



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL NO E14 OF 2021

BEATRICE MUENI MBITI.....APPELLANT/APPLICANT

VERSUS

HON TOM MBALUTO.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's court at Machakos

(Hon Ms A. Nyoike) delivered on 22nd April 2021 in the Machakos ELC No.42 of 2019)

RULING

Introduction

1. Before this Court for determination is the Appellant's Notice of Motion application dated 28th of April 2021 seeking the following orders:
 - a. **That this Honourable Court be pleased to order stay of execution of the decree and Judgment delivered on 22.04.2021 in ELC No. 42 of 2019 Chief Magistrates Court Machakos pending the hearing and determination of the Applicant's Appeal.**
 - b. **That the costs for the application be provided for.**
2. The application is supported by the Affidavit of the Applicant herein dated 28th of April 2021 who has deponed that the Judgment was entered by the Chief Magistrate's court on the 22nd of April 2021 in which the court declared the Respondent herein as the sole proprietor of Plot No. Machakos/Katheka-kai "A" 267 and further granted the Respondent eviction orders.
3. The Appellant deponed that the said Judgment is full of irregularities; that she has instructed her advocates to appeal against the Judgment and that the Respondent is likely to execute the decree, which action will render the appeal nugatory as any compensation may not be an adequate remedy.
4. In response to the application, the Respondent filed a Replying Affidavit dated 10th of May 2021. The Respondent deponed that the application lacks merit, is an abuse of the court process and has been brought in bad faith with the sole intention of denying the Respondent the fruits of his Judgment; that contrary to the Applicant's assertions, the impugned Judgment was issued fairly and regularly and that there has been no demonstration or any evidence to the contrary.
5. The Respondent deponed that he is the lawful owner of the suit property and that he was able to demonstrate this fact to the trial court; that the Appellant has not brought forth any evidence to show that she has any lawful claim on the suit land nor shown sufficient grounds to warrant the grant of the orders sought and that the Appellant stay as well as construction on the suit property has been with his permission,
6. The Respondent deponed that the Appellant has not demonstrated that unless the order of stay is granted, she will suffer irreparable harm; that the Appellant has not provided any evidence to show that she has any lawful claim over the suit property and that the Appellant has not satisfied the requirements under Order 42 Rule 6 of the Civil Procedure Rules.

Submissions

7. The application was canvassed by way of written submissions. The Appellant's counsel submitted that the trial Magistrate declared the Respondent as the sole proprietor of the suit property whilst the Appellant was claiming adverse possession against the Respondent having been in open possession and use of the suit property for 20 years without interruption was erroneous.

8. On substantial loss, counsel submitted that in the event the stay is not granted, the Respondent will proceed to execute the decree and Judgment and evict the Appellant from a portion of the suit property measuring 3 acres which was to be excised from the suit property, which portion the Applicant has substantially developed and that the injury that will arise from the eviction cannot be compensated in monetary terms.

9. On the issue of unreasonable delay, the Appellant's advocate submitted that there has been none; that the application was filed on the 28th of April 2021 before the expiry of 14 days from the date of delivery of the Judgment and that an order of security is discretionary.

10. The Respondent's Counsel submitted that the Appellant has not satisfied the requirements for the grant of orders of stay of execution as set out in Order 42 Rule 6(2) of the Civil Procedure Rules. Counsel cited the case of Re Estate of Philip Nthenye Mukonyo (deceased) [2018]eKLR where it was held;

“In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.”

11. According to counsel, the Appellants application offends the provisions of **Article 47(1) and 159(2)(b)** of the Constitution, **Sections 1A, 1B of the Civil Procedure Act** and that the likely consequence of granting the stay of execution would be unnecessary waste of judicial time.

12. On the issue of substantial loss, counsel opines that the Appellant has not demonstrated the substantial loss that she may suffer should the orders be granted; that the Appellant has failed to establish a legal right over the suit property as the Respondent merely permitted her to settle on the property temporarily and that the Appellant has misconstrued what is tantamount to substantial loss. In support of this, counsel cited the court of appeal case of Kenya Shell Limited Vs Benjamin Karuga Kigibu & Ruth Wairimu Karugu(1982-1988)1 KAR 1018 where the Court stated thus;

“It is usually a good rule to see if order 41 rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicants, 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 cornerstone of both jurisdictions for granting stay.”

13. Counsel also relied on the Court of Appeal case of Michael Oketch Adegwa & 3 others Vs Henry Omusambayi Nandwa & anor[2008]eKLR where the court in discussing the aspect of whether the intended appeal has high chances of success stated;

“The opinion of this Court is that the balance may be achieved by first and foremost considering the applicants' claim against the respondents and see whether or not it is tenable even of appeal. A strong indication emerges to the effect that the intended appeal is highly untenable and may not be rendered nugatory if stay is not granted...with lack of proprietary interest in the suit land, the plaintiff's position is that of trespassers.”

14. Counsel submitted that the Appellant has not provided evidence to the effect that she is ready and willing to provide security or abide by such orders as the court may make and that pursuant to **Order 42 Rule 6 (2) (b)** of the **Civil Procedure Rules**, no order for stay of execution may be made unless security is given by the applicant.

Analysis & Determination

15. Having considered all the relevant pleadings, the sole issue that arises for determination is;

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

16. The law governing the grant of stay of execution pending appeal is **Order 42 Rule 6** of the **Civil Procedure Rules**, the relevant part of 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 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.

17. It is apparent from the above provisions of the law that the Appellant is required to satisfy all the requirements set out therein to be entitled to orders of stay of execution. The requirements as per the above provision are threefold: whether there is sufficient cause; whether there is likelihood of substantial loss and whether security for the due performance of the decree has been provided.

18. The Court of Appeal in *Butt vs Rent Restriction Tribunal [1982] KLR 417* gave guidance on how a court should exercise its discretion when determining whether or not to grant a stay of execution. It stated thus;

“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.”

19. The Court of Appeal in the case of *Vishram Ravji Halai vs Thornton & Turpin Nairobi Civil Application No. 15 of 1990 [1990] KLR 365* stated that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under **Order 41 rule 6** (now **Order 46 Rule 2**) of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

20. In *Duncan Langat & another vs Paul Muli & another (suing as the administrators to the Estate of the late Pauline Munaine) [2021] eKLR* the High Court stated:

“The Applicant herein, was obligated by law to show “sufficient cause” for stay and secondly, demonstrate that a substantial loss is likely to be incurred unless stay is granted.”

21. As to what sufficient cause is, this was determined in the case of *Antoine Ndiaye vs. African Virtual University [2015] eKLR*, where Gikonyo J. opined as follows;

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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”.

22. The Appellant contends that that she will suffer substantial loss as the Respondent will, in execution of the decree, evict her from the suit property which she has resided in and substantially developed for 20 years. The Respondent on his part avers that the Applicant has not provided any evidence to support the contention that she has lawful claim to the property.

23. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga (1988) KLR 645* where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

24. In the case of *Tropical Commodities Suppliers Limited 7 Others Vs International Credit Bank Ltd (in liquidation)(2004) 2 E.A 331* the Court defined the aspect of substantial loss thus;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal.”

25. The evidence adduced before this shows that vide the Judgment delivered on the 2nd of April 2021, the court declared the Respondent as the sole proprietor of the suit property. The court further issued orders of eviction against the Plaintiff.

26. From the proceedings and the Judgment of the trial court, there is no dispute that the Appellant resides on the suit property. The issue in contention is whether she acquired any rights over the property by virtue of her residence thereon or whether as the Respondent contends, she is a mere licensee.

27. **In *Charles Wahome Gethi V. Angela Wairimu Gethi*, Court of Appeal Civil Appeal No. Nai.302 of 2007, the Court of Appeal held that:**

“It is not enough for the appellants to say that they reside or live on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants should suffer if the respondent executes the decree in this suit against them.”

28. In this instance, the court is persuaded that the eviction of the Appellant from the suit property where she has resided for 20 years, which residence has not been contested, would mean that any house built on the suit property would be demolished, thus rendering the Applicant homeless. These actions will occasion the Applicant substantial loss.

29. It is apparent from the pleadings that the Application for stay pending appeal was filed without unreasonable delay. The Judgment sought to be appealed against was delivered on the 22nd of April 2021 whereas the present application was filed on the 28th of April 2021.

30. The final aspect for consideration is whether the Applicant has provided security for due performance of the decree should his appeal ultimately fail. Considering the suit land will be there even after the Appeal has been heard and determined, an order for security for the due performance of the decree is not necessary.

31. For those reasons, the Application dated 28th April, 2021 is allowed as follows:

a. An order staying the execution of the Judgment and Decree of the Chief Magistrate’s court at Machakos (Hon Ms A. Nyoike) delivered on 22nd April 2021 in Machakos ELC No.42 of 2019 be and is hereby granted pending the hearing and determination of the Appeal.

b. Costs be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2021

O. A. ANGOTE

JUDGE

In the presence of:

No appearance for the Appellant/Applicant

Mr. Munyao for the Respondent

Court Assistant – John Okumu