



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 127 OF 2014

RICHARD NYONGESA MAYAMBA.....PLAINTIFF

VERSUS

JANE NAMONO MERU.....DEFENDANT

CONSOLIDATED WITH

ELC CASE NO. 4 OF 2019 (O.S)

JANE NAMONO MERUPLAINTIFF

VERSUS

RICHARD NYONGESA MAYAMBADEFENDANT

R U L I N G

By a Judgment delivered on 22nd October 2020, this Court dismissed the suit by **RICHARD NYONGESA MAYAMBA** (plaintiff herein) and instead allowed the Counter – Claim by **JANE NAMONO MERU** (defendant herein) with respect to the claim over land parcel **NO NORTH MALAKISI/SOUTH WAMONO/526** (the suit land). Having found that the defendant had acquired the title to the suit land by way of adverse possession, this Court directed that the plaintiff executes all the relevant documents to facilitate transfer of the said land to the defendant within 30 days of delivery of the said Judgment and in default, the Deputy Registrar of this Court would be at liberty to do so on his behalf. The defendant was also awarded costs of the dismissed suit and the Counter – Claim.

By a Notice of Motion dated 3rd December 2020 and filed herein on 4th December 2020, the plaintiff seeks the following orders: -

- a. That there be a stay of execution of the Decree herein pending the hearing and determination of the intended appeal at the Court of Appeal.**
- b. Costs be in the cause.**
- c. Any other order this Honourable Court may deem fit and just to make.**

The application is predicated on the grounds set out therein and is also supported by the plaintiff's affidavit dated 3rd December 2020.

The gravamen of the application is that being dissatisfied with this Court's Judgment delivered on 22nd October 2020, the plaintiff lodged a Notice of Appeal on 5th November 2020. That the appeal has high chances of success and should the execution process proceed, he stands to suffer irreparable loss and damage.

The application is opposed and the defendant filed a replying affidavit in which she has averred, inter alia, that the application ought to be filed in the Court of Appeal as provided in **Rule 5(b)** of that Court's Rules. That the intended appeal has no chances of success and the plaintiff has not demonstrated the nature of loss that he will suffer. That the application is a ploy to stop the defendant from enjoying the fruits of the Judgment and should be dismissed with costs.

The application has been canvassed by way of written submissions. Those have been filed by the plaintiff acting in person and by **MS**

MUMALASI instructed by the firm of ANNET MUMALASI & COMPANY ADVOCATES for the defendant.

I have considered the application, the rival affidavits and the submissions filed.

The plaintiff seeks the main order that there be a stay of execution of the decree herein pending the hearing and determination of an intended appeal to the Court of Appeal. Although the plaintiff has not cited the law upon which the application is founded, the relevant provision is **Order 42 of the Civil Procedure Rules**.

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows:-

6(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 sub rule (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.” Emphasis added.

It is clear from the above that the plaintiff herein was required to satisfy the following conditions in order to justify the grant of an order for stay of execution pending appeal: -

- 1: Sufficient cause.**
- 2: Demonstrate that he will suffer substantial loss unless stay is granted.**
- 3: Offer security.**
- 4: File the application without unreasonable delay.**

In **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410, PLATT Ag JA** (as he then was) stated the following on the issue of substantial loss as a condition for granting an order of stay of execution pending appeal: -

“It is usually a good rule to see if Order XL1 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 some 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.”

In the same case, **GACHUHI J.A** (as he then was) added that: -

“It is not sufficient by merely stating that the sum of Kshs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgment. What assurance can there be of the appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgment.” Emphasis added.

In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN 1963 LTD 1990 KLR 365**, the Court of Appeal addressed the issue as follows: -

“Thus the superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.” Emphasis added.

Guided by the above, it is clear that the Judgment herein was delivered on 22nd October 2020. This application was filed on 4th December 2020 some six (6) weeks later. I will not consider that delay to be unreasonable taking into account the fact that the Judgment was delivered by way of email. However, it has been stated that any delay must be explained. The plaintiff has therefore surmounted the hurdle of delay.

The plaintiff was also required to demonstrate that unless the order for stay is granted, he will suffer substantial loss. And it is not enough for the plaintiff to simply aver, as he has done in paragraph V of his application: -

V “That the plaintiff/Applicant shall suffer irreparable loss and damage should the said appeal which has high chances of success succeed when execution is already carried out.”

The plaintiff must go further and show what loss he will suffer and that it will indeed be substantial loss. This Court has already found that it is the defendant, and not the plaintiff, who has always been in occupation and possession of the suit land. There is nothing to suggest that the defendant intends to dispose of the suit land once it is registered in her names in compliance with this Judgment. The plaintiff has land elsewhere at **KHABUKOYA “B”** village where he buried **AMINA** the wife to **GAVA CHIRO** who was the first registered proprietor of the suit land. The execution of this decree will not render him destitute. The plaintiff has therefore been unable to demonstrate that he will suffer any substantial loss if this application is dismissed.

Finally, the plaintiff was required to offer security **“for the due performance of any such decree or order as may ultimately be binding on him.”** He has made no such offer nor even suggested that he is ready and willing to abide by any such conditions that the Court may impose.

The up – shot of all the above is that the Notice of Motion dated 3rd December 2020 and filed herein on 4th December 2020 does not meet the threshold of the applicable law. It is devoid of any merit and is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

25th February 2021.

Ruling dated, delivered and signed in Open Court at **BUNGOMA** on this 25th day of February 2021 as the plaintiff is now acting in person following his notice dated 4th November 2020 and has no email address to which the ruling can be emailed.

Boaz N. Olao.

J U D G E

25th February 2021.

25/02/2021

Coram: Hon. B. N. Olao JUDGE

CA: Joy

ORDER

On 2nd February 2021, I had directed that this ruling would be delivered in Open Court today since the plaintiff has no e-mail address to which it can be sent in keeping with the **COVID – 19** pandemic guidelines.

However, he has not turned up in Court and it is now 3:30 pm. The ruling be e-mailed to the defendant’s Counsel to-day. The Deputy Registrar to write to the plaintiff at his last known address to come for a copy of the ruling at his convenience.

Boaz N. Olao.

J U D G E

25th February 2021.