



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC APPEAL NO. 10 OF 2019

GILBERT CHEGE NJOROGE.....1ST APPELLANT/APPLICANT

TANGO AUCTIONEERS.....2ND APPELLANT/APPLICANT

VERSUS

JOSEPH MUCHIRI MUNGAI.....RESPONDENT

RULING

1. Before me for determination is an Application via a the Notice of Motion dated 31st July 2019 brought under the provisions of Section 3A of the Civil Procedure Act, Order 42 Rule 6(2) and Order 51 of the Civil Procedure Rules, and all other enabling provisions of the law where the 1st Applicant seeks for orders of stay of execution of the ex-parte judgement in Nyahururu CMCC 304 of 2017, delivered on the 5th January 2019, and all other consequential orders therefrom pending the hearing and determination of the Appeal. The 1st Applicant also sought for the Honourable Court to call for the Subordinate Court 's file and give directions ex-debito justitiae as well as for costs to the Application.
2. The Application is supported by the grounds set on the face of the said Application as well as on the sworn affidavit of Gilbert Chege Njorothe 1st Applicant herein, dated the 31st July 2019.
3. The said Application was opposed vide the Respondent's Replying Affidavit dated the 20th August 2019 in which the Respondent sought for the dismissal of the said Application with costs for being an abuse of the Court process.
4. The Application was disposed of by way of written submission wherein the Applicants gave brief facts of the matter in issue to the effect that vide Nakuru HCC No. 580 of 1990, the 1st Applicant herein sought for and was granted orders of eviction which was carried out by the 2nd Applicant/Appellant against the Respondent. Further orders were to the effect that the Land surveyor Nyandarua, do re-establish the exact position of the original beacons of the parcel of land No. Nyandarua/Ol Kalou South/8.
5. Pursuant to the said orders and execution of the same therein, the Respondent herein filed suit in Nyahururu CMCC 304 of 2017 against the Applicants herein seeking damages arising from the legally sanctioned eviction and re-establishment of the beacons to No. Nyandarua/Ol Kalou South/8.
6. That the Respondent sought for and obtained an interlocutory judgment after the 1st Applicants' Counsel failed to enter appearance and defence within the stipulated time prescribed by the law.
7. Thereafter the 1st Applicant filed his Memorandum of Appearance and defence as well as a Notice of Preliminary Objection to the effect that the said suit was bad in law in line with Section 34(1) of the Civil Procedure Act and further that it was Res judicata Nakuru HCC No. 580 of 1990.
8. That despite the Notice of objection, the Court proceeded to hear the Respondent's case on his formal proof despite there having been no service effected upon the 1st Applicant. That an ex-parte judgement was thereafter delivered in favour of the Respondent on the 15th January 2019 pursuant to which the 1st Applicant filed an application in the trial Court seeking that the same be set aside for none service of the hearing notice and the fact that they had a strong defence. The said application was heard and a ruling delivered on the 9th July 2019 dismissing it.
9. The Applicants' application to this Court therefore sought for the determination of the following issues.

- i. Whether the Appellant/Applicants are entitled to stay of execution pending Appeal.
- ii. Whether the Honourable Court ought to call for the Subordinate Court's file and give directions ex-debito justitiae.
- iii. Whether costs should issue.

10. On the first issue for determination, it was the Applicants' submission that the provisions of Order 42 Rule 6 of the Civil Procedure Rules sets the three conditions for stay of execution pending Appeal to wit:

- i. That substantial loss may result unless the order is made
- ii. The application has been made without undue delay; and
- iii. The Applicants satisfy such security as the Court orders for the due performance of such decree or order;

11. They also relied on the decided case in **Butt vs Rent Restriction Tribunal [1982] KLR 417** as cited with approval in the case of **Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR** in which the Court of Appeal gave guidance on how Courts should exercise discretion in an application for stay of execution.

12. They submitted that they would suffer a twofold substantial loss unless stay of execution was granted for reasons. In the first instance that whereas in the impugned judgement they were required to pay a substantial amount of money of Ksh 1,232,937.50/=, the Respondent was a man of straw and therefore he would not be in a position to refund the money after their Appeal, which had a high chance of success, succeeded.

