



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 490 OF 2017

JOHN NGANGA KIBE PLAINTIFF/ APPLICANT

VERSUS

REBECCA MUTHONI KIAMA1ST DEFENDANT/ RESPONDENT

MESHACK MBUTHIA GITAU ALIAS

MICHECK MBUTHIA GITAU 2ND DEFENDANT/ RESPONDENT

RULING

1. The Plaintiff filed a Notice of Motion dated 24th June 2020 wherein he sought orders that:

i. Spent.

ii. Spent.

iii. Spent.

iv. Pending the filing, hearing and determination of the Plaintiff/ Applicant's Appeal, this Honourable Court be pleased to stay execution of the Ruling and/or Order delivered by Honourable Justice B.M. Eboso (Mr.) on 11th June 2020, and any other orders that may be issued pursuant thereto.

v. Cost of this application be in the cause.

2. This application is based on the grounds on the face of it and the Plaintiff/ Applicant's Supporting Affidavit dated 24th June 2020, where he avers that he is aggrieved by the ruling of this court dated 11th June 2020 and has filed a Notice of Appeal against part of the ruling. That the ruling determined this entire suit save for directions on cost, and the applicant and other third party *bonafide* purchasers for value residing on the suit property are now faced with the threat of eviction in execution of this court's ruling. This would cause them prejudice, irreparable loss, thus rendering the Applicant's intended appeal nugatory.

3. The Respondent/1st defendant opposed the Application by way of her Replying Affidavit dated 16th November 2020, where she avers that the application has no merit, is defective and ought to be dismissed. She states that prayer 4 for stay of execution pending hearing and determination of the appeal cannot be granted as there is nothing capable of execution.

4. The Applicant responded via a further affidavit dated 19th February 2021 averring that there are further proceedings after the court's ruling of 11th June 2020 as the court is yet to decide on costs of this suit. That unless the proceedings with respect of determination of the costs of this suit are stayed, his intended appeal would be rendered nugatory.

5. Further, if orders of stay of proceedings are not granted, the process of assessing the costs of the suit would be futile if their appeal is successful, requiring the order of costs to be overturned or a refund of the costs paid. Further, suits should not run concurrently in different courts.

Submissions

6. The Applicant filed written submissions dated 19th February 2021 in support of his Notice of Motion, which echoed the position as contained in his application and affidavits. The Applicant gave a background to this suit, which is based on the claim of ownership of **Title**

No. Nairobi/ Block 126/466. He avers that he bought the suit property from the 2nd Respondent who had represented that he had a power of attorney from the 1st Respondent to facilitate the sale. The 1st Respondent denied selling the property and claimed that the power of attorney was a forgery.

7. During trial, the Applicant and 1st Respondent entered into a sale agreement dated 15th March 2018 and filed a consent in court on the same date, but the said consent was later withdrawn through another consent dated 22nd January 2019. The 1st Respondent thereafter filed a Notice of Motion dated 17th June 2019 seeking to restrain the Applicant from dealing with the suit property on grounds that the sale agreement of 15th March 2018 had been rescinded. The Applicant filed a Replying Affidavit dated 29th October 2019 and parties filed their respective submissions. The court then issued its ruling on 11th June 2020 indicating that the suit was compromised under Order 25 rule 5 of the Civil Procedure Rules. The Applicant is seeking a stay of execution of the aforementioned ruling pending hearing and determination of an intended appeal.

8. The Applicant submits that the Court's ruling is capable of execution as himself and 3rd party *bonafide* purchasers are at risk of eviction. Further, the 1st Respondent may institute a fresh suit and seek to enforce the consent dated 22nd January 2019 and have the plaintiff and the 3rd party purchasers evicted from the suit property.

9. The applicant relied on the case of **Margaret Wagithi Njuki v Bernard Waweru Kiburi & 2 others [2020] eKLR** where the court granted a stay of execution and a temporary injunction to prevent sale of the suit property. The court quoted with approval **Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, where the court held that the purpose of a stay of execution is to preserve the substratum of the case:

“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”.

