



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 58 OF 2005

JONATHAN APPHUS OYALO WABALAPLAINTIFF

VERSUS

VINCENT WABWIRE NGALU.....1ST DEFENDANT

EMILY NABWIRE WABALA..... 2ND DEFENDANT

RULING

Following this Court's Judgment delivered on 22nd November 2018 in favour of the defendants, the plaintiff promptly moved to this Court by his Notice of Motion dated 19th December 2018 brought under **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 42 Rule 6 of the Civil Procedure Rules**.

The plaintiff seeks the following orders:-

(a) Spent

(b) The Honourable Court be pleased to grant an order of stay of execution of its Judgment and decree issued on 22nd November 2018 pending the hearing and determination of the appeal before the Court of Appeal.

(c) Costs be in the cause.

The gravamen of the application which is grounded on the affidavit of the plaintiff and the grounds set out therein is that being dissatisfied by the said Judgment, the plaintiff filed a Notice of Appeal and is in the process of filing the substantive appeal which shall take time to process and prosecute. That the plaintiff stands to suffer substantial loss as the 1st defendant is pursuing the decree and might alienate, dispose of or in any other way deal with the suit property to the plaintiff's loss and detriment. That the 1st defendant has never been in occupation of the disputed portion of the suit property for over 50 years and therefore stands to suffer no prejudice and is incapable of restituting the decree in case the appeal succeeds.

The application is contested and in his Replying Affidavit dated 28th January 2019 filed with the authority of the 2nd defendant, the 1st defendant has deponed, inter alia, that the application is not only incompetent but also an abuse of the process of this Court. That the plaintiff will not be prejudiced even if execution proceeds as he does not stay on the land in dispute. That this application is a delaying gimmick calculated at denying the defendants the fruits of the Judgment. That this application does not meet the threshold set out in **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules**.

The application was canvassed by way of written submissions which have been filed by **MR OMONDI** Counsel for the plaintiff and **MR MAKALI** Advocate for the defendants.

I have considered the application, the replying Affidavit and the submissions by Counsel including the cases cited therein.

This application is founded on **Order 42 Rule 6(1) and (2)** 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 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 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.” Emphasis added

It is therefore clear from the above that a party seeking orders of stay of execution pending appeal must satisfy the following criteria:-

- 1. There must be sufficient cause to warrant the grant of such orders.**
- 2. The application must be filed without unreasonable delay.**
- 3. The applicant must satisfy the Court that unless the order of stay is granted, he will suffer substantial loss.**
- 4. The Applicant must also give such security as the Court may order.**

I have no doubt that the plaintiff moved to Court without unreasonable delay. The Judgment appealed from was delivered on 22nd November 2018 and this application was filed on 19th December 2018.

I shall now consider whether the plaintiff has established sufficient cause and that if the order for stay is not granted, he will suffer substantial loss.

Substantial loss is the cornerstone of an application for stay pending appeal and without evidence of such loss, it would be a rare case when an appeal can be rendered nugatory – **KENYA SHELL LTD .V. KIBIRO & ANOTHER 1986 KLR 410**. See also **MUKUMA .V. ABUOGA 1988 KLR 645** and **SILVERSTEIN .V. CHESONI 2002 1 KLR 867**. In his Supporting Affidavit at paragraphs 7 and 8, the plaintiff has deponed as follows:-

7 “That I stand to suffer substantial loss if execution is levied against me as the 1st Respondent is actively pursuing a decree and might alienate, dispose of or in any other way deal with the suit property to my loss and detriment.”

8 “That the Respondent being a person known to me is not capable of restituting the decree in case my appeal succeeds.”

The averments that the 1st defendant is actively pursuing a decree and might alienate the suit property and is also incapable of restituting the decree should the appeal succeed was not really rebutted. The defendants, by their Replying Affidavit, appear to have placed more emphasis on the strength of their case. While considering an application such as this one, the Court must balance the competing interest of both parties and ensure that while a successful party is entitled to the fruits of his Judgment, the other party pursuing his right of appeal should also be assured that his appeal, if successful, will not be an academic exercise. In my view, if the appeal succeeds after the suit property has been alienated, and taking into account the averment that the defendants are not capable of restituting the decree, that will amount to substantial loss.

Having considered the application herein, I am satisfied that the plaintiff has demonstrated sufficient cause to warrant the orders of stay sought. I also do not see the prejudice that will be caused to the plaintiff who still retains the title to the suit property.

I therefore allow the plaintiff’s Notice of Motion dated 19th December 2018 in the following terms:-

- 1. A stay of execution of this Court’s Judgment and decree issued on 22nd November 2018 is granted pending the hearing of the appeal before the Court of Appeal.**
- 2. The plaintiff to deposit with the Deputy Registrar of this Court the title to land parcel NO. W.BUKUSU/KHASOKO/146 within 30 days of this ruling.**
- 3. In default of (2) above, the stay order shall lapse.**
- 4. Costs of this application shall abide the results of the pending appeal.**

Boaz N. Olao.

J U D G E

11th July 2019.

Ruling dated, delivered and signed in Open Court this 11th day of July 2019 at Bungoma.

Mr. Murunga for defendant present

Mr. Onyando for Mr. Omondi for plaintiff present

Gladys – Court Assistant present

Boaz N. Olao.

J U D G E

11th July 2019.