13. That secondly, if the stay was not allowed their Appeal would be rendered nugatory considering the fact that if they were to succeed in their Appeal, they would face serious hardship in being refunded the said colossal sum by the Respondent who had failed to prove that that he was a man of means capable of refunding the decretal sum if the Appeal succeeded. They relied on the cases of **GN Muema T/A Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR**, **Focin Motorcycle Co. Limited vs Ann Wambui & Another [2018] eKLR** and **Antoine Ndiage Vs African Virtual University [2015] eKLR** to buttress their submission.

14. That further, they would suffer irreparable loss and a greater injustice since the Respondent would get a chance to have a monetary decretal sum arising from a process of circumventing the law. That they had not been served with the hearing notice prior to the hearing of the formal proof yet they had entered appearance and further that the suit arose from a valid eviction order. That they were already incurring substantial loss arising from all these injustices and the failure by the Respondent to adhere to the law. They relied on the decided case of **Parklands Shade Hotel Ltd T/A Klub House Two vs. Joyce Wanjiku Mbaka [2010] eKLR** to submit that they had satisfied the first condition set by law to the effect that they would suffer substantial loss unless the order of stay was granted.

15. On the second condition to be fulfilled, it was their submission that they had filed their application timeously and without undue delay. That the ruling Appealed against had been delivered on the 9th July 2019 wherein the present application as well as the Appeal had been filed on the 31st July 2019. That the time of 30 days stipulated under Section 79G of the Civil Procedure Act for filing of an Appeal, had not lapsed. Reliance was placed on the case in **Focin Motorcycle** (supra)

16. The Appellant submitted that on the third condition set out by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, that they were willing and ready to abide by any conditions of the Court in relation to security for due performance of the said decree or order.

17. On the second issue for determination as to whether the Court ought to call for the Subordinate Court's file and give directions ex-debito justitiae, it was the Applicants' submission that given the circumstance of the matter before it, it was imperative for the Court to call for the subordinate Court's file so as to acquiesce itself with all the facts so as to ensure that substantial justice was done to all parties.

18. On the last issue for determination, the Applicant's submitted that pursuant to the decided case in **Orix Oil Limited vs Paul Kabeu [2014] eKLR**, the Application ought to be allowed and the Respondent to bear the costs. They sought for the prayers in their Application to be granted.

Respondent's Submission.

19. Vide their undated written submission filed on the 6th January 2020, the Respondent submitted that they had filed a Complaint against the Appellant/Applicants, before the Chief Magistrate's Court dated the 8th November 2017, on the 13th November 2017.

20. That when the 1st Applicant failed to file their Memorandum of Appearance, they had sought for interlocutory Judgement on the 6th December 2017 which request had been granted after which they had subsequently fixed the matter for hearing there having been no order to serve in the absence of either an appearance or defence. The judgement had been delivered on the 15th January 2019.

21. That whereas the 1st Applicant was the proprietor of parcel No Nyandarua/Ol Kalou South/9, the Respondent on the other hand was the proprietor of parcel No. Nyandarua/Ol Kalou South/8, parcels of land adjoining each other.

22. That the orders issued in the judgment of 4th May 2012 in Nakuru HCC No. 580 of 1990 were directed to parcel No. Nyandarua/Ol Kalou South/8 but later there were directions issued for the re-establishment of the exact position of the original beacons in respect to the

same parcel of land.

23. That instead of ascertaining the boundaries and enforcing an eviction order pertaining to the said parcel of land, the Applicants had misdirected themselves and had damaged properties that belonged to the Respondent on parcel No. Nyandarua/Ol Kalou South/9, which then culminated into a civil suit being Nyahururu CMCC 304 of 2017.

24. The Respondent adopted the Applicants' issues for determination and submit that the Application was brought in bad faith and aimed to delay enjoyment of the fruits of a successful litigation. That the 1st Applicant had not demonstrated the substantial loss he was likely to suffer and therefore an Appeal could not be rendered nugatory by a money decree being satisfied. He relied on the decided cases in **Joseph Gachie T/A Joska Metal Works vs Simon Ndeti Muema [2012] eKLR** and **Machira T/A Machira & Co Advocates vs East African Standard (No.2) [2002] KLR 63**.

