REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 243 OF 2017

PAOLO DA FANO.....PLAINTIFF

VERSUS

OLIVA ROCCO.....DEFENDANT

RULING

1. By the Notice of Motion application dated 25th November 2019, Oliva Rocco (the Defendant) prays for orders: -

1. ……..

2. …….

3. That this Honourable Court be pleased to issue an order suspending and or staying its Ruling and orders dated 24th October 2019 pending the hearing and determination of appeal filed therefrom;

4. That the costs of the application be provided for.

2. The application which is supported by an Affidavit of the Defendant's donee of a power of attorney Daniela Ventureli is based on the grounds:

a) That this matter came up on 24/10/2019 for Ruling on the Defendant's application dated 12/2/2019 seeking to amend the defence and introduce a Counterclaim. The Court allowed the application but imposed conditions which are adverse and punitive to the Defendant;

b) That following the Ruling of this Court dated 24th October 2019, the Defendant has filed an Appeal from the same Ruling and Orders;

c) That the Defendant therefore seeks stay of the orders pending disposal of the filed Appeal;

d) That execution will occasion the Defendant substantial loss as it will require him to pay Euros 34,611/- and in default his counterclaim would be dismissed and thereby occasioning a miscarriage of justice;

e) That the Defendant's Appeal has high chances of success and will be rendered nugatory if the Ruling and consequent orders of this Court are not stayed;

f) That this application is brought without undue delay and the orders have not lapsed;

g) That it is in the interest of justice that the aforesaid Ruling and consequent orders are stayed pending the hearing of the Defendant's Appeal; and

h) That it is in the interest of justice that the orders sought are granted.

3. Paolo Da Fano (the Plaintiff herein) is opposed to the application. In a Replying Affidavit sworn and filed herein on 29th January 2020 by the Plaintiff's donee of a Power of Attorney Grace Laika, the Plaintiff avers that the Court had granted the Defendant conditional leave to

defend this action. The condition given was that the Defendant was to pay 50% of the monthly instalments due within 30 days of the Court's Ruling dated 31/07/2018, a condition the Defendant failed to fulfil.

4. The Plaintiff avers that the Defendant moved the Court and filed an application dated 12th February 2019 seeking leave to amend his defence and introduce a Counterclaim and the Court allowed conditional leave which again the Defendant failed to fulfil.

5. The Plaintiff further avers that the Defendant's conduct has been dilatory as the Defendant has had numerous opportunities to comply with Court orders but chose not to do so. The Plaintiff accuses the Defendant of seeking by this application to circumvent his obligation under the orders granted by the Court in his unrelenting quest to disobey the Court's Orders.

6. The Plaintiff avers further that the Defendant has not shown that the Plaintiff does not have capacity or the necessary means to refund the decretal sum if the same is paid and urges the Court to disregard the claim that the Defendant's Appeal shall be rendered nugatory if an order of stay of execution is not granted.

7. I have perused and considered the Defendant's application for stay and the response thereto by the Plaintiff. I have also perused and considered the submissions and authorities placed before me by Mr. Mogaka, Learned Counsel for the Defendant. The Plaintiff did not file any submissions herein.

8. The principles guiding the grant of a stay of execution pending appeal are well settled. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows: -

> ***"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."***

9. In ***Vishram Rauji Halai –vs- Thornton & Turpin, Civil Application No. Nai 15 of 1990 (1990) KLR 365***, the Court of Appeal held inter alia that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the jurisdiction of this Court to do so under Order 41 Rule 6(what is now Order 42 Rule 6) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, such an application must be made without unreasonable delay.

