



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 407 OF 2016

1. JOSEPH KIPCHIRCHIR BIRIR

2. JULIE JEROP KOECH.....PLAINTIFFS/RESPONDENTS

VERSUS

RISPER JEROTICH KIPTUM.....DEFENDANT/APPLICANT

RULING

1. The application before me for determination is the Notice of Motion dated 9th July, 2020 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and all enabling provisions of the law. The defendant/applicant is seeking mainly orders of stay of execution of the decree and judgment delivered by this court on 8th July, 2020 pending hearing and determination of the Appeal filed.

2. The application is premised on the grounds on the face of the motion and supported by the affidavits of Risper Jerotich Kiptum sworn on 9th July 2020, and further affidavit sworn on 10th September, 2020. The applicant has sworn that this court delivered a judgment herein on 8th July, 2020 in favour of the respondents. That being aggrieved, the applicant filed a notice of appeal and made an application for typed copies of proceedings for purposes of lodging an appeal in the Court of Appeal. The applicant avers that the said judgment delivered on 8th July, 2020 concerns a parcel of land known as Kilifi/Mtwapa/3834 which consists of the applicant's homestead. The applicant is apprehensive that she may be evicted at any time which action will render the applicant and her family homeless and destitute. The applicant states that she resides on the said land together with her family whereby she has put up permanent stone dwelling houses, shop, fish pond, drilled a borehole, cattle pen among other developments. The applicant further states that she carries out farming activities, including rearing cattle, goats, chicken and has planted crops. The applicant stated that all these developments are clear from the pleadings and evidence on record, and has also annexed some photographs showing the said developments. It is the applicant's case that she has been in open and continuous occupation of the suit property together with her family and workers since 2002 and calls the property her home. It is the applicant's contention that the execution and consequent eviction will occasion her substantial loss and untold suffering since they will be rendered homeless and destitute as they have no other home to go to. The applicant is apprehensive that if the orders sought are not granted, the respondents will execute the judgment by demolishing the applicant's houses, shop, fish pond among other developments and evict the applicant and her family. Relying on legal advice the applicant believes that she has a good appeal capable of succeeding and that the execution of the decree herein by way of eviction of the applicant will render the intended appeal nugatory. The applicant states that she is ready and willing to abide by all the conditions the court may impose on the application for stay.

3. The application is opposed by the respondents through a replying affidavit of Joseph Kipchirchir Birir sworn on 13th August 2020 and another sworn on 7th September, 2020. It is the respondents contention that the application simply serves to delay the final conclusion of this suit. It is deposed that the applicant has a home in Mtwapa where she rents and is therefore not homeless. That the animals on the land can be taken to another farm or place, adding that every crop has a season for planting and harvesting to avail vacant possession. The respondents are also of the view that the applicant can relocate to her home upcountry. That as per the requirements of Order 42, the applicant has not shown the substantial loss that may result to her unless the orders are made in her favour. The respondents contend that the applicant never financed any development activity on the suit land. That the main house was improved using proceeds of milk and beef sales from cattle that were on the farm at the time, adding that it was irresponsible for the applicant to continue putting up a shop or fish pond on the property knowing fully that the owner requires her ultimate removal from the said land. The respondents aver that the assets on the land can be relocated in the intervening period. That the applicant has not offered any security as to the due performance of the decree as may ultimately be binding on her. The respondents also accuse the applicant of disrespecting the court and gave examples of messages sent by the applicant and also accused the applicant of building a new shop on the land which was not there during the pendency of the suit. The respondents want the application dismissed with costs.

4. The application was canvassed by way of written submissions. The applicant relied on the case of **Butt-v- Rent Restriction Tribunal (1982)KLR 417** in which the Court of Appeal gave guidance on how a court should exercise discretion in an application for a stay of

execution. The applicant submitted that she will suffer substantial loss unless the orders for stay of execution sought herein are issued, and the appeal, if successful will be rendered nugatory as the applicant may inter alia, be evicted from the suit property. That it will be impossible to value or measure what is fair value and or remuneration due to the applicant once eviction takes place. It is the applicant's submission that the application herein was made without unreasonable delay. The applicant's counsel relied on the case of **Beatrice Ndunguri Mwai & Another –v- Sicily Wawira Titus & Another(2020) eKLR; Mugar –v- Kunga (1988)KLR** and submitted that the applicant is willing to abide by directions given by the court for due performance of the decree. That in this case, the suit property is registered in the names of the respondent and as such, that is sufficient security to preserve the interest of the respondents over the suit property pending the hearing and determination of the pending appeal. The applicants counsel therefore urged the court to grant the order of stay of execution without demanding that the applicant furnishes security for the due performance of the decree. They relied on the case of **Wanjala Ojombo Mubweka & Another –v- Leonard Ongweni Barasa (2020)eKLR**. The applicant also urged the court to grant prayer 4 of the application to ensure full compliance with any orders that the court may issue.

5. On their part, the respondents submitted that the applicant has no legal interest over the suit parcel of land as her relationship with the land was tied down to her employment relationship with the respondents. That the applicant only managed to reside on the land by the permission of her employers who are the proprietors of the suit land. The respondent's counsel relied on the case of **Wairimu Mburu –v- Chege Thaiya (2019)eKLR; Delamere Estates –v- Ndungu Njai & Others (2006)eKLR, Wellington Lusweti Barasa & 75 Others –v- Lands Limited & Another (2014)eKLR and Mbira –v- Gachuhi (2002)1EA 138**. It is the respondents' submission that the application herein lacks a foundation as to why it should be granted, adding that it is nothing more than to delay the respondents fruits of their success in the judgment and decree herein. That a stay will offend the old age adage that "justice delayed is justice denied", now a principle of justice in Article 159 of the constitution. The respondents therefore urged the court to have the application dismissed with costs.

6. I have considered the application, the affidavits on record, the submission filed and the authorities cited. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which 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 to it seem just, and any person aggrieved by an order of stay made by the court from whose decisions 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 such application has been made without undue delay;

(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.

7. The relief is discretionary but the discretion must be exercised 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. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the applicant unless stay of execution is granted; and thirdly 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. From the record, the decree appealed against was made on 8th July, 2020 and the application herein was filed on 10th July 2020. This was after only two days. The application was therefore made timeously.

9. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicant, I wish to refer to the case of **Kenya Shell Limited –v- Benjamin Karuga Kigibu & Ruth Wairimu (1982-1988)KAR 108** where the Court of Appeal stated:

“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. ”

10. In the case of **Absalom Dora –v- Turbo Transporters (2013)eKLR**, it was stated that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree- holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. ”

11. The Court of Appeal in the case of **Butt –v- Rent Restriction Tribunal (supra)** while considering an application of this nature had this to say: -

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements

5. The court in exercising its power under Order XLI Rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. ”

12. In the present case, the applicant has stated that she will suffer substantial loss unless stay of execution is granted because the respondents are likely to evict her and the developments carried out on the suit property may be demolished. That if the eviction and demolition are carried out, the appeal will be rendered nugatory.

13. In this case, it is not in dispute that the applicant has been residing in the suit property for some years and has some developments thereon, including permanent houses, a shop, fish pond etc etc. From the material on record, I am satisfied that unless the orders sought herein are granted, the applicant may be evicted and her developments demolished. This no doubt will result in substantial loss and may render the appeal nugatory. In this case, the decree awarded by the court was for vacant possession and permanent injunction. The applicant has been staying on the suit property for several years. The suit property is registered in respondents' names. Therefore, I do not think that an order for security for costs is necessary in the circumstances of this case.

14. The upshot is that I find the application dated 9th July, 2020 has merit and the same is allowed. Costs of the application shall abide the outcome of the appeal and shall follow the event.

DATED, SIGNED and DELIVERED at MOMBASA this 22nd day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE