REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

ELC CASE NO. 72 B OF 2019

PHILIP KIPROTICH TUITOEK.....PLAINTIFF

VERSUS

EDNA JEBIWOTT KIPLAGAT.....1ST DEFENDANT

THE LAND REGISTRAR, UASIN GISHU COUNTY.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING.

This ruling is in respect of an application by the 1st defendant/applicant dated 28th October 2020 seeking for the following orders;

a) Spent.

b) That there be an order of temporary injunction restraining the plaintiff by himself, his agents, servants or any person acting on his behalf from transferring or dealing in any other way with land parcel number SERGOIT/KELJI BLOCK 1 (NGOCHOI)/22 pending the hearing of this application inter parties.

c) That there be an order of temporary injunction restraining the plaintiff by himself, his agents, servants or any person acting on his behalf from transferring or dealing in any other way with land parcel number SERGOIT/KELJI BLOCK 1 (NGOCHOI)/22 pending the hearing and determination of the 1st defendant's appeal to the Court of Appeal.

d) That cost of this application be in the cause.

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

1ST DEFENDANT /APPLICANT'S SUBMISSIONS

The applicant relied on the grounds on the face of the application and the supporting affidavit sworn by Edna Jebiwott Kiplagat. The application is brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 as well as Section 3A of the Civil Procedure Act.

It was the applicant's submission that that the Plaintiff/Respondent obtained *ex parte* judgment against her in default of appearance and defence. She thereafter filed an application dated 15th April, 2020 seeking to set aside the ex parte judgment but the application was dismissed vide a ruling delivered on 26th May, 2020. Upon dismissal of the application to set aside the judgment, the applicant filed an application on 3rd June, 2020 seeking to review the ruling of the Court and the application was dismissed on 15th October, 2020.

The applicant deponed that she is aggrieved by the entire ruling of this Court and has filed a notice of appeal and states that the intended appeal raises triable issues and has high chances of success.

It was the applicant's contention that the plaintiff is in the process of selling and transferring the suit property being land parcel number **SERGOIT/KELJI BLOCK 1 (NGOCHOI)/22** to a third party and unless restrained by way of an injunction, the intended appeal shall be rendered nugatory and she will suffer irreparable loss. The applicant urged the court to grant the orders as prayed in the interest of justice.

Counsel filed submissions and relied on the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016]eKLR**, where an arguable appeal was defined as

> *"no more than one that raises a legitimate point or points deeming judicial determination. An appeal need not raise a multiplicity or any number of such points; a single arguable Point is sufficient to earn an appeal such affiliation."*

Counsel further cited the case of **Socfinaf Ltd (Ruera Estate) v Abisagi Igoki [2018]eKLR,** where it was held that,

> *"to earn a stay of execution, one is not required to persuade the court that the filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal; a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict."*

The Court of Appeal case of **National Industrial Credit Bank Ltd Versus Aquinas Francis Wasike and Another, Nairobi Civil Application Number. 238 of 2005**, held that:

> *"…it is to be remembered that in an application such as this the grounds for appeal are not to be argued; all that an applicant has to do is to point out to the court the ground or grounds which he believes are arguable and leave it to the court to decide on the issue of whether or not the matters raised are arguable."*

Counsel argued that the intended appeal raises triable issues and that the applicant should be given an opportunity to be heard in the appeal. That if the injunction is not granted the plaintiff will proceed to sell and transfer the suit land to a third party and thereby render the intended appeal nugatory.

Counsel relied on the case of **Giella Versus Cassman Brown & Company Ltd [197 EA 358**, on the principles for grant of injunctions and submitted that the applicant has met the threshold and urged the court to allow the application as prayed.

PLAINTIFF'S/RESPONDENT'S SUBMISISONS.

The respondent opposed the application vide a replying affidavit whereby he deponed that the applicant wants to deny him the fruits of his judgement. That the applicant has not proved that she will suffer any substantial loss as the value of the land is determinable vide a valuation report.

The respondent also averred that he is a man of means who can refund the value of the land should the appeal succeed. It was the respondent's contention that he stands to suffer great prejudice should the application be allowed since he had already sold the property to a third party and would not be able to perform his contractual duties under the Agreement for sale of land.

Counsel submitted that this application is an abuse of court process as this court has on three instances in this suit and a related matter being **Eldoret Elc No. 16 of 2020 Edna Jebiwot Kiplagat vs Philip Kiprotich Tuitoek & 2 others** considered the prayers for injunction and dismissed the same with costs in all occasions.

Mr Kibii further submitted that the delivery of the previous Rulings against the issuance of the injunctive reliefs means that the court issued negative orders against the 1st Defendant's application and the same could therefore not be stayed.

Counsel relied on the cases of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR and Electro Watts Limited v Alios Finance Kenya Limited [2018] eKLR** where the Court held that stay orders cannot be granted where a negative order has been issued.

