



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 34 OF 1998**

**EUNICE MUGURE MUCHORI.....1<sup>ST</sup> PLAINTIFF**

**IBRAHIM BAIYA MUCHORI.....2<sup>ND</sup> PLAINTIFF**

**JIM B. MUCHORI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PETER MACHARIA.....DEFENDANT**

**RULING**

**The Application**

1. The application dated **18/12/2020** was filed in court on **21/12/2020** by the defendant has been bought under **Sections 1A, 1B** and **3A** of the **Civil Procedure Act, Order 42 Rule 6** of the **Civil Procedure Rules**. The defendant seeks the following orders:-

**(1) ...spent**

**(2) ...spent**

**(3) That the court be pleased to grant a stay of execution of the judgment made by this court on the 17/12/2020 pending the hearing and determination of the defendants intended appeal before the Court of Appeal.**

**(4) That the costs of this application be provided for.**

2. The application is supported by the affidavit of the defendant sworn on **18/12/2020** and also his supplementary affidavit sworn on **25/1/2021**. The grounds in the affidavits in support of the application and on the face of the application are that the applicant intends to appeal against the decision of this court and that the defendant has an arguable appeal which would be rendered nugatory if the orders sought were not granted. It is also urged that the application has been brought without delay and that the defendant is ready to abide by any conditions as to security.

**The Response**

3. In response to the application the plaintiffs filed a replying affidavit of the 1<sup>st</sup> plaintiff sworn on **9/1/2021**. The plaintiffs' response is that the plaintiffs' advocate has not been served with a copy of the notice of appeal and the letter requesting for certified copies of proceedings and no copies thereof have been attached to the supporting affidavit; that the litigation has taken a lengthy period; that no draft memorandum of appeal has been exhibited to show the possible merits of the appeal; that the applicant has never been in possession of the suit land and can not therefore suffer any substantial loss if the stay order is not granted and that no risk of such loss has been demonstrated. It is also urged that that no particular security has been offered and that in any event the plaintiffs are not of the intention to dispose of the suit property.

**Submissions**

4. The plaintiffs/respondents filed their written submissions on **25/1/2021**. The defendant filed his submissions on **10/2/2021**.

**Determination**

5. The main issue arising in the instant application is whether this court should issue a stay of execution order pending appeal.

6. The conditions for the grant of a stay of execution pending appeal are set out in **Order 42 Rule 6(1)** 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 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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

7. Given the import of the above provisions, the main matters to be considered in the instant application are whether:-

**(i) There is an appeal in place;**

**(ii) The application was made without unreasonable delay;**

**(iii) Substantial loss may result unless the order is made; and**

**(iii) The Applicant is prepared to offer security.**

8. I have noted that there is a Notice of Appeal that was filed in the court record by the applicant on **21/12/2020** which date is about **4 days** from the date of the delivery of the judgment. However the plaintiff's submission is that while such a notice of appeal has been filed but not shown to have been served, the stay order can not be based on it. In response thereto, the applicant's supplementary affidavit in the matter explains that the applicant was only waiting for the signed and sealed copies of the notice of appeal for purposes of service. I find that excuse plausible.

9. The validity of the notice of appeal having been challenged by the plaintiffs, is it necessary for this court to delve the issue at this stage?

10. The provisions of **Order 42 Rule 6 (4)** provide as follows:

**“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”**

11. I have not seen any case law cited by the respondents to support their point of view. Further I have examined the provisions of **Rule 75** of the **Court of Appeal Rules** which provides as follows:

**“(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court.**

**(2) Every such notice shall, subject to Rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**

**(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only for the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.**

**(4) When appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.**

**(5) Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.**

**(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant”.**

12. The custodian of the appellate process is the Court of Appeal. It is the duty of the Court of Appeal under **Rule 84**, where a person affected by an appeal has so applied, to strike out a notice of appeal on the ground that the appeal does not lie or that some essential step in the proceedings has not been taken, or has not been taken within the prescribed time. This jurisdiction having been granted to the Court of Appeal in such specific terms, this court is therefore not inclined to usurp it to declare the notice of appeal invalid for the purpose of the instant application. I therefore find that there is an appeal in place within the contemplation of **Order 42 Rule 6(4)** for the purposes of the instant stay application.

