



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 18 OF 2020

HENRY MUNYAO KILONZO.....APPELLANT/APPLICANT

VERSUS

AMY MUASYA.....1ST RESPONDENT

KATELEMBO ATHIANI MUPUTI & RANCHING

CO-OPERATIVE SOCIETY LTD.....2ND RESPONDENT

MACHAKOS LAND REGISTRAR.....3RD RESPONDENT

RULING

Introduction:

1. This Ruling is in relation to a Notice of Motion Application dated, 19th June, 2020, in which the Applicant is seeking for the following orders:

a) That this Honourable Court be pleased to issue a stay of execution of the Judgment dated 27th May, 2020, Decree and all consequential orders thereto pending the hearing and determination of the Appeal.

b) Costs of the Application be borne by the Respondents.

2. The Application was supported by the Affidavit of Henry Munyao Kilonzo who deponed that Judgment was entered in favour of the 1st Respondent on 27th May, 2020 by the lower court; that he is dissatisfied with the said Judgment and has filed an Appeal; that he has done extensive developments on parcel of land number Machakos Town Block 3/480 (*the suit land*) and that he is at risk of suffering irreparable harm that cannot be compensated by way of damages in the event the 1st Respondent executes the Judgment.

3. It was deponed by the Plaintiff that there is absolutely nothing holding back the 1st Respondent from executing the Judgment at any time; that he has an arguable Appeal which has high chances of success and that the Application should be allowed to ensure parties have their chance to argue their case on Appeal.

4. The Application was opposed vide a Replying Affidavit sworn on 8th July, 2020 by the 1st Respondent who deponed that the Application is bad in law and fatally defective; that the Plaintiff's claim against her failed; that the dismissal of the suit is a negative order which is not capable of execution and that the prayer for stay is unfounded and the court lacks a basis of granting the same.

5. The 1st Respondent deponed that the Applicant has not demonstrated that he has an arguable Appeal; that the Applicant has not met the threshold for granting stay of execution; that the Application is meant to deny her fruits of her Judgment and that the Applicant should be compelled to deposit the costs of the suit in the lower court and the costs of the Appeal in court.

6. The 1st Respondent averred that she is the registered owner of all that land known as Machakos Town Block 3/480; that she acquired the said parcel of land from the 2nd Respondent and that she had peaceful and quiet enjoyment of her property since 2013 until the Plaintiff's recent encroachment and trespass.

Submissions:

7. The Applicant's counsel cited Order 42 Rule 6(2) of the Civil Procedure Rules which provide for the grounds that a court should consider in granting an order of stay as follows:

“(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.”

8. Counsel submitted that the Application for stay of execution was filed within thirty (30) days from the date of the Judgment of the trial court and thus was filed without unreasonable delay. Counsel referred the court to the case of **Jaber Mohsen Ali & another vs. Priscillah Boit & another [2014]** where the court was of the view that:

“The Applicant needs to demonstrate three elements. There must be demonstration that substantial loss will result if stay is not granted; secondly the application must be made without unreasonable delay; and finally, there needs to be security for the due performance of the decree. Much has been said about the respective strengths of the cases of the parties but that is not a consideration under Order 42 Rule 6. Apart from the three elements, the essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful applicant only gets a paper judgment.”

9. Learned counsel submitted that unless the orders sought in the Application are granted, the Applicant will suffer monumental and irreparable harm owing to the fact that he had conducted extensive cultivation on the said parcel of land for seven (7) years now.

10. Learned counsel submitted that the Applicant has an arguable Appeal which revolved around the issue of fraudulent registration of land which affects his rights to land as enshrined under Article 40 of the Constitution and Section 24 of the Land Registration Act.

11. It was their humble submission that granting the orders sought would not prejudice the Respondents since the Applicants have all along been in possession of the said land; that failure to do so will occasion the Applicant a great injustice and that it is in the interest of justice that the orders sought be granted.

12. The 1st Respondent's advocate filed his submissions dated 19th October, 2020. Counsel submitted that the Appellant/Applicant was seeking a negative order which was not capable of execution. Counsel relied on the case of **Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the Court of Appeal (Kantai JA) held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation od stay- called a “positive order”- either an order that has not been compiled with or has partly been compiled with. See for this general proposition, the holding of the Court of Appeal in Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘...an order for stay of execution must be intended to serve a purpose...’ (emphasis supplied)

13. It was submitted that the Applicant has not met the threshold of granting a stay of execution order and that the Applicant should be compelled to deposit the costs of the suit in the subordinate court and the costs of the Appeal in court because the 1st Respondent was apprehensive that she will not be able to recover the same if the Appeal was dismissed.

Analysis and findings:

14. I have considered the Application, the submissions by counsel and authorities. The only issue that arise for determination is whether this court should stay the execution of the Judgment of the lower court delivered on 27th May, 2020 in Machakos CMCC No. 110 of 2018.

15. Order 42 Rule 6(2) of the Civil Procedure Rules provides for the grounds that a court should consider in granting an order of stay as follows:

“The court must be satisfied that substantial loss will result to the Applicant unless the order of stay is granted; the order is made without unreasonable delay; and the Applicant gives such security as the court may order for the due performance of such decree or order that may ultimately be binding on the Applicant.”

16. The Judgment of the lower court shows that the Applicant herein sued the Respondents seeking for a declaration that he has a legal and equitable interest in land known as Machakos Town Block 3/480. The Defendant filed a Defence denying the allegations raised in the Plaintiff.

17. After hearing the matter, the court dismissed the Applicant's Plaintiff, with a rider that the 2nd Respondent do refund the Applicant the purchase price of Kshs. 2,000,000. The Applicant's claim having being dismissed, there is no positive order that was made against the Applicant capable of being stayed.

18. In the case of *Co-operative Bank of Kenya* (*supra*) Kantai JA., held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation of stay- called a “positive order”- either an order that has not been complied with or has partly been complied with. See for this general proposition, the holding of the Court of Appeal in Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘...an order for stay of execution must be intended to serve a purpose...’”

19. Considering that the lower court did not impose any positive obligation on the Applicant which this court should delay or stay pending the hearing of the Appeal, it is my finding that the order of stay cannot issue. The order of stay of execution of the Judgment of the lower court will not serve any purpose in the circumstances of this case.

20. For those reasons, I dismiss the Application dated 19th June, 2020 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE