



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 116 OF 2013

PAUL KINYANJUI MWANIKI - (Deceased) Substituted with

JANE WANJIRU KIBE.....PLAINTIFF

-VERSUS-

SIMON MUTHUI KAHIGA.....1<sup>ST</sup> DEFENDANT

PAUL KIRERU KAHIGA ..... 2<sup>ND</sup> DEFENDANT

THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT

RULING

**A. INTRODUCTION**

1. By a judgment dated and delivered on 31<sup>st</sup> July, 2018 the trial court entered judgment for the Plaintiff in terms of her amended plaint dated 4<sup>th</sup> June, 2015 together with costs. By the same judgement, the court dismissed the 2<sup>nd</sup> Defendant's counterclaim with costs to the Plaintiff.

2. Being aggrieved by the said judgment and decree, the 2<sup>nd</sup> Defendant lodged an appeal to the Court of Appeal being Nyeri Civil Appeal No. 174 of 2018 (*the appeal*). The said appeal is said to be pending hearing and determination.

**B. THE 2<sup>ND</sup> DEFENDANT'S APPLICATION**

3. Vide a notice of motion dated 4<sup>th</sup> May, 2020 brought under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** (*the Rules*) and **Section 3A** of the **Civil Procedure Act (Cap. 21)**, the 2<sup>nd</sup> Defendant sought a stay of assessment of costs, stay of execution of the decree and stay of further proceedings pending the hearing and determination of the appeal.

4. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Paul Kireru Kahiga on 4<sup>th</sup> May, 2020. It was contended that assessment of the Plaintiff's bill of costs shall affect the pending appeal and may lead to conflicting decisions. It was further contended that the Plaintiff shall not suffer any prejudice should the orders sought be granted.

**C. THE PLAINTIFF'S RESPONSE**

5. The Plaintiff filed a replying affidavit sworn on 22<sup>nd</sup> July, 2020 in opposition to the said application. It was contended that the application had not been filed without unreasonable since the judgment in issue was delivered on 31<sup>st</sup> July, 2018. The Plaintiff further contended that the 2<sup>nd</sup> Defendant has not demonstrated what substantial loss he shall suffer unless the orders of stay were granted. It was also contended that the 2<sup>nd</sup> Defendant had not shown how conflicting decisions shall arise if the costs of the suit and counterclaim were taxed or how the pending appeal shall be affected by such taxation. The court was consequently urged to dismiss the said application.

**D. THE PARTIES' SUBMISSIONS**

6. It would appear that the parties had agreed to canvass the said application through written submissions. The record shows that the 2<sup>nd</sup> Defendant filed his submissions on 5<sup>th</sup> November, 2020 in support of his application whereas the Plaintiff filed his on 27<sup>th</sup> November, 2020

in opposition thereto. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not file any submissions with respect to the application.

7. The 2<sup>nd</sup> Defendant submitted that he had made out a case for stay pending appeal in that unless the stay sought was granted his appeal shall be rendered nugatory. It was also submitted that the 2<sup>nd</sup> Defendant shall suffer substantial loss if his title deed to the suit property were to be cancelled during the pendency of the appeal. The 2<sup>nd</sup> Defendant cited the cases of **Kenya Shell Limited v Benjamin Karuga and Another [1982 -1988] 1KAR 1018; CFC Stanbic Bank Limited v John Kungu Kiarie and Another [2016] eKLR; Antoine Ndiage v African Virtual University [2015] eKLR and James Wangalwa and Another v Agnes Naliaka Chesoto [2013] eKLR** among others.

8. On the other hand, the Plaintiff submitted that the 2<sup>nd</sup> Defendant had failed to demonstrate the element of substantial loss within the meaning of **Order 42 Rule 6(2)** of the **Rules**. The Plaintiff further submitted that the application for stay was filed over 1 year and 8 months after judgment and that the delay had not been satisfactorily explained. The Plaintiff relied upon **Masisi Minta v Damaris Wanjiku Njeri [2016] eKLR, James Waigwa and Another v Agnes Naliaka Neto [2012] eKLR; Silverstein v Chesoni [2002] 1KLR 867** in opposition to the application.

#### **E. THE ISSUES FOR DETERMINATION**

9. The court has considered the 2<sup>nd</sup> Defendant's notice of motion dated 4<sup>th</sup> May, 2020, the Plaintiff's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the 2<sup>nd</sup> Defendant has satisfied the requirements for grant of stay pending appeal.

(b) Who shall bear costs of the application.

#### **F. ANALYSIS AND DETERMINATION**

##### **(a) Whether the 2<sup>nd</sup> Defendant has made out a case for stay pending appeal**

10. The court has considered the material and submissions on record on this issue. The 2<sup>nd</sup> Defendant's application is primarily based upon **Order 42 Rule 6(2)** of the **Rules** which stipulates as follows:-

**“2. No order for stay of execution shall be made under sub-rule (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.”**

11. Although the 2<sup>nd</sup> Defendant's advocate submitted that there was a risk of substantial loss and of the appeal being rendered nugatory unless the stay was granted, there were no averments of such loss either in the application or the 2<sup>nd</sup> Defendant's supporting affidavit. All that the 2<sup>nd</sup> Defendant was concerned about was the risk of 'conflicting' decisions from the courts on the same subject matter. That is quite clear from paragraphs 10 and 11 of the supporting affidavit.

12. There was absolutely no mention or demonstration of substantial loss in the supporting affidavit. The attempt by the 2<sup>nd</sup> Defendant's advocates to introduce and demonstrate substantial loss through written submissions is not permissible. The court is of the opinion that substantial loss is a question of fact and evidence thereof should be placed on record properly through a sworn affidavit. As was held in the case of **Kenya Shell Limited v Karuga and Another** (supra) substantial loss is the cornerstone for granting a stay of execution pending appeal. Accordingly, the court is not satisfied that the 2<sup>nd</sup> Defendant has demonstrated substantial loss within the meaning of **Order 42 Rule 6(2)** of the **Rules**.

13. The other aspect for consideration is whether or not the instant application was filed without undue delay. There is no dispute that the decree the subject of the appeal was passed on 31<sup>st</sup> July, 2018. There is also no dispute that the instant application was filed on or about 20<sup>th</sup> May, 2020. The period of delay of about one year and 10 months was not explained by the 2<sup>nd</sup> Defendant in his supporting affidavit. It would appear from the submissions on record that his advocates again attempted to explain the delay through submissions.

14. The court is far from satisfied that a satisfactory explanation was rendered for the delay. The court does not accept that the Covid-19 pandemic could be used as an excuse because the first case was reported in Kenya in March, 2020 whereas the decree the subject of the appeal was passed in 2018. In the premises, the court is of the opinion that the 2<sup>nd</sup> Defendant has failed to satisfy another critical requirement for granting stay pending appeal.

##### **(b) Who shall bear costs of the application**

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of

an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Plaintiff shall be awarded costs of the application.

**G. CONCLUSION AND DISPOSAL**

16. The upshot of the foregoing is that the court finds no merit in the 2<sup>nd</sup> Defendant's notice dated 4<sup>th</sup> May, 2020. Accordingly, the same is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI THIS 24<sup>TH</sup> DAY OF MARCH, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Muhoho for the Plaintiff

No appearance for the Defendants

Court assistant - Wario

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**HON. Y. M. ANGIMA**

**JUDGE**

**24.03.2021**