REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 125 OF 2014

DAVID SIKUKU KONES.....PLAINTIFF/RESPONDENT

VERSUS

BASHIR TOWETT CHEMASWET.....1ST DEFENDANT/APPLICANT

VINCENT WASAM KIRUNYI.....2ND DEFENDANT/APPLICANT

RULING

(On Stay of Execution Pending an Intended Appeal)

THE APPLICATION

1. The Defendants brought a Notice of Motion dated **19/04/2021** and filed on **03/04/2021**. It generally sought an order of stay of execution pending Appeal. It was brought under **Section 3A** of the **Civil Procedure Act, Order 42 Rule 6** of the **Civil Procedure Rules** and all enabling provisions of law. The Applicant sought for the following specific orders:

(a) ….spent

(b) ….spent

(c) That at the *inter partes* hearing hereof, orders granted in prayer (b) above do operate until the preferred appeal to the Court of Appeal is heard and determined.

d) Costs be provided for.

2. The Application was supported by an affidavit sworn by **1st** Defendant, Bashir Towett, on **19/04/2021** and a Supplementary one sworn by him on **24/05/2021**. The grounds of the application were that after the delivery of the judgment herein on **15/04/2021**, the applicants lodged a Notice of Appeal before this Court on **27/04/2021**. They stated further that the intended appeal is arguable and would be rendered nugatory if the orders sought were not granted. The other grounds were that the application was brought timeously and in good faith, and the Respondent would not suffer any prejudice if the orders were granted. Lastly, the other ground was that the interests of justice demanded that the orders be granted.

3. The Supporting Affidavit reiterated the contents of the grounds save that it included the undisputed fact that judgment was delivered by way of electronic mail on **15/04/2021**. The deponent also stated that the intended appeal was not frivolous as demonstrated by the draft Memorandum of Appeal he annexed to his Affidavit. He then deponed further that the **2nd** Defendant would be evicted from the subject land of which he was in possession if stay of execution of the orders of the Court was not granted. He then stated that he was aware that the **2nd** Defendant had ploughed the land and the crop he planted would be destroyed and he would suffer loss if the Court did not stay the execution herein. In his Supplementary Affidavit, he reiterated that he was aware that the **2nd** Defendant was in possession of **2** acres of the suit land. He then stated that the orders issued on **21/01/2015** were never executed. He deponed further that in **March 2021** the **2nd** Defendant planted maize on the parcel he occupied and later someone planted beans on half an acre thereof. He deponed that the Plaintiff's portion of the suit land was separated from the **2nd** Defendant's by an empty space. He then stated that as Applicants they would be contesting the order of specific performance. He deponed lastly that the Respondent's contention was not new to them since the Respondent has always boasted that the Applicants were "going nowhere".

THE RESPONSE

4. The Plaintiff opposed the Application through a Replying Affidavit he swore on **12/05/2021** and filed on **13/05/2021**. In it, he contested the fact that the **2nd** Defendant was in possession of part of the suit land. He deponed that the Application was frivolous, vexatious, an abuse of the process of the Court and an afterthought and was brought in bad faith. He further argued he was granted possession of the land in the interim period of the pendency of the suit and the Appeal cannot be rendered nugatory since he would deliver possession if the Court of Appeal found in favour of the Applicants. He then stated that it would be injurious to him if the Court issued orders of stay of execution. He then deponed that if the Applicant had planted on the suit land, then he had "*committed an act of treachery with the full knowledge that the matter was still pending for delivery of judgment*" (emphasis mine) and contempt of Court. He then prayed that for the unbecoming conduct, the Applicant be denied audience. His further deposition was that he had deposited the sum of Kenya Shillings **175,000/=** as ordered by the Court but the Respondent had refused to accept it.

SUBMISSIONS

5. The Applicants filed his written submissions on **02/06/2021**. The Respondent filed his on **15/12/2021**.

DETERMINATION

6. This court carefully considered the Application, the affidavits both in support and opposition to it, the submissions on record as well as the law and the case law cited. It found two issues for determination. These were:

(a) Whether the Applicant has satisfied the criteria for grant of stay of execution pending appeal.

(b) Who to bear the costs of the instant Application

7. I start by analyzing **whether the Applicant has satisfied the requirements for grant of an order for stay of execution pending appeal.** The law on stay of execution of judgment pending (an intended) appeal is now well settled. In order for a court to grant such orders, the party moving the Court ought to satisfy it that he has placed himself within the parameters set out in **Order 42 Rule 6** of the **Civil Procedure Rules.** I reproduce the provision here below and then summarize from it what I understand to be the specific requirements to be met. It states:

"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.

8. Three main conditions ought to be satisfied, namely,

i. That substantial loss may result in case the order is not granted

ii. The application is brought without undue delay

iii. Security for due performance of the decree has been offered by the Applicant.

9. I shall not reinvent the wheel on the import and interpretation of this provision. Other decisions have included a number of further conditions to be fulfilled. I will follow a number of such decided cases that lay the basis for and expound on the conditions to be satisfied by an Application of this nature. In **Civil Appeal No.107 of 2015, Masisi Mwita -vs- 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:-

"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.

"In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo…Vs…Straman EA Ltd (2013) as follows:-

"In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."

These twin principles go hand in hand and failure to prove one dislodges the other"

10. The above are the requirements this Court proceeds to analyze whether or not the Applicants fulfilled. At the outset, it is clear that the **2nd** Applicant who is said to be in occupation of **2** acres of land did not swear an Affidavit in support of the Application. Only the **1st** Applicant did. It appears from the two affidavits he swore that he was basically pushing the Application for and on behalf of the **2nd** Applicant and not his. Nowhere did he attempt to demonstrate how he fulfilled the conditions above as an Appellant. In essence it seems to me that the **2nd** Defendant is one I would call a '*sleeping party*''/Applicant. That brings into sharp focus the veracity of the deposition by the **1st** Applicant on the issues in this matter.

11. As I look into the truthfulness of the deposition, it would be proper to go back slightly into the history of this suit, particularly in regard to representation of the parties and their respective documents on the record. The Plaintiff brought this suit through the firm of Ms. Risper Arunga and Co. Advocates. By the time judgment was delivered, he was being represented by the firm of Ms. Walter Wanyonyi & Co. Advocates. The **2nd** Defendant on the one hand entered appearance through the firm of Ms. Okile & Co. Advocates. By the time judgment was delivered, he was being represented by the said firm but on **19/04/2021** a consent was filed allowing the firm of Ms. Katama Ngeywa & Co. Advocates to act for him, and a Notice of Change of Advocates from the immediate former law firm filed the same date. The **1st** Defendant on the other hand came on record through the firm of Ms. Katama Ngeywa & Co. Advocates. By the time judgment was delivered he was represented by the said firm of Advocates.

12. It is important to note that all along, before the two defendants jointly instructed the firm of Ms. Ngeywa, they filed their respective documents and pleadings separately. However, in the instant Application, the **1st** Defendant swore the Affidavit on **19/04/2021** purporting it to be a joint one. He stated in paragraph **2** as follows, "*That I am authorized by the 2nd Defendant/Respondent to swear this Affidavit on my own behalf and on her behalf*."

13. I have carefully perused the Court record to ascertain when the authorization to swear the Affidavit on behalf of the **2nd** Defendant was given and filed. I have found none, let alone the fast that the **2nd** Defendant has always sworn affidavits and even filed witness statements in this matter to state that he was an adult male of sound mind. As to when he changed his sex or sexual orientation to be female, it is not known or indicated to the Court. Thus, the Court is left with no option but to conclude that the Affidavits in support of the Application before me are but founded on pure lies and are only designed to make the Court issue orders which even the **2nd** Defendant herein is not aware of or supports. Needless to say, that the law requires that where a person swears or writes a statement and wishes to file it for and on behalf of one or other persons, that should be done together with written authority which should be given prior to it. To the extent that the **1st** Applicant swore a false affidavit to which he alluded facts which could only be in the knowledge of the **2nd** Defendant, the Application was defective and should be dismissed on that account alone.

