



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 16 OF 2015

JOSEPHAT OUNDO OMODO.....PLAINTIFF

= VERSUS =

MARTINA ANYANGO KHANYA.....DEFENDANT

R U L I N G

1. The defendant filed this application under certificate on the 5th of November, 2020 seeking for orders THAT:

(a) The application herein be certified urgent and heard exparte in the first in the first instance;

(b) This Honourable Court be pleased to issue an order of stay of execution of the judgement herein delivered on 29.04.2020 together with the decree thereof pending hearing and determination of this application interpartes;

(c) In any event the Honourable Court be pleased to issue any conservatory orders pending hearing and determination of this appeal; and

(d) The costs of this application abide with the outcome of Appeal.

2. The Application was supported by the affidavit of MARTINA ANYANGO KHANYA dated 5/11/2020 on the following grounds;

(a) THAT, the Defendant being aggrieved with the judgement herein delivered on the 29th of April, 2020 filed an appeal designed as KISUMU COURT OF APPEAL Civil Appeal 76 of 2020;

(b) That the said appeal has high chances of success and should the decree herein be executed, the Appeal thereof shall be rendered nugatory and purely academic and the Applicant shall suffer great prejudice;

(c) That the Respondent through his known agents/servants, Dasemy Auctioneers has issued a proclamation of attachment of moveable property of the applicant in his bid to satisfy the decree herein;

(d) That the Plaintiff/Respondent would suffer no prejudice if this application is allowed.

3. The Plaintiff filed his replying affidavit on the 7th of December, 2020 urging this Court to dismiss the Application as it had not demonstrated the substantial loss that the Defendant will suffer, neither has she explained why there was an inordinate delay nor offered any security for the due performance of the decree.

4. Parties agreed to canvass the Application by way of filing written submissions. It is only the Plaintiff/Respondent who filed his submissions on the 7th of December, 2020. **Order 42 Rule 6 (2) of the Civil Procedure Rules** provide that 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

(b) that the application has been made without unreasonable delay;

(c) Such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the Applicant.

5. The Defendant seeks to stay an execution for the costs awarded by this Court to the Plaintiff which costs were arrived at by the consent of both parties on the 5th of August, 2020 before the Deputy Registrar. It is also noteworthy that the Defendant brought this Application almost six months after delivery of the judgement on the 29th day of April, 2020 and three months after the consent for costs on the 5th day of August, 2020. The Respondent argues that the delay has not been explained to this Court especially considering the fact that the Defendant lodged their appeal on the 29th of June, 2020.

6. The Respondent further argued that the Defendant has also failed to furnish this Court with security for the said costs as a requirement under Order 42 Rule 6 (2). Although in paragraph 12 of her supporting affidavit the Applicant stated that she is willing to comply with the conditions and terms imposed by the Court, she should have clarified in the affidavit the details of security she was offering. In **Samwel Gisiira Ogoti vs Seventh Day Adventist Church E.A & 2 others (2020) eKLR** the Learned Judge dismissed an application for stay on the basis that the applicant had not demonstrated by way of affidavit that he is willing to furnish security for costs which is one of the pre-requisites for granting an order for stay pending appeal.

7. The Court of Appeal in **Butt vs Rent Restriction Tribunal [1982] KLR 417** gave guidance on how courts should exercise discretion when granting stay of execution and held that:

(a) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

8. The court is called upon to determine whether or not the Applicant has met any of the criteria set for granting an order for stay. The Applicant pleaded that if the orders of stay are not granted, his appeal shall be rendered nugatory. Part of the decree required the Defendant to execute a transfer in respect of L.R no Bukhayo/Kisoko/3448 to the Plaintiff. The Applicant has appealed against this decision which appeal is still pending. Refusing to grant a stay of execution of this portion of the decree is likely to interfere with the outcome of the appeal in the event the appeal succeeds as it would make parties incur unnecessary costs in reversing the transfer of the title back to the defendant's name. On this account, I am satisfied that the Applicant has shown a likelihood of substantial loss.

9. The second limb of the stay is seeking stay of execution of the Respondent's taxed costs of Kshs.130,000. In **Victory Construction vs. BM (minor suing through next friend one PMM) 2019 eKLR** Odunga J. quoted the decision of the Court of Appeal in the case of **Machira T/A Machira & Co Advocates vs East African Standard [2002] KLR 63** where the Court of Appeal held that **"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. 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 is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal."**

10. Therefore, taking the interests of both parties in this case, I make an order that the Defendant shall have the taxed costs deposited in an escrow account in the joint names of the advocates on record; within 60 days of this ruling to protect the interest of the plaintiff/respondent. Further, I have noted that the defendant delayed in bringing the current application to Court until after her goods were proclaimed. She is directed to pay the auctioneers costs to be agreed and or taxed.

11. In conclusion, the application is allowed on terms stated herein that:

(a) Stay of execution of the decree pending appeal is granted on the decree relating to execution of the transfer documents of the suit title.

(b) (i) The defendant/Applicant shall deposit the amount of taxed costs of Kshs.130,000 in a joint escrow account in the names of the advocates for the parties on record to be held pending hearing and determination of the said appeal.

(ii) In default, the execution shall proceed and amounts realized deposited on the escrow account.

(c) The costs of this application to abide the winner in the appeal.

DATED, SIGNED & DELIVERED AT BUSIA THIS 23RD DAY OF MARCH, 2021.

A. OMOLLO

JUDGE