10. The Applicant submitted that in accordance with Order 42 Rule 6, the application for stay has been brought without undue delay, that the Applicant will suffer substantial loss through eviction of himself and other third parties from the suit property if the orders for stay of execution are not granted, and that he is willing to furnish the court with reasonable security and abide by such conditions as the court may order pending determination of the appeal.

11. He further relied on the cases of **Antoine Ndiaye vs African Virtual University [2015] eKLR** where the court stated that the relief of stay of execution is discretionary and should only be granted where sufficient cause has been shown in accordance with Order 42 Rule 6 of the Civil Procedure Rules.

12. He also relied on **Socfinac Company Limited v. Nelphat Kimotho Muturi [2013] eKLR** where the court expanded the conditions for grant of stay to include giving effect to the overriding objective:

“To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions....”.

13. With respect to defining substantial loss, he relied on the Ugandan case of **Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005** cited in **Antoine Ndiaye (Supra)**, where the court stated that:

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal..”.

14. The case of **James Njoroge Gitau vs Lucy Chepkurui Kimutai [2018] eKLR**, was also cited where the court found that an applicant in possession of the property for a considerable amount of time would suffer substantial loss if they had to leave and seek alternative accommodation.

15. On the issue of suitable security, the Applicant relied on the case of **Francis Mburu Kamau vs Methi & Swani Farmers Cooperative Society [2020] eKLR** where the court affirmed the decision in **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR**, where the court set out thus:

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal.”

16. The Applicant submitted that there is need to stay the court's proceedings with respect to determination of costs pending hearing and determination of their intended Appeal else the Appeal will be rendered nugatory. Further, should the appeal succeed, these proceedings would be rendered futile and would call for overturning the order of costs and/or refund of costs.

17. The Applicant relied on the case of **Nathan Chesang Moson & 2 others v Community Uplift Ministries (2020) eKLR** which cited

with approval the **Matter of Global Tours and Travels Limited – Nairobi HCCC No 43 of 2002** where it was stated that;

“... if the applicant succeeds on its appeal, most unsavoury situation will result ... To undo what would have been done in the meantime would be impossible or impossible without further litigation. That is not the kind of damage which can be compensated by an award of costs and it would not be optimum utilisation of judicial time to proceed with the trial of the petition at the risk of such prospects. In those premises it would be in the interest of justice to grant an order of stay of proceedings in this case pending appeal.”

18. He also relied on the case of **Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR** where the court stated that:

“This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory.”

19. The Applicant also relied on **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** and **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999**.

20. The 1st Respondent filed her written submissions dated 6th July 2021 averring that prayer 4 was the only substantive prayer remaining for determination as prayers 1, 2 and 3, which were to be determined before the hearing of the application have been overtaken by events.

21. The 1st Respondent concedes that the Application has been brought without undue delay. On whether the Applicant would suffer substantial loss if the orders of stay are not granted, the Respondent submitted that the Applicant has not shown by way of empirical or documentary evidence what substantial loss he would suffer, and how such loss would be occasioned. Rather, his allegations of loss are based on speculation.

22. She submitted that the possible eviction would only arise out of what the Applicant speculates could happen if the 1st Respondent files a fresh suit. Further, there is no imminent threat of eviction as were a fresh suit to be filed, the Applicant would be afforded an opportunity to enter appearance and file a defence.

23. She submitted that the Applicant had exaggerated the number of 3rd party occupants in stating that there were hundreds or thousands of such parties, yet the suit property of two and a half acres could not yield such number of subplots. In addition, such third parties were not subject to this suit and the sale of the land to them is also contrary to the sale agreement dated 15th March 2018.

