REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT ELDORET

ELC N0.288 OF 2017

JEREMIAH YATICH (SUING AS THE ADMINISTRATOR OF THE ESTATE OF

JOSHUA YATICH CHEPYEGON [DCD])..... PLAINTIFF/ APPLICANT

-VERSUS-

CHRISTOPHER KIPKOSGEI.....1ST DEFENDANT/RESPONDENT

DENIS KIPKOS.....2ND DEFENDANT/RESPONDENT

SILAS KIPKOSGEI.....3RD DEFENDANT/RESPONDENT

ENOCK KIPTUM.....4TH DEFENDANT/RESPONDENT

RULING

This ruling is in respect of two applications dated 27th October 2020 by the plaintiff/applicant and one dated 10th November 2020 by the defendant /applicants respectively.

The court will first deal with the defendant/applicants 'application dated 10th November 2020 seeking for the following orders:

a) Spent

b) That there be stay of execution of the judgment delivered by the Honourable Court on 25th February 2020 pending the hearing and determination of this application.

c) That there be stay of execution of the judgment delivered by the Honourable Court on 25th February 2020 pending the hearing and determination of the defendants 'intended appeal

d) That costs of this application be provided for.

Counsel canvassed the applications vide written submissions

DEFENDANT/APPLICANTS'SUBMISSIONS

Counsel submitted on the threshold for stay of execution pending appeal as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules and that they will suffer substantial loss if the orders are not granted.

Mr. Chebii submitted that the non-compliance with the court order has been occasioned by the plaintiff's failure to relocate to the other parcels. That the applicants are willing to relocate if a survey is done.

Counsel urged the court to allow the application as it has met the threshold for grant of stay of execution and disallow the application for eviction.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel for the plaintiff opposed the application and faulted the applicant for failing to file the application timeously and that they have not met the provisions of Order 42 Rule 6 of the Civil Procedure Rules. That no explanation has been given for the delay in filing the application 8 months after the judgement

Counsel took issue with the applicant's submission that survey should be done before the applicants relocate as these are issues that are extraneous and overtaken by events as they were not part the court's decree.

Counsel relied on the case of **Jackson Kibor vs Kipruto Arap lelei ad 19 others ELC Case No. 94 of 2016** to buttress the point that the applicants have not established any substantial loss that they would suffer if stay orders are not granted.

Mr Kipnyekwei urged the court to dismiss the application for stay and allow the application for eviction of the defendants in enforcement of the court judgment dated 25th February 2020.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicants have met the threshold for grant of an order of stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules. This Order provides as follows:

> *(1) 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 subrule (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) …*
>
> *(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*
>
> *(5) …*
>
> *(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."*

Accordingly, Order 42 Rule 6 sets out three conditions that an applicant for stay of execution pending appeal must satisfy, namely:

> a) that substantial loss may result to the applicant unless the order is made,
>
> b) that the application has been made without unreasonable delay, and
>
> c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

> *"1. 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.*
>
> *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.

5. *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." The high court is empowered to order stay of execution pending appeal either in exercise of its inherent jurisdiction or under the provisions of Order.*

The Court has powers to grant orders of stay of execution, however, this power is discretionary and must be exercised judiciously as was held in **Canvass Manufacturers Ltd vs Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**. The court stated that:

"*In Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory, the discretion must be judiciously exercised".*

In exercising this power, the court is obligated to balance between the right of a successful litigant to enjoy the fruits of his/her Judgment with the right of appeal of a dissatisfied litigant whose appeal should not be rendered nugatory in case his or her appeal succeeds.

It is trite that the purpose of stay is to preserve the subject matter in dispute so that the right of the appellant to appeal is not rendered nugatory. See ***Odunga J's Digest on Civil Case law and Procedure, 2nd Edition, Volume 4, Law Africa 2010 at 3749.***

Further in the case of **Consolidated Marine vs Nampijja & Another, Civil App.No.93 of 1989 (Nairobi**) as cited by the court in **Paul Kamura Kirunge v John Peter Nganga *(Supra),*** the court observed;

"*The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory*"

The first issue that the applicant must grapple with is whether the application was filed timeously. This judgment was delivered on 25th February 2020 and the applicants were granted 30 days to vacate the suit premises of which they never did. The plaintiff/ respondent filed an application dated 27th October 2020 seeking for the eviction of the defendants from the suit land.