Counsel cited the case of **Catherine Njeri Maranga v Serah Chege & another [2017] eKLR** where Mwongo J. in refusing to grant orders of stay cited **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR,** where the Court of Appeal stated:

> *"16. In Kanwal Sarjit Singh Dhimažl v. Keshavji Juvraj Shah 20087 eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:*
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> *"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18h December, 2006 The order of 18/7 December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not-order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [19767 KLR 63 at page 66 paragraph C). "*
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> *17. The same reasoning was applied in the case of Raymond M. Omboga v. Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:*
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> *"The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...*

Mr Kibii also submitted that whereas the orders are sought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which provides for stay of execution pending appeal, the 1st Defendant/Applicant is seeking orders of injunction under the provisions of Order 40 Rule 1, 2 & 3 of the Civil Procedure Rules making the application fatally defective in the first instance. That even if the court was to consider the application for injunction, the applicant has not met the threshold as provided for under Order 42 Rule 6 of the Civil Procedure Rules.

It was counsel's submission that the applicant has not established that she will suffer substantial loss if the order is not granted and relied on the case of Joseph **Gachíe t/a Joska Metal Works vs Simon Ndeti Muema [2012] eKLR** where the Court held as follows:-

> *"In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgment and that would be denying a successful litigant of the fruits of judgment which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay."*

Counsel therefore urged the court to dismiss the application with costs but should the court be inclined to allow the application then the applicant should deposit a substantial sum in the courts discretion as security for costs.

ANALYSIS AND DETERMINATION.

This application is for an injunction pending the hearing and determination of an intended appeal in the Court of Appeal. The appropriate legal provision for stay of execution pending appeal is Order 42 Rule 6 of the Civil Procedure Rules as cited by the applicant in her application. Notwithstanding the manner in which the prayers are phrased, the application is that of stay of execution under Order 42 Rule 6.

As I had noted earlier that this application is for injunction but the submissions and the provisions under which the application has been brought are for stay of execution. The court will therefore apply the overriding objective and deal with the application. The applicant should be clear on what orders she is seeking for.

I notice that the applicant chose to apply for injunction most probably due to the fact that the appeal preferred to the Court of Appeal arises from negative orders of rulings of this Court of 26th May, 2020 and 15th October, 2020 where the Court dismissed the applicant's application to set aside the *ex parte* judgement as well as the application for review of the ruling as negative orders are incapable of being stayed.

Applications for stay of execution pending appeal are anchored under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

> *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.*
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> *(2)No order for stay of execution shall be made under sub rule (1) unless—*
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> > *(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.*

Section 3A of the Civil Procedure Rules provides for the inherent powers of court and enjoins the Courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

The issues for determination are as to whether the applicant has met the ingredients for grant of stay of execution that is, was the application filed timeously, sufficient cause, whether the applicant will suffer substantial loss if the orders are not granted and the issue of security for the due performance of the decree.

In the case of ***Masisi Mwita V Damaris Wanjiku Njeri (2016) eKLR***, the Court 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:-*
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> *"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.*

Further in the case of **Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, the Court held that:-

> *"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".*

The applicant filed the application 28th October 2020 which is about two weeks after the delivery of the ruling. I find that the application was filed without undue delay.

On the issue of substantial loss which is a cornerstone of applications for stay of execution, the applicant must demonstrate that she will suffer loss if the orders sought are not granted. What constitutes substantial loss has been addressed in many cases. In the case of **Mukuma V Abuoga (1988) KLR 645** the court stated that;

> *"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."*

Similarly, in the case of **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, it was held 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".*

The Court went further to hold that;

> *"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 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 order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding. On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."*

Further in the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held that;-

> *"... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them."*

The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal and the interests of the Respondent who is seeking to enjoy the fruits of his judgment as was stated in the case of **Machira t/a Machira & Co. Advocates vs East African Standard (No. 2) (2002) 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 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 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".*

The applicant has generalized that she will suffer substantial loss without specifics. Proof of substantial loss requires much more than merely stating that you are likely to suffer substantial loss What is the nature of the loss that she is likely to suffer. Is it sentimental value or monetary? If it is monetary then the respondent has stated that he is a man of means who is able to refund the money if the appeal is successful.

It should be noted that the financial ability of a decree holder is not the sole reason for allowing or disallowing orders of stay as was held in the case of **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991.**

The applicant has not indicated whether she is willing to furnish any security for the due performance of the decree. In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** the court held that:

> *"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."*

The court has noted that the applicant has filed 3 applications including filing another suit in respect of the same parcel of land which applications were dismissed. The court's hand is tied as allowing this application would be in furtherance of abuse of court process. The intended appeal against the ruling of this court is a negative order whereby stay cannot issue as stated in the earlier authorities.

I find that the application lacks merit and is therefore dismissed with costs to the respondent.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE