



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 116 OF 2017

JECINTA WANJIKU NJUKIPLAINTIFF

VERSUS

JANE WAMBURA MUGO.....1ST DEFENDANT

ELIUD MURAGE RURIGA.....2ND DEFENDANT

JACOB MUGO MURAGE.....3RD DEFENDANT

SILAS RURIGA MURAGE.....4TH DEFENDANT

JUDGMENT

Summary of facts

This Honorable Court delivered its judgement in this matter on the 12th of June 2020 in favour of the Plaintiff herein. The following orders were given:

- a) A declaration that customary trust existed in respect of Land Parcel No. MWERUA/KABIRIRI/1909 and a further declaration that by operation of the law, the plaintiff is entitled to a share of her father's property*
- b) That the two parcels of land transferred to Jacob Mugo Murage and Silas Ruriga Murage, the 3rd and 4th defendants herein, being L.R No MWERUA/KABIBIRI/4043 and 4045 was irregular, un-procedural and illegal and that the two titles are hereby cancelled;*
- c) An order for determination of the trust and that land parcels MWERUA/KABIBIRI/4043 and 4045, a resultant parcels of subdivision be transferred to the Plaintiff to hold in trust for herself and her siblings who did not get a share;*
- d) In view of the close relationship between the parties, each party to bear their costs.*

On 28th July 2020, the Plaintiff filed a Notice of Motion Application seeking to execute the decree and in particular for the following orders:

- (i) Vesting orders for registration of land parcels MWERUA/KABIBIRI/4043 and 4045 in her name;
- (ii) That production of the original title deeds for the said parcel numbers be dispensed with at the time of registration;
- (iii) Costs of the application.

On 10th September 2020, the 2nd Defendant filed a Notice of Motion Application praying for the following orders:

- (i) A certification of the matter as urgent;
- (ii) Issuance of a stay of execution of the judgement delivered on 12th June 2020 pending the hearing and determination of the application;
- (iii) Issuance of a stay of execution of the judgement and subsequent orders issued on 12th June 2020 pending the hearing and

determination of the intended Appeal;

(iv) Costs of the application.

On 12th October 2020 the Plaintiff filed her replying affidavit in opposition of the 2nd Defendant's application. She contends that the Defendant's intended appeal is out of time, that the orders of stay cannot be issued in the present case and that the intended appeal lacks merit.

The parties agreed to have the matter canvassed by way of written submissions.

Submissions

The 2nd Respondents filed their submissions on 23rd October 2020. He stated that he was aggrieved by the decision of the court in the matter and has lodged his Notice of Appeal at the Court of Appeal in Nyeri under Civil Appeal No. 100 of 2020. In support of his application for stay of execution of judgement, he stated that he stands to suffer substantial loss on grounds that his two sons do and have been residing on the parcels of land to be registered in the Plaintiff's name. That the stay sought is meant to preserve the subject matter pending the hearing and determination of the intended appeal. He further submits that the present application was filed within three months of judgement and explains that the delay was caused by his lack of finances to instruct an advocate to mount an appeal owing to the financial implications of the Covid-19 pandemic on his business. Lastly, he submits that he is ready to furnish whatever security he is directed to by the court.

The Plaintiff filed her submissions on 2nd November 2020 and reiterated the contents of her replying affidavit. She submits that the Defendant's delay is inexcusable and his application dated 10th September 2020 is only in reaction to hers dated 28th July 2020. She argues that the reason given for the delay is a feeble excuse and ought not to be entertained. She contends that the stay sought if granted will only operate to deny her enjoyment of the fruits of the judgement delivered in her favour.

Issues for determination

Whether the Court can grant stay of execution of the judgement and orders issued on 12th June 2020.

Legal analysis and opinion

The present application is brought under **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. The provision is reproduced hereunder.

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application”

The provision is explicit on the matters to be taken into consideration in a decision on whether or not to grant a stay of execution. The case of **Stephen Wanjohi Vs Central Glass Industries Ltd HCC No. 6726 of 1991**, summarized the requirements as follows:

“For the court to order a stay of execution there must be: -

i. Sufficient cause

ii. Substantial loss

iii. No unreasonable delay

iv. Security and the grant of stay is discretionary”.

In **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal held that:

“1. The power of the court to grant and refuse an application for stay of execution is discretionary, that is discretionary power. To stay execution must however 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”.

