



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 192 OF 2017

(Formerly Kisii ELC case No. 103 of 2016)

TITUS KAHUNYORO MOKOH.....PLAINTIFF/APPLICANT

VERSUS

RISPER AKEYO OGINGA.....DEFENDANT/RESPONDENT

JUDGMENT

1. On 12th April, 2018, judgment was rendered in this matter in favour of the plaintiff in terms of the orders sought in his plaint dated 13th April 2016. The plaintiff was ordered to pay Kshs. 70,000/= being part of the consideration paid to him for the aborted sale of the suit property, LR NO. KAMAGAMBO/KABUORO/1251. It was further ordered that each party was to bear costs of their respective claims herein.

2. Being aggrieved by the decision of this court, the defendant through her counsel, S.M. Sagwe and Company Advocates, filed a notice of appeal dated 12th April 2018 in this matter.

3. On 30th April 2018 learned counsel for the defendant also filed a Notice of motion of even date pursuant to Section 3A 1A, 1B, 63 (e) of the Civil Procedure Act and order 42 of the Civil Procedure Rules (hereinafter referred to as the application) seeking the following orders:-

i. Spent

ii. Spent

iii. The court be pleased to order stay of execution of the judgment and decree of this court pending hearing and eventual disposal of appeal by the court of appeal at Kisumu.

iv. Costs of this application be provided.

4. The application is anchored on grounds 1 to 8 set out on it's face. The grounds include:-

a) The applicant on being aggrieved by the judgment and subsequent decree of this court and has lodged a notice of appeal.

b) That the applicant stands to suffer substantial loss in the nature and to the extent of the judgment plus necessary costs of this suit.

c) This application has been made promptly and without undue delay.

5. The application is further supported by the defendant's affidavit sworn on 30th April 2019. The defendant averred, inter, alia, that Judgment was passed against her on 12th April 2018 and the proceedings have been availed to her. That she was ready to file a record of Appeal within sixty (60) days as required by law and upon being supplied with all necessary documents.

6. The plaintiff through M/s. Oguttu, Ochwangi, Ochwal and Company Advocates opposed the application by way of the plaintiff's 21 paragraphed replying affidavit sworn on 16th May 2018. He averred, inter alia, that the application has not met the minimum threshold for granting orders sought therein. That the application offends Rule 9 of the Oaths and Statutory declaration Rules. That the same is untenable and merely intended to delay, obstruct and or defeat the realization of the fruits of the judgment in this suit.

7. On 13th February, 2019, this court directed the parties to canvass this application by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules 2010.**

8. Learned counsel for the defendant filed submissions dated 14th March 2019 on 15th March 2019, wherein counsel made reference to the orders sought in the application and the grounds thereof. Counsel submitted that the defendant has satisfied the two (2) conditions for the grant of stay of execution; that the intended appeal is arguable and would be rendered nugatory if successful, unless the court granted the stay. Counsel relied on authorities which include **Patani and another –v– Patani (2003) KLR 518 and Bob Morgan Systems Limited and another –v- Jones (2004) eKLR.**

9. By submissions dated 29th March 2019 (not 2018) as shown therein and filed on 4th April 2019, learned counsel for the plaintiff urged this court to dismiss the application. Counsel framed and analysed two (2) issues for determination namely:-

a) Whether the applicant has met the condition set in granting orders for stay of execution.

b) Whether the defendant/applicant is therefore entitled to the orders sought.

10. In support of the said submissions, counsel cited **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** on the grounds that must be satisfied for granting of an order of stay pending appeal. Counsel further relied on authorities including the cases of **Joseph Gachie t/a Joska Metal Works –v- Simon Ndeti Muema (2012)eKLR, Kenya Shell Ltd –v- Kibiru and another (1986) eKLR and Francis A. Mbalanya –v- Cecilia N. Waema (2017) eKLR.**

11. I have carefully examined the entire application, the plaintiff's replying affidavit and submissions of counsel for the respective parties. The two (2) issues for determination are as set out in the plaintiff's submissions.

12. The application is brought under **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** which provides:-

“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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.” (Emphasis added)

13. The defendant contended that in the event that stay sought is not granted, execution process shall be commenced to realize the fruits of the judgment. That she stands to suffer substantial loss in the nature and the extent of the judgment and necessary costs of the suit.

14. In the case of **Blue Shield Insurance Company Ltd –v- Mahinda (2009) KLR 551 at 561** it was held that :-

“ The intended appeal will not only been rendered nugatory but also that the applicant is likely to suffer great hardship in the nature of financial loss which would be out of proportion to the loss that the respondent is likely to suffer.....”(Emphasis added)

15. The plaintiff asserted that there is no evidence of substantial loss availed to the court by the defendant. Clearly, the defendant has not shown the damages she would suffer if the order of stay is not granted; see **Kenya shell Ltd case (Supra).**

16. The defendant stated that she has made the application promptly and without delay. Quite plainly, the application was filed within eighteen (18) days from the date of delivery of the judgment hence it was made without unreasonable delay.

17. The defendant further contended that she has filed an Appeal by seeking leave to extend time to file and serve record of appeal which was allowed. That she filed the record of appeal accordingly. However, she has not availed any sufficient material to fortify her position.

18. In the case of **Malindi Law Society of Kenya –v- Law Society of Kenya Nairobi Branch and 5 others Civil Application number 20 of 2017, (2017) eKLR** it was held that grant of stay of existing orders cannot be a matter of course. It rests upon genuine conditions, grounds, merit and dispatch.

19. In the instant application, the defendant has not given to court any strong indication or at all of security for the due performance of the decree to enable it exercise its discretion in granting the order of stay sought therein. I agree with the plaintiff's counsel that the orders sought in the application are in a vacuum thus the application is legally untenable.

20. The upshot is that the defendant's application dated 30th April 2018 is want of merit. The same is hereby dismissed with costs to the plaintiff.

DELIVERED, DATED and SIGNED at MIGORI this 9th day of July 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Ochwangi learned counsel for the plaintiff/respondent

Defendant/applicant - Present

Tom Maurice – Court Assistant.