13. Regarding whether the application was filed without unreasonable delay I note that the same was filed only **4 days** from the date of delivery of judgment and hence there was no unreasonable delay in its filing.

14. The third issue to address is whether substantial loss may result perchance the stay order sought is not made.

15. The applicant, convinced that substantial loss may result, stated that the respondents may dispose of the suit land and cited the case of **Richard Muthusi Vs Patrick Gitumu Ngomo & Another 2017 eKLR** and quoted it to the following extent:

**“56. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:-**

**Substantial loss may result to him unless the order is made;**

**That the Application has been made without unreasonable delay; and**

**The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.”**

16. The respondents on the other hand seek to persuade this court that no such loss may be suffered by the applicant. One of their grounds for that belief is that first, the applicant has not demonstrated the possibility of the said loss. The second is that according to their replying affidavit the plaintiffs are not inclined to dispose of the suit land and the applicant may still be able to execute the judgment at the end of his appeal if successful.

17. The respondents cite the case of **James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR** and quote the following passage therefrom:-

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein V. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

18. It is clear from the impugned judgment of this court that the applicant has not been in possession of the suit land. There is therefore no risk of eviction and destruction of property or interruption of any stay. I find that there is no risk of substantial loss in the circumstances of this case.

19. Regarding the arguability of the appeal the applicant states that the court awarded the plaintiffs more acreage than that which was sought by them. However retracing the process of this dispute, this court finds that the applicant’s father had no land and was awarded land by the tribunal which award was nullified by the High Court in a Judicial Review Application. This court thus observed rightly as quoted by the respondents that:-

**“24. The defendant admits of the existence of the Tribunal award, the magistrates court judgment and the Judicial review proceedings that nullified both the award and the judgment. In this court’s view it behoved the defendant in the**

circumstances of this suit to present evidence to demonstrate that there was a successful appeal against the decision of the High Court in the judicial review proceedings and this he did not do. He also admitted that his father did was not in possession of the 9 acres by the time the Survey Committee of Wamuini Farm finalised its work. In this court's view, the nullification of the award and judgment t of the Tribunal and the Magistrate's court respectively left the defendant's father in the same position that he was in before the award: landless. It is logical then that the late John Muchori Baya was also left in the same position that he was in before the award, that is, as owner of the suit land."

20. The respondents relying on the case of **Geoffrey Wanjala Wafula & Another V Jairus Wakhungu Mulunda 2018 eKLR** cited the following passage:-

**"Having regard to the previous proceedings and the circumstances of the dispute, the applicants have not demonstrated that the pending appeal is capable of conferring title to a portion of the disputed land to the applicants which would justify a right to continued occupation of the land registered in the name of the respondent.**

**Further, since there is no pending claim to the suit land by the applicants in their own right other than the appeal, and as the applicants have another piece of land, we are not satisfied that the intended appeal would, if successful, be rendered nugatory. In the event the appeal succeeds the applicants could regain possession."**

21. The respondents also cite from the case of **Mary Wambui Muriithi Vs Margaret Wanjiku Kariuki [2017] eKLR** as follows:-

**"21. In dealing with the plaintiff's application I must take caution so as not to prejudice the pending appeal. An in-depth discussion of the grounds of appeal is to be avoided.**

**22. However, after perusing the grounds of appeal and relating them to the above analysis of the evidence taken at the hearing of the suit and also the judgement of this court, I am unable to say that the plaintiff has even one arguable ground. I also do not find that there is any evidence adduced to the effect that the appeal would be rendered nugatory by the refusal to grant a stay of execution as prayed by the plaintiff. Indeed the defendant has been portrayed as one who has been merely intent on entering the land and reaping from its fruits."**

22. This court is in agreement that the cited decisions are appropriate in the present instance.

23. In this court's view the contents of **paragraph 24** of the judgment intended to be appealed from is clear evidence that the applicant has no arguable appeal for the purpose of enabling this court grant a stay as sought.

24. The applicants have offered to abide by the court's orders as to security. However the conditions for the grant of a stay order are to be construed conjunctively and not disjunctively, that is to say, they must all be in existence at any given time for an order of stay to be issued. Since the applicant has failed to demonstrate that there is risk of substantial loss or that he has an arguable appeal, his application must fail. Consequently, I dismiss the application dated **18/12/2020** with costs to the respondents.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 22<sup>nd</sup> day of February, 2021.**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**