Upon service of the application the defendant/ respondent retaliated with an application dated 10th November 2020 seeking for stay of execution pending appeal. As much as applicants have a right to appeal when they are aggrieved by the decision of a court, the right should not be a hindrance to other parties also enjoying or enforcing their rights. That is why Order 42 Rule 6 comes into play for guidance on which applications to be allowed or rejected. The court is also given latitude to exercise its discretion which must also be done judiciously.

When a party is desirous of lodging an appeal to a superior court, he/she should be diligent and take the necessary steps to indicate such by filing a notice of appeal in good time and application for stay of execution pending appeal. In the instant case the applicant filed a notice of appeal on 19th March 2020 but did not file an application for stay until 10th November 2020. The 30 days within which the defendants were to vacate the suit premises lapsed on 25th March 2020.

This means that the applicants went to slumber and only woke up when they were served with a decree of the court on 13th August 2020 and the application dated 27th October 2020 for eviction. This application was filed after 9 months and no explanation for the delay in filing this application has been offered by the applicants.

The applicants blamed the late filing on the COVID 19 Pandemic, however, the National Council for the Administration of Justice (NCAJ) on the 15th of March 2020 issued a statement on scaling down of court operations and mitigation measures in light of the Covid-19 pandemic.

Court registries remained open and technically courts never closed down but scaled down operations with protocols to guide the scaling up of court operations being issued on the 15th of June 2020 by the Chief Justice, whereby the courts adopted e-filing system and virtual courts which enabled matters to be heard and determined.

In the case of **Ruth Shikanda (Suing as Legal Repr. on behalf of the Estate of Agnes Ayori Ashiembi (DCD) v Sibed Transport Company Ltd [2020] eKLR**, the learned judge declined a similar excuse that the Covid-19 pandemic affected the filing of cases and took judicial notice of the fact that court registries never closed while dismissing the application. On that limb I find that the applicants did not file the application timeously.

As regards what constitutes substantial loss, the court in **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR** observed as follows:

"*No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial*

loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

In this application, the applicants claim that they will suffer substantial loss if the eviction order is granted and that if the stay orders are not granted, they will suffer prejudice in that permanent and semi-permanent structures will be demolished and if their appeal is successful, they will suffer great loss.

The applicants however contradict themselves by stating that they are willing to obey the court decree but need survey to be done before execution can issue. It should be noted that survey was never an issue in the proceedings before the court. This in effect is like asking the court to sit on its own judgment and reopen the case for re-litigation.

Counsel for the applicant submitted that the defendant's failure to relocate and/or vacate the suit land has been compromised by the plaintiff's failure to vacate the other parcels of land to enable the defendants relocate. This in essence is an admission that the defendants want to vacate the suit premises and what they are bargaining for is time to organize themselves.

If that is the case, then is there any arguable appeal in the wake of all this statements of admissions and further arguments that they need a survey to be carried out first before they vacate. What would the defendants appeal be all about in such a scenario? I find that the defendants have not established any substantial loss that they will suffer if the stay of execution is not granted having considered their arguments and admissions that they are willing to vacate subject to survey being done. I further find that they have not established that they have an arguable appeal.

Finally, as regards security, the court can order security on its own motion on application by a party. As such, this is a discretionary power that the court exercises taking into account the interests of justice and rights of the parties.

In the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, the court stated*:*

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation…"

Similarly, in **Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR**, the court observed:

"the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

From the forgoing and from the determination of the above two limbs of the application I find that this application lacks merit and is therefore dismissed with costs to the plaintiff/respondent.

From the onset we were dealing with two applications one for stay of execution by the defendant/applicant and another for eviction orders by the plaintiff/applicant. I had stated that I will first deal with the application for stay which essentially determines the application for eviction.

Having found that the application for stay lacks merit and is dismissed with costs, I therefore grant the orders as prayed in the plaintiff's application dated 27th October 2020 for the enforcement of the judgment dated 25th February 2020.

The Officer In Charge of Kabarnet Police Station to provide security to the court Bailiffs in execution of the orders. The eviction to be carried out during the day and in a humane manner.

DATED and **DELIVERED** at **ELDORET** this **22nd DAY** OF **APRIL, 2021**

M. A. ODENY

JUDGE