14. In the case of ***RESEARCH INTERNATIONAL EAST AFRICA LTD v JULIUS ARISI & 213 OTHERS [2007] eKLR*** , the Court of Appeal in considering an Affidavit that had been sworn on behalf of some plaintiffs without their written authority stated as follows: "*In our respectful view, the learned Judge overlooked rule 12 (2) of Order I CP Rules which requires that the authority, if granted, should be in writing and signed by the person giving it and, further that such written authority should be filed in the case. In the absence of such a written authority in the case file, the learned Judge erred…*" Whereas there is no express provision about a case where a Defendant swears an Affidavit for an on behalf of other defendants, claiming to have been authorized by them yet he has no written authority from them, by the same token that Affidavit is defective. Plaintiffs are treated as individuals in terms of pleadings before the Court hence the specific written authority is required. Similarly, Defendants should be treated likewise. It is time the Rules were amended to reflect that equality of the parties. I hold that the **1st** Defendant did not have capacity to swear the Affidavit on behalf his co-defendant. However, this Court has more to say on the Application.

15. As to whether the Application has been brought without unreasonable delay, this court notes that it was filed on the **03/05/2021**. That was **18 days** from the date of delivery of the judgment which was on **15/4/2021**. In addition, the Applicant filed a Notice of Appeal which has been attached to the Affidavit and the original thereof is in the Court file. The Notice was filed on **27/04/2021**. That was only **fourteen (14) days** after the delivery of the judgment. Based on the two steps by the Applicant, I find that the Applicants did not move the Court on the instant Application with undue delay hence they satisfied the condition of filing such application without undue delay. This is because in terms of **Rule 2(2)** of the Appellate Jurisdiction Act/Court of Appeal Rules an ""appeal", in relation to appeals to the Court, includes an intended appeal;…". In relation to appeals preferred to the Court of Appeal, it only requires the lodging of a Notice of Appeal in the appropriate registry and that suffices that there is an Appeal. This has been held in many matters, for instance, in ***Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR***.

16. Will the Applicant suffer substantial loss if the orders sought are not granted? To answer this question, I will look at what the Applicant has stated in support of the Application. In his Affidavit and grounds in support of the Application the **1st** Applicant did not in any way say that he will suffer substantial loss. All he stated was that the **2nd** Applicant will suffer such a loss. He did not even demonstrate how that would be especially given that from the time he alleged that the **2nd** Defendant's crop of maize would be destroyed it is almost a year gone. By contrast he swore that the Respondent will not suffer prejudice if the orders were granted. With due respect, since the orders of **21/01/2015** were explicit as shall be stated below, nothing can be further from the truth that the Respondent will not be prejudiced if the orders are granted.

17. Moreover, if what the Applicant swore was in his Supplementary Affidavit was anything to go by, then the Applicants are in contempt of Court. In paragraph **5** of the Affidavit he deponed that the orders of the Court of **21/01/2015** have never been executed as against the **2nd** Defendant. He also swore that the **2nd** Defendant planted crop on the disputed parcel of land early **2021**. The orders issued on **21/01/2015** were clear: First there was a mandatory injunction directing the defendants to demolish within seven **(7)** days a fence and structures they erected on the Plaintiff's land - the suit land herein. Secondly, there was a temporary injunction restraining them or their servants, agents and or employees from encroaching, trespassing onto, wasting, ploughing, growing crops, fencing or erecting structures on the parcel of land. For the **1st** Defendant to boldly swear that the said order was never executed hence they be granted the orders of this Court on borders on impunity and direct contempt of Court.

18. The applicant averred that the intended appeal would be rendered nugatory if the orders of stay of execution were not granted. His argument was that the Respondent would execute the decree thus rendering the appeal nugatory. He did not demonstrate even by way of the submissions filed how that would occur. The **1st** Applicant did not demonstrate to this court the nature of the substantial loss he would suffer. This limb of the Application fails. In my view, the instant Application is a mere academic exercise and designed to keep the Court busy when it should be engaged in other important business.

19. Thus, whereas the Applicants did not offer any security for the due performance of the decree herein, I need not consider whether or not they should have demonstrated that they could provide some.

b) Who to bear the costs of the instant Application

20. The upshot is that this court finds dated **19/04/2021** lacking completely in merit and it is hereby dismissed with costs to the Respondent.

21. To clear any doubt, this Court directs that the orders of *status quo* issued on **30/06/2021** are hereby vacated.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 7TH DAY OF FEBRUARY, 2022.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.