24. The Respondent relied on the cases of **Henry Sakwa Maloba vs Bonface Papando Tsabuko (2020) eKLR** and **Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR** where the court held that:

“It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

25. She also relied on **Gideon Omare v Machakos University [2019] eKLR** where the court cited **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, where it was stated that;

“If there is no evidence of substantial loss to the applicant, 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

26. The Respondent urged the court to deny the orders for stay averring that the suit was compromised under Order 25 Rule 5 of the Civil Procedure Rules as the parties had entered into a sale agreement which the Applicant breached when he failed to pay the balance of the purchase price; that this a dilatory tactic to enable the Applicant to continue breaching the agreement for sale, and that the Applicant is still in possession of the property and is continuing to subdivide and dispose the same to unsuspecting third parties.

Analysis and Determination

27. The issue for determination in this matter is whether the court should grant stay of execution of the ruling dated 11th June 2020 pending hearing and determination of the Applicant’s intended appeal.

28. The applicable legal provision for stay of execution or proceedings is found in **Order 42 Rule 6 of the Civil Procedure Rules 2010**, which provides that:

“6. (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.”

29. The courts have consistently upheld the principles set out in **Order 42 rule 6**, the purpose being to preserve the substratum of the suit (**Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, **Antoine Ndiaye vs African Virtual University [2015] eKLR** and **Socfinac Company Limited v. Nelphat Kimotho Muturi [2013] eKLR**).

30. In **George Obonyo v Marcel Ochieng [2021] eKLR**, the court cited with the approval the Court of Appeal case of **Butt vs. Rent Restriction Tribunal [1979] eKLR** where it was 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 principal 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 the 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; and*

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 its 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*

31. There is no dispute that the current application was filed without undue delay. On substantial loss, an applicant ought to provide proper and adequate evidence of the substantial loss that he stands to suffer (**Samvir Trustee Limited vs. Guardian Bank Limited [2007] eKLR**). Substantial loss refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal (**Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005**).

32. In **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held that -

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

33. In **James Wangalwa and another Vs. Agnes Naliaka Cheseto [2012] eKLR** the court further discussed what substantial loss entails:

“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. This is what substantial loss would entail.”

34. The Applicant has indicated that they would suffer substantial loss should they be subjected to eviction. Such eviction would however not be in execution of the court’s ruling dated 11th June 2020. Rather, it is predicated on the speculation that the Respondent would file a suit to effect the consent dated 22nd January 2020 and that eviction orders would be granted therein.

35. The Applicant also indicates that substantial loss would be occasioned to third party *bonafide* purchasers who are in occupation of the suit property. However, the said third parties are in essence not parties to this suit.

36. I find that the Applicant has failed to satisfy the evidentiary burden on the second condition of substantial loss.

37. The third condition is with respect to security for the due performance of the orders that the court may grant the applicant. This is necessary to balance the two competing interests of the successful litigant’s right to the fruits of their judgement, and the unsuccessful litigant’s right to appeal, which should be safeguarded from being rendered nugatory (**Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR**).

38. In this suit, the Applicant is willing to abide by any reasonable conditions that may be set by the court which in itself is a mark of good

faith, see **-Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another [2018] eKLR**. Nevertheless, the court retains the discretion to grant or not to grant the orders sought taking into account the overall circumstances of the particular case.

39. It is pertinent to consider what action needs to be stayed. In **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR**, the Court of Appeal for East Africa stated, court stated as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs” (Emphasis added).

40. In the ruling delivered by this court on 11.6.2020, it was held that the suit as between the two litigants had been compromised under Order 25 Rule 5 of the Civil Procedure Rules. The court declined the 1st Defendant’s Notice of Motion dated 17th June 2019 as it was premised on a new cause of action. There is nothing that the court ordered the parties do or refrain from doing. Only the issue of costs is pending. Taking into account that the net effect of the sale agreement of 15.3.2018 and the subsequent consent of 22.1.2019 was to birth a new cause of action, then any stay of execution of the proceedings herein would only convolute the dispute further.

41. In light of the foregoing analysis, I find that the application dated 24.6.2020 is not merited. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kariuki G. E. for the Plaintiff/Applicant

Court Assistant: Edel Barasa