



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC APPEAL NO. 3 OF 2021

NEPHAT NJIRU M'KUMA & 8 OTHERS.....APPELLANTS/APPLICANTS

VERSUS

MWANIKI MUTHEE.....RESPONDENT

RULING

INTRODUCTION

1. The application under consideration is a notice of motion filed on 13th May, 2021 by the Applicants and dated 10th May, 2021. It is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules 2010.

APPLICATION

2. The Applicants are NEPHAT NJIRU M'KUMA & 12 OTHERS, who are the appellants in the appeal, while the Respondent is MWANIKI MUTHEE, who is also the respondent in the appeal. The motion came with four (4) prayers, but prayers 1 and 2 are moot now. The prayers for consideration are therefore two (2) – prayers 3 and 4 – and they are as follows:

iii) **THAT** there be a stay of execution of the decree in EMBU MC ELC NO 156 OF 2018 pending hearing and determination of the appeal herein.

iv) **THAT** the cost of this application be borne by the respondent.

3. The application is anchored on grounds that the respondent may execute the decree before the appeal is heard and determined and that this could render the appeal nugatory if it succeeds. It was said that if execution succeeds the applicants may be evicted from their family land and further that the respondent who is their father intended to dispose of their matrimonial land thus leaving them destitute.

4. To the application is attached a supporting affidavit dated 10th May 2021 and sworn by Nephath Njiru M'kuma, the 1st applicant. The applicants averred they had been sued by their father in Embu MC ELC NO. 2018 for removal of a caution. It is averred that judgment was rendered against them and being aggrieved by the said judgment they lodged the present appeal. They pleaded that they have a good appeal with high chances of success and that the court had determined that the suit land was both ancestral and matrimonial, but nevertheless allowed the suit for reason that there was no counterclaim in the defence.

5. According to the applicants if the caution is lifted their father will dispose of the suit land where the 13 family members are said to reside. The applicants are of the view that no prejudice will be suffered if stay is granted and have expressed their willingness to abide by any condition that would be attached to the grant of stay. They averred that this being a land matter, then the land itself would be enough security.

6. The respondent responded to the application via a replying affidavit dated 18.5.2021 and sworn by Njeru Ithiga, counsel on record, for the respondent. The counsel confirmed having instructions not to oppose the application provided the applicants complied with the requirement under Order 42 rule 6(2) of the Civil Procedure Rules to provide security for due performance of the decree in favour of the respondent. According to the respondent, the suit land, being registered in his name, could not be used as security and the court was urged to order the applicants to deposit in court a specific amount of money as security and in the event of non-compliance to dismiss the application.

7. By a supplementary affidavit dated 28.5.2021, the applicants opposed the condition imposed by the respondent for grant of security as due performance for allowing the application. The suit was said to be a non-monetary suit and the due performance of the decree was said to be withdrawal of the caution which would cost Kshs. 500/=, and it was therefore argued that the demand for security lacked legal basis. It was

opined that the court should allow the application unconditionally as the application was not opposed.

SUBMISSIONS

8. The application was canvassed by way of written submissions. The applicants filed their submissions on 21.12.2021. According to them, a party seeking provision for security for costs must demonstrate that he is apprehensive that if costs are ordered to be paid then the opposing party will not be in a position to pay. It was therefore argued that the respondent had failed to demonstrate such incapacity on the part of the applicants.

9. It was argued that the respondent's fears were unfounded for reasons that the appellants were his wife and children and that they could not run away, hence the respondent would be able to execute for costs. They further submitted that the appeal has high chances of succeeding as, according to them, the suit land is both customary land and matrimonial land. The suit was also said not to be a money suit and that the appellants were only seeking that the caution be placed on the suit land to remain in force awaiting the hearing and determination of the appeal. The court was urged to allow the application unconditionally.

10. The respondents on their part filed their submissions on 21.6.2021. They reiterated that they were not opposed to the application for stay of execution, provided the appellants comply with the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules on security for due performance of the judgement/decree. It was submitted that the provision on security was mandatory.

11. According to the respondent, he who seeks equity must do equity. It was argued that the applicant ought to deposit a significant amount of security and not the Kshs. 500/= which he had suggested. The amount was said not to be fair. It was contended that suit land was registered in the name of the respondent and it could therefore not be used as security by the applicant.