25. On the issue as to whether or not he was in a position to refund the sums in satisfaction of the decree, the Respondent relied on the case of **Caneland Ltd & 2 Others vs Delphis Bank Ltd Nai Civil Application No. 344 of 1999** to submit that the burden was upon the Applicants to prove that he could not refund the same

26. On the second issue for determination, the Respondent submitted that any party that sought equitable remedy to Court 'must come in good faith and in good time'. That the Applicants sought to delay the due process which delay was unjustified. That the provisions of Article 159(2) of the Constitution were not meant to oust the rules of procedure the handmaidens of justice

27. On the last issue for determination, the Respondent submitted that since it was a settled principle that the cost follows events and that the successful party in litigation was entitled to the fruits of litigation being costs, that the Applicants' application was bound to fail hence he would be entitled to costs.

Determination.

28. I have considered the Applicants' Application for stay of execution of the ex-parte judgement in Nyahururu CMCC 304 of 2017, delivered on the 5th January 2019, and all other consequential orders, pending the hearing and determination of the Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.

29. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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 sub rule (1) unless—

(a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.

30. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

i. The Court is satisfied that substantial loss may result to the 1st Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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 Applicants.

31. I find two issues for determination arising therein namely:

i. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this Court should make

32. 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. According to section 1A(2)

The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.

33. While under section 1B some of the aims of the said objective are;

The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

34. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. 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. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

35. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicants to demonstrate the kind of substantial loss they would suffer if the stay order was not made in their favour.

36. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V 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.”

37. The 1st Applicant contends that he would suffer irreparable loss if stay is not granted as he was required to pay a substantial amount of money of Ksh 1,232,937.50/=. That the Respondent was a man of straw and therefore would not be in a position to refund the money after their Appeal, which had a high chance of success succeeded. That if the stay was not allowed, their Appeal would be rendered nugatory considering the fact that if they succeeded in their Appeal, they would face serious hardship in being refunded the said colossal sum by the Respondent who had failed to prove that he was a man of means and would be able to refund the decretal sum.

38. What amounts to reasonable grounds for believing that the Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the Respondent was a person of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success.

39. As was held in the case of **Justus Kyalo Musyoka v John Kivungo [2019] eKLR**.

Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgment. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court

40. Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income. In the case at hand, the Respondent has disclosed that he owns the suit land upon which the Applicants trespassed. This could mean therefore that he is a person with a source of income and would therefore be in a position to refund the 1st Applicant the decretal amount should the Appeal succeed. He also submitted that the Applicants had not discharged their burden of proving that the Respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree as was held in the case of **Caneland Ltd & 2 Others (supra)**

41. It therefore follows that even without going to the merit of the Appeal, even if orders sought herein are not granted, there is no evidence that the Applicant/Appellants will suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of his/her Judgment.

42. On the second condition, there is no dispute that the impugned judgment was delivered on the 15th January 2019 wherein the 1st Applicant sought for stay of execution in the trial Court. The application was denied vide a ruling delivered on the 9th July 2019. The present application as well as the Appeal were subsequently filed on the 31st July 2019. I find that the said application is brought without undue delay.

43. On the last condition as to provision of security, the 1st Applicant in the present application has indicated his willingness to furnish security for a grant of the order for stay of execution. Having found that all the three conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Appellant/Applicants and further, having regard to the provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this Court is not inclined to grant the order of stay of execution so sought as the said Order would not serve any purpose. Further, the issue of provision of security is not applicable in the circumstance.

44. Having found as herein above, this Court is not inclined to grant the order of stay of execution so sought and therefore the prayers (ii) and (iii) sought in the Applicants’ application will automatically fail.

i. In the circumstance, the Appellant/Applicants’ Notice of Motion dated 31st July 2019 is hereby denied and dismissed with costs to the Respondent.

ii. The Appellant/Applicants shall lodge his Appeal against the decree of the lower Court within 14 days from this date.

iii. That upon filing of the memorandum of Appeal in (ii) above, the Applicants shall prepare, file and serve their record of Appeal within 30 days.

Dated and delivered at Nyahururu this 6th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE