



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 160 OF 2017

1. RAEL MUSYOKI

2. MUTHIANI MUSYOKIAPPLICANTS

-VERSUS-

PAUL MUTUKU KISWIIRESPONDENT

RULING

1. The application for determination is dated 6th July, 2020 filed by the Applicants under certificate of urgency on even date. It is brought under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law.

2. The Applicants seek the following Orders:

i. Spent.

ii. Spent.

iii. That this Honourable Court be pleased to stay the execution of the judgment delivered on 21/05/2020 pending the hearing and determination of the intended appeal.

iv. That the costs of this application be provided for.

3. The application is supported by the affidavit of Rael Musyoki sworn on the same day. The basis of the application is that judgment was entered in favour of the Respondent on 21st May 2020 and that the upshot of it is that the Applicants are now facing the prospect of imminent eviction from the suit property known as Land Parcel No. Makueni/Kiou/1591. The Applicants also contend that they have filed an appeal against the Judgment at the Court of Appeal and that the appeal will be rendered nugatory if the orders sought are not granted.

4. The application is opposed by Paul Mutuku Kiswii vide the replying affidavit sworn on 28th July, 2020. He has deposed that the application has been made following an unreasonable delay which has not been explained by the Applicant. The Respondent also contends that the Applicant has not demonstrated that he will suffer substantial loss should stay of execution of the judgment herein not be granted. The Respondent further argues that application is frivolous, an abuse of the court process and prays that the same be dismissed with costs.

5. The parties duly filed their respective submissions as per the directions issued on 6th July, 2020. It is common ground from the parties' submissions that the prerequisite conditions for a grant of the orders sought herein are well spelt out under Order 42 Rule 6 (2) of the Civil Procedure Rules (2010). These are: -

i) That substantial loss may result to the Applicant unless the order is made;

ii) That the application has been made without unreasonable delay;

iii) That security has been given by the Applicant for the due performance of the decree as may ultimately be binding on him.

6. On substantial loss, the Applicants' contention is that the Respondent will proceed to evict them from the suit property, where they have been residing for a very long time. They are apprehensive that the intended appeal will be rendered nugatory in the event the Respondent executes the judgment before the appeal is heard and determined. The Applicants have cited and annexed two authorities in support of the application namely:

- **Patel v East Africa Cargo Handling Services Ltd [1974] EA 75; and**
- **Joseph Gitahi Gachau & Another v Pioneer Holdings (Africa) Ltd [2014] eKLR**

7. In his submissions, the Respondent asserts that the Applicants have not demonstrated any substantial loss that they stand to suffer. He further submitted that no factual particulars or evidence has been annexed to the Applicants' supporting affidavit and as such there is no basis to find any substantial loss.

8. On the aspect of delay, the counsel submitted that judgment herein was delivered on 21st May, 2020. That Applicants then filed a Notice of Appeal on 15th June 2020 and the application herein was filed on 6th July, 2020 which is a span of about six weeks.

9. On security, the Respondent has submitted that there is no willingness by the Applicants to provide the same for the due performance of the decree. As such, it is submitted that the Applicants lack good faith in presenting this application. The Respondent relies on the following authorities:

- **Antoine Ndiaye –Vs- African Virtual University [2015] eKLR;**
- **Charles Wahome Gethi –Vs- Angela Wairimu Gethi [2008] eKLR;**
- **David Kipkoskei Kimeli –Vs- Titus Barmasai [2019] eKLR;**
- **Exclusive Mines Limited –Vs- Ministry of Mining & 2 Others [2015] eKLR; and**
- **Machira t/a Machira & Co. Advocates –Vs- East African Standard [2002] Eklr.**

10. On whether the Applicants have satisfied the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010, this Court's discretion is guided by the Court of Appeal decision in **Butt v Rent Restriction Tribunal [1982] KLR 417** where it was held as follows:

“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 [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers 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. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

11. In my view, the length of time from the date of judgment to filing the formal application herein was six weeks.

12. I also note that I had granted temporary stay of execution for 60 days which was set to lapse on 21st July, 2020. The application was thus made within sufficient time when the threat of execution became apparent to the Applicants.

13. On substantial loss, I find that the Applicants have not demonstrated in clear terms the nature of substantial loss they are likely to suffer should execution of the judgment herein proceed. In fact, the Applicants have merely repeated that they stand to suffer substantial loss without discharging the evidentiary burden attached thereto. I am minded to agree with Platt Ag. J.A. (as he was then) when he held as follows in **Kenya Shell Ltd v Kibiru [1986] KLR 416:**

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

14. Lastly, the Applicants have not expressed their willingness to abide by such order for security as this Court will order in their application. I can only agree with the Respondent's submission that the application is being made in bad faith with an intention to hamper valid execution of judgment.

15. Given the above findings, it is my view that there is no sufficient cause to inhibit the Respondent's right to enjoy the fruits of his judgment. The application is hereby dismissed with costs to the Respondent.

Signed, dated and delivered at Makueni via email this 3rd day of February, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi