18th June 2020, decree arising therefrom and any proceedings arising therefrom pending hearing and determination of the intended appeal.*
 5. *Costs of this application be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs 1 to 7.
4. The application is supported by the affidavit of George Odete, Corporation Secretary of the 2nd defendant/applicant sworn on the 10th August 2020.
5. The application is opposed. There is a replying affidavit sworn by Anil Kapila, a director of the plaintiff, company, sworn on the 17th November 2020.
6. The application was canvassed by oral submissions.
7. It is the 2nd and 3rd defendants'/applicants' submissions that they are entitled to a right of appeal which will be rendered nugatory if the stay of execution order is not granted. Further that they have relied on three authorities where the application for stay was filed two months after judgment but nevertheless stay of execution was granted.
8. That they have demonstrated that they will suffer substantial loss if these orders are not granted and that the suit property is sufficient security for the due performance of decree. That the court at this stage is not concerned with the merits of appeal. They pray for the orders sought.

9. It is the plaintiff's/respondent's submissions that the application has been overtaken by events as the plaintiff has taken possession of the suit property. That this court has rendered a final decision in the matter. Further that this application has been brought after an inordinate delay, two months after judgment was delivered. No explanation has been given. The defendants/applicants have failed to demonstrate what prejudice they will suffer if these orders are not granted. No security for the due performance of the decree has been offered by the applicants. It prays that the application be dismissed with costs.

10. It is the 1st defendant's/respondent's submission that the court in considering this application ought to be guided by the conditions set out under order 42 rule 6(2) of the Civil Procedure Rules. They relied on the case of **Butt vs Rent Restriction Tribunal; Samvir Trustee Limited vs Guardian Bank Limited; Victory Construction vs B M (2019 eKLR)**.

11. I have considered the notice of motion, the affidavit in support and the replying affidavit. I have considered the oral submissions on record and the authorities cited. The issues for determination are:-

(i) Whether the 2nd and 3rd defendants'/applicants' application meets the threshold for grant of orders of stay of execution pending appeal.

(ii) Who should bear costs?

12. The principles guiding the grant of stay of execution pending appeal are well settled.

Order 42 rule 6(2) of the Civil Procedure Rules provides that:-

“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.

13. It is clear from the above provisions that for an order of stay of execution pending appeal to be granted, specific conditions must be met by the applicants.

14. I have considered the notice of motion herein. I find that it was filed two (2) months after judgment had been delivered. No explanation has been given by the applicants. I find that it has been brought after an inordinate delay.

15. It is the 2nd, 3rd defendants'/applicants submissions that they stand to suffer substantial loss if these orders are not granted. That there is need to preserve the suit property pending appeal. The plaintiff/respondent on the other hand submits that the suit property is unlikely to be disposed of as the plaintiff is to hold it in trust for the residents.

16. I am convinced that there is no threat that the suit property will pass on to the hands of third parties. The applicants have failed to demonstrate what prejudice will be occasion to them if these orders are not granted.

17. In the case of **Feisal Amin Jan Mohammed t/a Dunvia Forwarders vs Shami Trading Co. Ltd [2014] eKLR Kasango J** stated as follows:-

“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated a substantial loss that may result to him unless the order is made, that the application is made without unreasonable delay and that the applicant has offered proper security”.

I am guided by the above authority.

18. In the case of **Machira t/a Machira & Co. Advocates vs East African Standard [2002] KLR 63** it was stated thus:-

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.....

where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.....”.

I am guided by the above authority in finding that the applicants herein have failed to demonstrate what substantial loss they are likely to suffer if these orders are not granted. I find that the application herein has failed to meet the requirements set out under order 42 rule 6 (2) of the Civil Procedure Rules. In conclusion I find no merit on this application and the same is dismissed with costs to the plaintiff/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 21st day of January 2021

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

No appearance for the 1st defendant

Mr. Simiyu for Kanjama for the 2nd and 3rd defendants

Phyllis – Court Assistant