



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC 145 OF 2017

JOSEPH NDUNGU KIRERU (Suing in his capacity as the

Administrator of the estate of MWANGI MUIRU(Deceased)...PLAINTIFF/APPLICANT

VS

ELIJOHN CHEGE MUGO.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff filed an application on 5/2/2020 seeking orders for stay of execution of the Judgement delivered on 11/12/19. The application is premised on the grounds annexed thereto and the supporting affidavit of Joseph Ndungu Kireru sworn on the 4/2/2020.
2. The Applicant states that he is dissatisfied with the judgement of the Court delivered on the 11/12/2019. That he filed a Notice of Appeal on the 3/2/2020. That he is yet to file the Memorandum of Appeal due to the delay in obtaining the certified typed proceedings from the Court. That the Respondent has started erecting new and permanent structures on the suit land and that the Court should restrain him in order to maintain status quo.
3. The application is opposed by the Respondent who contends that the Applicant has not shown any probability of success in the intended Appeal. That the application is devoid of merit and is merely intended to delay the execution of the judgement and the transfer of the suit land to the Respondent thus denying him the right to enjoy the fruits of his judgment.
4. In his further supplementary affidavit filed on the 21/12/2020 the Applicant reiterated the contents of his supporting affidavit.
5. Parties elected to file written submissions but by the time of writing the ruling it is only the Applicant who has filed.
6. I have read and considered the written submissions.
7. Order 42, Rule 6 (2) of the Civil Procedure Rules provide 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. The Applicant has stated that he filed the application after the period allowed for the December Court vacation. In my view the application does not suffer from delay. It was filed timeously.
9. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated: -

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”
10. Has the Applicant shown substantial loss that he is likely to suffer? The Applicant has averred that the subject matter is land and therefore sensitive. That the Respondent is constructing permanent structures on the suit land and the Court should order status quo so that the Appeal is not rendered nugatory. It is this that he terms as substantial loss.
11. I have perused the record and it is evident that the Applicant applied for typed proceedings in the suit on the 17/12/2019 and on the

17/2/2020 the Court through a letter of even date informed the Applicant that the proceedings were ready for collection upon payment of the balance of the requisite charges. The plea therefore that the Applicant has been prevented from filing his memorandum of Appeal because the typed proceedings are yet to be availed is not true. Filing the Memorandum of Appeal is a sure way of a litigant's preparedness to attend to his Appeal. It is true that the Court cannot sit on Appeal on its own decisions however the memorandum of Appeal cannot be ignored in determining an application for stay of execution. The memorandum of Appeal assists the Court to determine the nature of the grounds filed before the appellate Court and whether the execution if allowed would render the Appeal nugatory.

12. The Appellate rules provide that the memorandum and the record of Appeal must be filed within 60 days failure which the Notice of Appeal lapses, this period lapsed either on 20/2/20 or on 17/3/20 following the delay in obtaining proceedings. The Defendant rightly contends that there is no Appeal in existence given that there is no evidence that the record and the memorandum of Appeal has been filed and /or leave was obtained to file the Appeal out of time. The Applicant admits that he has been unable to file his record of Appeal, this has not been regularized to date.

13. That said it is trite that an Appeal perse is not sufficient to grant stay of execution pending Appeal. The law is that the existence of an Appeal does not operate as stay, further still, the fact that one has a good Appeal is a not enough. This was the decision in the case of **Catherine Njeri Maranga v Serah Chege & Another [2017] eKLR where the Court held;**

“From the Provisions of Order 42 Rule 6, it is clear that the Court must be satisfied that there is “*sufficient cause*” to grant a stay. Further, the filing of an Appeal does not, *ipso facto*, guarantee stay of execution of the Court's orders. The two conditions which must be considered are: whether the Court is satisfied that the Applicant will suffer substantial loss if the order is not made; and secondly, that the Applicant is willing to give such security for the due performance of the decree or order in issue, as may ultimately be binding on him or her.

14. Likewise in the case of **Carter & Sons Ltd -Vs- Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997 at Page 4 the Court of Appeal held as that:**

“ . . . the mere fact that there are strong grounds of Appeal would not, in itself, justify an order for stay. . .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, and the application must, of course, be made without unreasonable delay.”

15. The Applicant argues that the Defendant has constructed on the land. That may be so having succeeded in his suit. The question is whether this is something that is reversible? Is a construction of a house an irreversible act on the land. In my view I think not. In other words the construction is not enough ground to demonstrate substantial loss. This may be compared with the decision of the Court in **James Wangalwa & Another -vs- Agnes Naliaka Cheseto [2012] eKLR** where the Court stated that 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. The reason is because execution is a lawful process.

16. It was the duty of the Applicant to place before the Court evidence of substantial loss that is likely to be suffered if the stay is not granted.

17. For the above reasons the Court is not persuaded that the Applicant is deserving of the orders.

18. The application is dismissed with costs to the Respondent.

19. **It is so ordered.**

DATED, DELIVERED AND SIGNED AT MURANGA THIS 18TH DAY OF FEBRUARY 2021.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Nderitu HB for Ngigi for the Plaintiff/Applicant

Momanyi HB for Gatheru for the Defendant/Respondent

Njeri, Court Assistant