



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 116 (A) OF 2017

(FORMERLY NAKURU ELC NO 495 OF 2013)

MARY WAMBUI WAWERU.....PLAINTIFF/APPLICANT

VERSUS

SERAH WANJA WACHIRA (sued as the personal

Representative of the Estate of

LYSTER WACHIRA MWANGI (Deceased).....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is an Application by way of a Notice of Motion dated 1st July 2019 brought under the provisions of Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules where the Applicant seeks for orders of stay of execution of the judgement delivered by this Court on the 18th June 2019, pending the hearing and determination of an Appeal.

2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Mary Wambui Waweru the Applicant herein.

3. The Application was opposed vide the Respondent's Replying Affidavit dated the 15th July 2019 in which the Respondent sought that it be dismissed with costs for reason that the judgement and resultant decree were not positive orders capable of execution.

4. By consent, parties agreed to dispose the Application through written submissions and whereas the Applicant filed their written submissions, the Respondent did not file hers despite the many opportunities and leave the Court had given her to file.

5. The Applicant's submission was to the effect that the law governing the grant of stay of execution was the provisions of Order 42 Rule 6 of the Civil Procedure Rules which set 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 Applicant satisfy such security as the Court orders for.

6. On the first condition, it was their submission that if the judgement delivered on the 18th June 2019 was satisfied in full or in part, the Respondent would not be in a pecuniary position to reimburse the Applicant should the Appeal succeed in its entirety. That the Respondent had neither refuted nor provided any evidence that she was capable of refunding the detrital sum were she to be paid and the Appeal succeeded. They relied on the decided case in **Florence Hare Mkaha vs Pwani Tawakal Mini Coach & Another [2014] eKLR** to buttress their submission.

7. The Applicant further submitted that their Application was filed on the 1st July 2019 pursuant to the judgement which was delivered on the 18th June 2019, which was without undue delay.

8. On the third condition on the issue of security, the Applicant submitted that she was willing to abide by the Court's condition if imposed. That however the higher Court (sic) had set precedent that it was not always necessary for Courts to impose an order for security in land matter as opposed to liquidated claims. She therefore urged the Court to find that it was not necessary to impose any order of security. The Applicant relied on the case of **Focin Motorcycle Co. Limited vs Ann Wambui & Another [2018] eKLR** to urge the Court to stand guided

by this position.

9. The Applicant further submitted that her Appeal had a high chance of success and therefore her Application should be allowed and there be orders of stay of execution.

10. The Respondent did not file any written submission but from her Replying Affidavit dated the 5th of July 2019 she had deponed that the Applicant's case had been dismissed with costs vide a judgment dated the 18th June 2019, which Judgment and the resultant Decree were not and would not in any circumstances be positive orders capable of execution and therefore the only the orders that existed for execution in her favour had been orders as to costs.

11. That the only reason the Applicant was seeking the orders for stay of execution was due to the fear that the Respondent would reflect the suit property in her late husband's property for confirmation and distribution in a Succession Cause which in this case was not a good and/or valid ground for the orders so sought.

12. That the Applicant had not stated the substantial loss she would suffer if her Application was not allowed and therefore the dismissal of her case remained as she pursued her Appeal to the Court of Appeal.

13. That the Applicant had also not offered any security for due performance of such decree.

14. Lastly that the Application dated 1st July 2019 was without merit and the same ought to be dismissed with costs.

Determination.

15. I have considered the Applicants' Application for stay of execution of the judgement which was delivered on the 18th day of June 2019, pending the hearing and determination of the Appeal. I have also considered the reasons given for and against the said Application.

16. 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.

17. 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.

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

- i. Whether the Applicants had satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

19. 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.

20. 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.

21. 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.

22. This Court dismissed the Applicant's suit vide its Judgment of 18th June 2019 wherein the Court did not order the Applicant to do or abstain from doing any act. I have considered the Application herein and the various positions urged on behalf of the parties. There is a long line of authorities where the Court of Appeal has held that where the High Court (herein read the Environment and Land Court) does not grant any positive order in favour of the Respondents which is capable of execution, a stay would not be an efficacious order in those circumstances. See **Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004, Mombasa Seaport Duty Free Limited vs. Kenya Ports Authority Civil Application No. Nai. 242 of 2006** and **William Wambugu Wahome vs. The Registrar of Trade Unions & Others Nai.Civil Application No. 308 of 2005.**

23. 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 she would suffer if the stay order was not made in her favour.

24. 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

25. In the Application before me, the Applicant has not pleaded that she would suffer any loss and neither has she provided any evidence on the kind of irreparable loss she would suffer if the order of stay was not granted. Instead what she had submitted on was the inability of the Respondent to refund the decretal sum were she to be paid and the Appeal succeeded.

26. 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 her success.

27. 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

28. 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.

29. I also find that the Applicant had not discharged her burden of proving that that the Respondent would not be able to refund the decretal sum if paid to her in satisfaction of the decree as was held in the case of **Caneland Ltd & 2 Others vs Delphis Bank Ltd Nai Civil Application No. 344 of 1999.**

30. It therefore follows even without going to the merit of the Appeal, that even if orders sought herein are not granted, there is no evidence that the Applicant 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.

31. On the second condition, there is no dispute that the impugned judgment was delivered on the 18th June 2019 wherein the present Application was filed on the 1st July 2019. I find that the said Application is brought without undue delay.

32. On the last condition as to provision of security, the Applicant in the present Application has indicated her willingness to furnish security for a grant of the order for stay of execution.

33. Having found however that all the 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 Applicant and further that there had been no positive orders in favour of the Respondent issued in the impugned judgment of 18th June 2019, this Court is not inclined to grant the order of stay of execution so sought.

i. In the circumstance, the Applicants' Notice of Motion dated 1st 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