



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC APPEAL NO. 12 OF 2020

PETER KIPTARUS.....1ST APPEALLANT/APPLICANT

CHARLES KIPTARUS.....2ND APPEALLANT/APPLICANT

ISAAC KIPTARUS.....3RD APPEALLANT/APPLICANT

REUBEN KIPTARUS.....4TH APPEALLANT/APPLICANT

VERSUS

KIMAIYO ARAP RONO.....RESPONDENT

AND

DIRECTOR OF SURVEYS LAND REGISTRAR.....1ST INTERESTED PARTY

ELGEYO MARAKWET COUNTY.....2ND INTERESTED PARTY

ATTORNEY GENERAL.....3RD INTERESTED PARTY

RULING

This ruling is in respect of a Notice of motion dated the 30th July 2020 by the appellant/applicants seeking for the following orders:

- a) Spent
- b) That this Honourable Court be pleased to issue orders of stay of execution of decree/judgment in Iten Principal Magistrate's Court Land Case No 7 of 2018 pending the hearing of the application inter partes and pending the hearing and determination of the appeal filed herein by the applicants.
- c) Costs for the application be provided for.

Counsel agreed to canvass the application vide written submissions which were duly filed

APPELLANT/APPLICANT'S SUBMISSIONS

Counsel for the applicant submitted that unless the orders of stay of execution of the judgment is granted the applicant risks being evicted from the suit land. It was counsel's further submission that the respondents have taken steps to execute the decree as the applicant's application in the lower court for stay was dismissed on 29th July 2020.

Counsel listed three issues for determination in an application for stay of execution and submitted that the applicant has met the requirements as stipulated in Order 42 Rule 6 (2) of the Civil Procedure Rules. The applicant must satisfy the court that:

- a) Substantial loss may result to him/her unless the order is made.

b) That the application has been made without unreasonable delay.

c) The applicant has given such security as the court ordered for the performance of such decree or order as may ultimately be binding on him.

On the issue as to whether the application was brought without undue delay, the applicant stated that the application was filed at the Lower Court on 19th June, 2020 eight (8) days before the expiry of 30 days stay of execution lapsed and a Memorandum of Appeal was then filed on 3rd June, 2020, 6 days after the delivery of the judgment hence there was no delay. That this application was filed on 4th August 2020 after the application for stay filed in the lower court was dismissed on 29th July 2020.

Counsel submitted on the issue whether the applicants will suffer substantial loss that the applicants stand to lose 2 1/2 acres of land if the said stay of execution of decree/judgment which ordered the cancellation of title of parcel No. Cherangany/Ko itu gum/13. Counsel relied on the case of **Kiraita Abuta V Richard Nyandika Nyangiya (2019) eKLR** where the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** was quoted Mativo J. stated;

"- The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto** where it was held *inter alia* that:-

"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.

Counsel also relied on the case of in **Butt —v- Rent Restitution Tribunal (1979) eKLR** which held as follows: -

"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It was counsel's submission that the applicant has an arguable appeal and relied on the case of **Miriam Chemain v Estate of Philomena Chepeitui Represented by Joseph Mariach [2018] eKLR** where the court held that :

"an arguable appeal is not one which will necessarily succeed but one that is deserving of the court's consideration "

Counsel further relied on the case of **Nairobi Commercial & Admiralty Division case NO. 422/2006 Antoine Ndiaye v African Virtual University J. Gikonyo** while dealing with the issue of stay of execution made reference to the case of **Absalom Dora v Turbo Transporters (2013) eKLR**, held that:

"The discretionary relief of the 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 do not introduce and 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 prospects that the appeal will not be rendered nugatory"

The applicants contend that where title deeds are cancelled and the records in the registry altered/amended as directed by the lower court, they are apprehensive that the appeal shall be rendered nugatory and they stand to suffer irreparably from the resulting loss of 2½ acres of land.

Counsel submitted that in case the appeal succeeds it will force the applicants' to file another case to reverse the lower court's order to reinstate the title deed. This is because in the event the lower court's order to cancel the title deed is enforced, the applicants will suffer substantial loss.

Further that the applicants are ready and willing to abide with any conditions of the court on the issue of security for the performance of the decree therefore the application should be allowed as prayed.

RESPONDENT'S SUBMISSIONS

The respondent relied on the replying affidavit to the application and stated that the application should not be allowed as he has been on the suit land since 1971 and there is a risk that the applicants may trespass on the suit land.

