



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. E17 OF 2021

JAMES MUHINDI MACHIRA.....APPELLANT

-VERSUS-

SYMON NDORIA KABUCWA.....1ST RESPONDENT

EDWARD WAHOME KAGOIYA.....2ND RESPONDENT

RULING

1. By his Notice of Motion application dated 25th May 2021, James Muhindi *Machira (the Appellant)* prays for an order of stay of execution of the Judgment and consequent decree emanating from the Judgment of the Principal Magistrates Court dated 29th April, 2021 pending the hearing and determination of Appeal.

2. The application which is supported by an affidavit sworn by the Appellant is premised on the grounds that the Respondents obtained the Judgment in their favour and that they may at any time obtain a decree on their bill of costs and to proceed to execute

the same. The Appellant asserts that being aggrieved by the said Judgment, he has already lodged an Appeal before this Court and that if execution occurs, the Appeal shall be rendered nugatory thereby occasioning the Appellant irreparable loss and damage.

3. Symon Ndoria Kabucwa (*the 1st Respondent*) is opposed to the application. In his undated statement of Grounds of Opposition filed herein on 15th June, 2021, the 1st Respondent asserts there can be no stay of execution of a Judgment which simply dismissed the Plaintiff's suit on account that the Appellant had failed to prove his case against the two Respondents. The 1st Respondent further asserts that there is nothing to be stayed as the costs have not been assessed and urged the Court to find that the application is incompetent and misconceived.

4. Similarly, Edward Wahome Kagoiya (*the 2nd Respondent*) is opposed to the application. In his Replying Affidavit filed herein on 7th June, 2021, the 2nd Respondent avers that the Appellant has not satisfied the requirements for the grant of an order of stay of execution. The 2nd Respondent asserts that recovery of costs is a legal process and that such recovery cannot amount to substantial loss.

5. I have carefully perused and considered the application and the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. The application before me is expressed to be brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** – which states 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 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.”

7. As was stated by the Court of Appeal in **Mukuma -vs- Abuoga (1988) KLR 645**, the above conditions in **Sub-rule (2) of Order 42 Rule 6** share an inextricable bond such that the absence of one will affect the exercise of the discretion of the Court in granting stay of execution.

8. For a start, I had no doubt in my mind that the Appellant had come to this Court without undue delay. I say so because the decision sought to be stayed was rendered on 29th April, 2021 and the Appellant moved to this Court and lodged a Memorandum of Appeal together with his application less than one month thereafter.

9. According to the Appellant, he stands to suffer substantial loss

unless the orders of stay sought herein are granted. As was stated by Gikonyo J. in **James Wangalwa & Another -vs- Agnes Naliaka Cheseto (2012) eKLR**:

“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 Civil Procedure Rules. 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 Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein -vs- Chesoni (2002) 1KLR 867, and also in the case of Mukuma -vs- Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting of stay of execution, under Order 42 of the Civil Procedure Rules and Rule 5(2) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“... 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.”

10. The Appellant herein had in the Court below sued the Respondents seeking the following orders:

(i) An order that the title held by the 2nd Defendant for LR No. Magutu/Gathehu/1153 be cancelled forthwith;

(ii) An order that the 2nd Defendant do give vacant possession of LR No. Magutu/Gathehu/1153 and in default be evicted therefrom;

(iii) General damages for fraudulent conversion and trespass to the Plaintiff's property;

(iv) Costs of the suit.

11. Upon hearing the parties to the suit, the trial Court dismissed with costs the Appellant's case on the grounds that the allegation of fraud he had made against the two Respondents had not been proved. It is now the Appellant's case that the Respondents are likely to execute for costs. He asserts that it is only fair that the *status quo* be maintained pending the hearing of the Appeal and that in the event the stay is not granted, the Appeal will be rendered nugatory with the consequence that he shall suffer irreparable loss.

12. The Appellant has however not demonstrated how the Appeal would be rendered nugatory. There was also no demonstration of the substantial loss he is likely to suffer. I did not, with respect, think that recovery of costs lawfully awarded by the Court at the end of litigation can amount to the substantial loss referred to under **Order 42 Rule 6(2)** as cited above. The Appellant was under a duty to establish other factors which show that the execution would create a state of affairs that would irreparably affect him or negate the very essential core of the Appeal. He has not done so.

13. As Kimaru J. stated in **Century Oil Trading Company Limited -vs- Kenya Shell Limited, Nairobi (Milimani) HCMCA No. 1561 of 2007**:

“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 different from that ...”

14. Arising from the foregoing, I am not persuaded that there is any merit in the application for stay of execution dated 25th May, 2021. I dismiss the same with costs to the Respondents

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 3RD DAY OF FEBRUARY, 2022.

In the presence of:

Ms. Lucy Mwai for 2nd Respondent

Mrs. Machira for the Appellant/Applicant

Ms. Mwai holding brief for Maina Karingithi for 1st Respondent

Court assistant - Mugambi

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J. O. Olola

JUDGE