12. The court was called upon to balance the interest of both parties: That of the appellant seeking stay to ensure his appeal is not rendered nugatory, and the respondent's interest to enjoy the fruits of his judgment. The respondent relied on the case of **Charles Kariuki Njuri Vs Francis Kimaru Rwara in Nyahururu ELCA No. 5 of 2020** where the court ordered deposit of Kshs. 1,500,000/= as security in a claim for Cancellation of title. The court was urged to order the applicant to deposit sufficient security in compliance with the mandatory provisions of the law as a condition for grant of orders for stay of execution.

ANALYSIS AND DETERMINATION

13. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. The sole issue for determination, is whether on order of stay of execution should be granted.

The legal provision on grant of stay of execution pending appeal is provided for under Order 42 Rule 6(2) of Civil Procedure Rules, 2010, which provides as follows:

“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.

The court appreciates the three pre- conditions set before an application for grant of stay of execution is allowed. However, it should be noted that the respondent is not opposed to the application herein provided the applicant grants security for due performance of the decree.

14. Whether or not to grant or disallow an application for stay of execution is a matter of discretion. In the case of **NGOTHO COMMERCIAL AGENCIES LTD V GEORGE WANJUKI GETHI [2006] EKLK** which cited with approval the case of **Butt –vs- Rent Restriction Tribunal [1982] KLR 417**, Madan J.A. held at page 419,

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful being nugatory, per Brett L. J. in **Wilson –vs- Church (No. 2) 12 ChD (1879) 454 at p 459**. In the same case Cotton L. J. said at p 458 “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”*

15. As stated above the respondent is not opposed to the application and the only contention between the parties is the issue of deposit of security as provided under Order 42 rule 6(2) of the Civil Procedure Rules. The applicants have contended that the court should allow the application unconditionally, while the respondent argues, that the provisions of Order 42 rule 6(2) make it mandatory and a prerequisite for deposit of security in an application for grant of stay of execution. I agree with the respondent that a deposit of security as envisaged under Order 42 rule 6(2) is not optional but mandatory. The wording of the said provision is in mandatory terms.

16. Further, according to the applicants the respondent has a duty to demonstrate that he is apprehensive that if costs are ordered, the applicants may not be in a position to pay such costs. On this, they argued that the respondent had failed to demonstrate. Among other reasons for opposing the issue of deposit of security, the applicants contended that they are children and wife of the deceased and are therefore not capable of running away after judgment. They also submitted that the suit is not a money suit and that they were only seeking to

have the caution remain in place until the appeal is determined.

17. I have carefully considered the arguments advanced by the applicants for opposing the deposit of security and, having stated that the same is mandatory, I wish to address my mind to the purpose and essence of deposit of security. In the case of **Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates, Nrb Misc. Civil Application No. 802 Of 2010**, the court stated:

‘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.’

18. Further in the case of **RWW vs. EKW [2019] eKLR**, the court stated as follows;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

19. The case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, is also instructive. The court observed as follows:

“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 Applicant 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...”

It is therefore trite law that the purpose of deposit of security is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant and this being a land matter such security serves to preserve the subject matter as the parties litigate on the appeal. However in doing so, the court has a duty to balance the interest of both parties; that of the applicants who seek to litigate on their appeal without having it rendered nugatory by virtue of the subject matter been disposed of or interfered with and that of the respondent who has a right to enjoy the fruits of his judgment.

20. From the pleadings before the lower court the subject matter of the suit are two parcels of land Gaturi/Nembure/1433 measuring 3.96 (Ha) and Kyeni/Kigumo/3841. The contention by the parties is a caution placed by the applicants which the court via it’s judgment delivered on 23rd March 2011 ordered that it be removed. The applicants are apprehensive that if stay of execution is not granted, the respondent can proceed to evict them from the land, which they argue is matrimonial/ancestral land. I am inclined to grant stay in the circumstances but also order the parties to deposit security before the court. The applicants are of view that the suit parcel of land would be enough security. This, the court cannot allow, as the land itself is owned by the respondent and not the applicants. The amount of security to be deposited is discretionary upon the court. In my view, and in balancing the interest of both parties as alluded to above, a deposit of security of Kshs. 250,000/= will suffice.

21. Accordingly, I grant stay of execution on condition that the applicants deposit Kshs. 250,000/= in court within 45 days from the date of this ruling and to further file the record of appeal within 60 days, in default the stay lapses. Costs of this application shall be in the appeal.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **1ST DAY of FEBRUARY, 2022**.

In the presence of M/s Muriuki for respondent and in the absence of Mugambi Njeru for appellants/applicants.

CA: Leadys

A.K. KANIARU

JUDGE

1.02.2022