



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

CIVIL APPEAL NO. 12 OF 2020

LEONARD AWORI.....PLAINTIFF/RESPONDENT

VERSUS

PATRICK OCHIENG...APPELLANT/DEFENDANT

RULING

1. By a Notice of Motion dated **29th December, 2020** brought under **Section 1, 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act, Order 22 Rule 22** of the **Civil Procedure Rules 9 Part 1 Rule 3) Cap 8 Laws of Kenya**, the appellant sought for orders as follows:-

1. ...spent

2. ...spent

3. THAT there be stay of execution of the Decree herein pending the hearing and determination of the intended appeal by the applicant.

4. THAT costs of this Application be provided for.

2. The grounds in which the application is premised are as follows: that judgment was entered against the Applicant on the **16th December, 2020**; that the applicant is apprehensive that the Respondent may proceed to execute the said judgment; that the appellant being aggrieved by the said judgment and decree has preferred an appeal against the entire judgment delivered on **16th December, 2020**; that the appeal has high chances of success; that it is in the interest of justice that the application should be granted and that the Respondent shall not be prejudiced if the application is allowed.

3. The Application is supported by the supporting Affidavit of Patrick Ochieng sworn on the same date. He depones that the Respondent filed the matter and the same was set down for hearing on **4th December, 2019** when the Respondent testified however he was stood down midway and the trial court (Hon. PK Mutai SPM) who ordered that the County Surveyor visits the suit land, make a report and file it in court; that the surveyor visited the ground and filed a report dated **23/10/2020**. The trial court then ordered the parties to file their submissions in respect of the surveyor's report; and the matter was set for mention on the **9/12/2020** for filing of submissions; however, the court delivered judgment on the main suit; that the court overlooked the surveyors' report dated **23/10/2020**; that where there are two conflicting reports regarding the same matter it has to be set down for hearing; that he has preferred an Appeal against the entire judgment and the said appeal has high chances of success; that he is apprehensive that the Respondent/Plaintiff shall execute the judgment thereby rendering the appeal nugatory and that he shall suffer irreparable damages if the order for stay of execution of the decree is not granted.

4. The Application was opposed by the Respondent by a Replying Affidavit sworn and dated **11th January, 2021** which I have perused.

5. Both parties filed their submissions on the instant application as directed by the court; the applicant filed his on the **20/01/2021** whereas the Respondent filed his on **08/02/2021**.

DETERMINATION AND ANALYSIS

6. I have carefully read through the Application, the Supporting Affidavit, the Replying Affidavit and the rival submissions filed by the parties herein and I find that the only issue for determination is whether the order for stay of execution sought should issue?

7. The grounds for the grant of an order for stay of execution are to be found in **Order 42 Rule (6) (1). Order 6 Rule 1(2)** states as follows:-

“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. In the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR the Court of Appeal (Gicheru JA, Chesoni & CockarAg. JA) held that:*

“...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.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

9. The Court has the discretion to order for stay of execution; however, the same has to be exercised judiciously.

10. The Court takes into consideration that the purpose of stay of execution pending appeal is to preserve the subject matter. In the case of *Consolidated Marine -vs- Nampija & Another Civil App. No. 93 of 1989 (Nairobi)* the Court held that:

“The purpose of the application for stay pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

11. The court is alive to the fact that the Respondent has to enjoy the fruits of his judgment in the lower court.

12. Has the Appellant satisfied the conditions for the grant of stay of execution?

13. Regarding the issue of unreasonable delay, I note that judgment was entered on the **16/12/2020** and the present application filed on the **29th December, 2020**. The application was filed **13 days** after judgment was delivered, in my view that does not amount to unreasonable delay; it was brought timeously.

14. I have perused the trial court file being **ELC. No. 85 of 2019** which the application emanates from. Indeed, the Applicant was ordered to remove the structures he has built. It was the plaintiff’s case that the structures were built on the road reserve blocking the plaintiff from accessing his parcel of land known as **Kiminini/Kinyoro Block 3/Matisi/540**. The removal was to be done within the next **60 days** failure to which the O.C.S Kitale Police Station and the Assistant County Commissioner Matisi Location would, according to the court’s directions, to evict the Defendant at his own cost. In his supporting affidavit, the Applicant depones that he shall suffer irreparable damages if the order of stay pending hearing of the appeal is not granted. I find that if the applicant is compelled to remove the structures before the appeal is heard and determined, the appeal may be rendered nugatory and he runs risk of suffering substantial loss.

15. Substantial loss is what has to be prevented by preserving the *status quo* because such loss will render the appeal nugatory. See the case of **Mukuma -vs- Abuoga [1988] KLR 645**.

16. The appellant has filed a draft memorandum of appeal together with the instant application which I have also perused. I find that the appellant has an arguable appeal. He has also proved that he will suffer substantial loss if the decree is executed against him and his appeal will be rendered nugatory if the application is not allowed.

17. I find that the application dated **23/12/2020** is merited and I hereby allow it in terms of **Prayer No. (3)** on condition that the appellant/applicant shall file and serve his record of appeal within **45 days** of this order in default of which the stay of execution order will automatically lapse and the plaintiff will be at liberty to execute. The costs of the application shall be costs in the appeal.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 22nd day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC KITALE.