As is already discernible from the rival submissions, the court is called upon to consider the issue of stay of execution by doing a balancing act. On the one hand, the Plaintiff/Judgement Creditor has a right to enjoy the fruits of the judgement, on the other, the Defendant/Judgement Debtor has an undoubted right of appeal. The following cases describe the balancing act perfectly:

Warsame, J (as he then was) in **Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court... The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

In **Machira T/A Machira & Co Advocates Vs East African Standard (No. 2) [2002] KLR 63**, it was 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 judgement 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 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 of the process of the court.”

As observed, the Applicant is required first to demonstrate that he stands to suffer substantial loss should the order sought not be granted.

The Court of Appeal in the case of **Mukuma Vs Abuoga (1988) KLR 645** defined substantial loss as follows:

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

In **David Kipkoskei Kimeli Vs Titus Barmasai [2019] e KLR**, it was held that:

“The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough.”

The Defendant avers that his two sons and their families have been residing on and have developed the properties to be transferred to the Plaintiff since July of 2017. He avers that the stay is meant to preserve the subject matter pending hearing and determination of the intended appeal. He further notes and the Plaintiff agrees that she has not at any time lived on the suit properties. The loss countenanced by the Defendant then is that in the absence of the stay, the orders for cancellation of the title deeds in his son’s names and the passing on of the property to the Plaintiff would render the appeal nugatory. It is my opinion that that the Defendant has argued his case and demonstrated that the loss to be suffered is substantial.

Onto the second limb. The Defendant is required to show that his application was made without undue delay. The judgement having been delivered on 12th June 2020, the Defendant was required to have filed his appeal within 14 days. The Notice of Appeal was filed on 7th October 2020, about three months after judgement.

In the case of **Jaber Mohsen Ali & Another Vs Priscillah Boit & Another, ELC No. 200 of 2012 (2014) e KLR**, the Court held that:-

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after the Judgement could be unreasonable depending on the Judgement of the court and any order given thereafter...”

Now the Defendant attributes the delay to a lack of finances brought about by the negative effects of the Covid-19 pandemic on businesses. While appreciating the Plaintiff’s sentiments that the present application was filed in August, still within the period of the pandemic, it is my opinion that it would be unreasonable for the court not to take judicial notice of the financial hardships occasioned by the Covid-19 pandemic.

Lastly, on the question of security, the court in **Aron C. Sharma Vs Ashana Raikundalia T/A Rairundalia & Co. Advocates** explained the purpose of the requirement as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

It is noteworthy that the Defendant has expressed his willingness to comply with any directions given by the court as to security. The decision in **Equity Bank Ltd Vs Taiga Adams Company Ltd [2006] e KLR**: - suggests that where an order as to security has not already been made, the Defendant ought to raise it and express their willingness to abide by the conditions given.

“Of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ... let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay....” which principle was also emphasized in **Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others**. *“The Applicant has been silent on the issue of security in this matter. The 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. I find in this matter the applicant has failed to meet the four mandatory tenets under which this application is brought. The applicant has failed to satisfy any of the four mandatory tenets under which stay of execution can be granted. The Court is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion in this matter; hence it is of the view that the application is not merited.”*

Again, in **Focin Motorcycle Co. Limited Vs Ann Wambui Wangui & Another [2018] e KLR** the court held as follows:

“...Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay...”

In my opinion and guided by the decision in **John Nginyi Muchiri Vs John Kamunya Mutahi & 4 others [2005] e KLR**, which case, similar to the present one concerned a parcel of land as opposed to liquidated damages, the court decided as follows on security:

“I therefore allow the application but order that the applicants deposit in court the respective title deeds for the suit premises together with signed blank transfers. These documents will be held by the court and will be kept in a safe place until the appeal is heard and determined. Further, the applicants shall within seven days from the date hereof file and give to the respondent an undertaking that they will not, individually and/or collectively use the suit premises in any manner that is likely to amount to waste thereof or carry thereon such activities as are likely to diminish the value of the land in question. These orders should also be extracted and registered against the title deeds in the appropriate land registry.”

Given the fact that the Plaintiff and Defendant are siblings and the subject matter is the two parcels of land, I would grant a stay of execution conditional upon the deposit of the original title deeds to L.R No MWERUA/KABIBIRI/4043 and 4045 and executed transfer forms in favour of the Plaintiff/Judgement Creditor herein within 21 days from today.

The defendant to pay the costs of this application.

Judgment READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 12th day of March, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mrs Makworo for the Defendants*
2. *Ms Wambui holding brief for Maina Kagio for the Plaintiff*
3. *Kabuta – Court clerk.*