10. Explaining what amounts to substantial loss in ***Century Oil Trading Company Ltd –vs- Kenya Shell Ltd Nairobi (Milimani) HCMCA No. 156 of 2007***, Kimaru J observed as follows: -

> ***"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 and different from that which is ordinary. Where execution of a monetary decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his Judgment."***

11. Commenting on the same principle in ***Kenya Shell Ltd –vs- Kibiru (1986) KLR 410,*** Platt, Ag JA (as he then was) expressed himself as follows: -

> ***"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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money."***

12. On his part, Gachuhi Ag Ja (as he then was) held at page 417 of the **Kenya Shell Ltd Case (Supra)** as follows: -

> ***"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is not paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the orders for stay is not granted. By granting a stay would mean that the status quo should remain as it were before Judgment. What assurance can there be of the appeal succeeding?. On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgment."***

13. In the matter before me, the Defendant prays for stay of execution on account that he will suffer substantial loss in the event he is compelled to pay the sum of Euros 34,611.00 as per the orders of this Court issued on 24th October 2019. Those orders were the result of another application filed by the Defendant and dated 12th February 2019 in which he sought leave to amend his defence and introduce a Counterclaim. That was the second substantive application being made by the Defendant herein.

14. From the record before me, the Defendant had initially failed for more than a year after being served with the suit papers herein to file a Statement of Defence. Accordingly, and by an application dated 28th June 2018, filed after the Plaintiff's suit had already been fixed for formal proof hearing, the Defendant sought leave to be allowed to file his defence out of time.

15. In the course of the hearing of the said application, it did emerge that the Defendant had not been paying certain instalments as per an Agreement of Sale executed by the parties whose terms are the subject matter of the dispute herein. Having considered both sides of the arguments, this Court did on 31st July 2018 allow the Defendant to file his Statement of Defence but on condition that he pays 50% of the monthly instalments that were due as per the Agreement within 30 days of the date of the said Ruling.

16. Subsequently, the Defendant filed his Statement of Defence, List of Witnesses and a separate list of documents after which the suit was set down for hearing. After the Plaintiff testified and closed his case however, the Defendant filed the second application dated 12th February 2019 wherein he sought leave to amend his defence and introduce a Counterclaim. That second application was opposed by the Plaintiff on the grounds inter alia, that the Defendant had failed to pay the 50% of monthly instalments as previously ordered before this Court and that as a result, he was not deserving of the prayers in the application.

17. In the impugned Ruling of 24th October 2019, this Court was persuaded that the Defendant had not paid a portion of the said instalments and that the account remained in arrears of Euros 69,222.00. As a result, and while this Court was persuaded to allow the Defendant's application, this Court granted the leave to amend the Defence and introduce a Counterclaim but on condition that the Defendant would clear 50% of the outstanding arrears being Euros 34,611.00 within 30 days from the date of the Ruling failure to which the application stood dismissed.

18. Aggrieved by that conditional leave, the Defendant has lodged an appeal with the Court of Appeal and now holds that the payment of the said sum as ordered would occasion to him substantial loss and that his appeal stands to be rendered nugatory.

19. I am not however persuaded that the Defendant stands to suffer any substantial loss as alleged or at all. First and foremost, there was no indication that the Plaintiff before me is a man of straw and that in the event the monies are paid to him, he would not be in a position to refund the same where the Defendant's appeal were to succeed.

20. Secondly, it was evident that the Defendant continues to reside in the property the subject matter of this dispute long after he stopped paying instalments for the purchase thereof to the Plaintiff. Again while the Court was persuaded that the account was in arrears in the sum of Euros 69,222.00, this Court had only asked him to clear half the amount pending a resolution of the dispute between them.

21. In my mind, even where the Plaintiff was found not to be a man of means, that alone would not necessarily justify his being barred from benefiting from the fruits of the orders made in his favour in the circumstances herein. The general rule as far as I understand it is that the Court ought not to deny a successful litigant of the fruits of his Judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

22. As was stated in ***Machira T/A Machira & Company Advocates –vs- East African Standard (No. 2) KLR 63***: -

> ***"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 principles 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 and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way application for the stay of further proceedings or executions, 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 Court, which is to do justice in accordance with the law and to prevent abuse of the process of the Court."***

23. Arising from the foregoing, I am not persuaded that there is any merit in the Defendant's application dated 25th November 2019. It was filed in abuse of the Court process and must fail. I dismiss it with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 23rd day of March, 2021.

J.O. OLOLA

JUDGE