



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 79 OF 2014

DAVID KIMUGUN KOSKEL.....PLAINTIFF

VERSUS

BENJAMIN TUWEI.....1ST DEFENDANT

JULIUS TUWEI.....2ND DEFENDANT

RULING

This ruling is in respect of a notice of motion dated 3rd May 2019 brought by the defendant/applicants seeking for the following orders:

- a) Spent
- b) That this honourable court be pleased to order stay of execution of judgement delivered on 4th April 2019 pending the hearing of this application inter partes.
- c) That this honourable court be pleased to order stay of execution of judgement delivered on 4th April 2019 pending the hearing of this application and thereafter the determination of the intended appeal.
- d) That costs of this application be provided for.

Counsel filed submission for and in opposition of the application and relied on the provisions of Order 42 rule 6 of the Civil Procedure Rules which provides as follows:

(2) No order for stay of execution shall be made under sub rule(l) 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.

Counsel for the applicant submitted that the applicant will suffer substantial loss if the order of stay is not granted and that the applicant has met the threshold by filing the application timeously without delay.

That Judgment was delivered on 4th April 2019 and that the application was filed on 3rd May 2019 before expiry of the 30 days stay granted by the court. Counsel relied on the case of **Reliance Bank v. Norlake Investments Ltd (2002) 1 EA 227**, where it was stated that there needs to be a balance, based on the claims of both parties in preserving the subject matter of the judgment, so that if the appellant is successful on appeal, he does not merely get a paper judgment. Also taking into consideration that successful litigant ought to be allowed to enjoy the fruits of the judgment unless the enjoyment of the same, is going to obliterate the subject matter of litigation, or will cause undue hardship to the other party, which would be unreasonable in the circumstances of the case.

Counsel therefore submitted that the defendants should be allowed exclusive possession, use and occupation of the land pending hearing of the appeal and urged the court to allow the application.

Counsel for the respondent opposed the application and submitted that allowing the defendants possession of the suit land would continue to perpetuate the trespass as found by the court. It was further counsel's submission that the defendants have not demonstrated any substantial

loss that they will suffer if the stay orders are not granted.

Mr. Keter submitted that the mere filing of a notice of appeal does not entitle a party to a stay of execution of the judgment and that it does not operate as an order of stay. Sufficient cause must be shown by the applicant why stay orders should be granted. Further that the court had ordered the defendants to pay damages for trespass of Kshs.250,000/= together with the costs of the suit of which Counsel submitted that the plaintiff stated that he is a man of means who is capable of refunding the said sums in the event the appeal succeeds.

Counsel further submitted that the applicants have not offered any security for the due performance of the decree and hence the application should be dismissed with costs to the respondents. Counsel cited the case of **court of Appeal at Nairobi, Civil Application Number NAI 28 0/ 2002 (UR and Abok James Odera T/A A.J Odera & Associates vs John Patrick Macharia T/A Machira (co. Advocates** where the court while considering an application for stay of execution pending the hearing of an appeal dismissed the application on the ground that the respondent was a man of means who would be able to refund the decretal sum and therefore the appeal would not be rendered nugatory.

Analysis and Determination

The principles for grant of stay of execution pending appeal are now settled as per the provisions of Order 42 Rule 6 which have to be adhered to before such orders are granted. There is also precedent on the rules governing the grant of stay pending appeal.

An applicant must meet the threshold for grant of stay of execution namely that he or she will suffer substantial loss unless the order is made, that the application has been made without unreasonable delay and that the applicant shall give such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

The issues for determination by the court are as to whether the applicant has met the above provisions. On the first issue on filing of the application without unreasonable delay, I find that the applicant has met this provision as the judgment was delivered on 4th April 2019 and the application was filed on 3rd May 2019.

On the second limb as to whether the applicant has demonstrated that they will suffer substantial loss which is the cornerstone of an application for stay of execution, I find that the applicants have not brought forth any evidence that they will suffer any substantial loss if the order of stay is not granted by the court. Mere regurgitation of a claim that a party will suffer substantial loss without laying any proof is not sufficient.

It should be noted that the survey report was adopted by consent by all the parties as an order of the court which was to the effect that the boundaries of parcel Nos SOY/KAPSANG BLOCK 5 (ZIWA)184 and SOY/KAPSANG BLOCK (ZIWA) 128 conform to the relevant Registry Index Maps (RIM) in the registration section.

The respondent has deposed that he is a person of means and that he would be in a position to refund the amount awarded as general damages if the appeal is successful. In the Court of Appeal decision in the case of **National Industrial Credit Bank Limited** as followed by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held that:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

In the current suit the court had awarded the plaintiff damages of kshs. 250,000/ in the spirit of balancing the rights of a successful litigant who should enjoy the fruit of the judgment and those of the aggrieved party who wants to appeal, it would be in the interest of justice to order that Kshs. 250,000/ be released to the plaintiff within 30 days from the date of this ruling failure of which the stay lapses. The applicant is restrained from interfering with the suit land pending the hearing and determination of the intended appeal

The costs of the application shall abide the outcome of the appeal.

DATED and DELIVERED at ELDORET this 2nd DAY OF October, 2019.

M. A. ODENY

JUDGE

RULING READ in open court in the presence of Mr.Keter for Plaintiff/Respondent and in the absence of Chebii for Defendants/Applicants.

Mr. Mwelem – Court Assistant