The respondent alluded to an injunction that had been issued restraining the appellants from interfering with the suit land on 20th January 2015 hence the appellants will not suffer any loss if the order of stay is not granted since the appellants have never been in possession and occupation of the suit property.

On the issue of security for the due performance of the decree the respondent contends that the appellants have no means and as a result are unlikely to furnish security.

Counsel submitted that it is trite law that a successful litigant is entitled to the fruits of his/her judgment and he/she may only be prevented from benefiting from such judgment within the provisions of the law as was held in the case of **Machira T/A Machira & Co. Advocates vs East Africa Standard (N02) (2002) eKLR 63** where the court stated that;

the ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That the trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse

Counsel therefore urged the court to dismiss the application with costs to the respondent

ANALYSIS AND DETERMINATION

The issues for determination in an application for stay of execution pending appeal are as set out in Order 42 Rule 6(2) of the Civil Procedure Rules which 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.”

For an applicant to be granted an order of stay of execution pending appeal he/she must establish that substantial loss may result unless the order is made, that the application has been brought without undue delay and lastly that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

The court notes that the application was filed at the Lower Court on 19th June, 2020 eight (8) days before the expiry of 30 days stay of execution lapsed and a Memorandum of Appeal filed on 3rd June, 2020, 6 days after the delivery of the judgment. The court further notes that this application was filed on 4th August 2020 after the application for stay filed in the lower court was dismissed on 29th July 2020. I find that there was no delay in the filing of this application.

On the second issue as to whether the applicants will suffer substantial loss if an order of stay of execution is not issued, the court in the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that”

This in essence means that in applications for stay of execution, the applicant must go a step further to establish the substantial loss that he would suffer. This is not ordinary loss which can just be claimed without substantiation. The applicant ought to establish that the execution of the decree/judgment will create a chain of events or state of affairs that will irreparably affect or negate the core of applicant as a successful party in the appeal.

In the case of **Silverstein –vs- Chesoni [2002]1 KLR 867** the Court held :-

“Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

The appellants/applicants contend that if the stay is not granted, there is the likelihood that their title deeds will be cancelled as ordered by the ELC Court in Iten. The import of such cancellation is that they stand to lose their land measuring 2 ½ acres and ultimately be evicted from the suit property. The appellants also stated that the respondent has taken steps to enforce the decree including the cancellation of the title deeds which has been in their possession for many years. They thus aver that should the stay of execution not be granted and subsequently their appeal succeeds, they will be forced to file a fresh case to reverse the lower court’s order and change of names once again in the land registry.

The conditions to be met in an application for stay of execution are central to the decision as to whether the order of stay of execution of decree/judgment may be granted by court pending appeal as was held in **Civil Appeal No.107 of 2015, Masisi Mwita vs. Damaris Wanjiku Njeri (2016) eKLR**, where the Court while affirming these criteria held that:

*“The application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & Another..Vs... Thornton & Turpin Ltd**, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-*

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient

Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.”

These conditions are cumulative and mandatory in nature and as such should an applicant fail in establishing a single criterion, then stay of execution cannot not be granted. In the case of **Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR** it was held that:-

“of all the four, not one or some, must be met before this court can grant an order of stay...”

The purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant. The Court therefore should balance the interest of an applicant seeking to preserve status quo and opt for the lower rather than the higher risk of injustice as was held in the case of **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**.

In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2)(2002) KLR 63** the court held that

‘it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars.’

On the third issue on security for the due performance of the decree the appellants stated that they are ready and willing to abide by the conditions given by the court. In the case of **Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee) [2019] eKLR** the court noted that:

‘offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute.’

However, in the case of **Beatrice Ndunguri Mwai & another v Sicily Wawira Titus & another [2020] eKLR** it was held that the court can ‘order security upon application by either party or on its own motion.’

The respondent stated that the applicants are of no means but did not file an affidavit to qualify the statement of means. The court has the discretion to order the applicant to provide security.

I have considered the application the rival submissions, the judicial authorities applicable and find that it would be in the interest of justice to order for stay of execution on condition that the appellants deposit the title deeds in court within the next 14 days’ failure to which the stay lapses.

DATED and DELIVERED at ELDORET this 4th DAY OF FEBRUARY, 2021

M. A. ODENY

JUDGE