



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 4 OF 2012

DAVID MACHARIA GAKUYAAPPLICANT

VERSUS

MOSES MWANGI KARANJA.....RESPONDENT

RULING

Introduction

1. On **12th March, 2018** the applicant brought the notice of motion of even date seeking stay of execution of the judgment of this court delivered on 26th February, 2018 pending the hearing and determination of the his intended appeal.

2. The motion is premised on the grounds that the applicant being dissatisfied with the judgment referred to above, intends to file an appeal against it; that unless the orders sought are granted, the respondent may obtain a decree pursuant to the judgment which will occasion irreparable loss and damage on the applicant.

3. In support of the averments contained in the application, the applicant David Macharia, annexed to his affidavit a notice of appeal dated 9th March, 2018.

4. In reply and opposition to the application, the respondent filed the replying affidavit sworn on 17th May, 2018 where he deposes that the application is meant to delay closure of this matter; that the application is a non starter having been filed under the wrong provisions of the Law; that the applicant has not demonstrated what substantial loss he will suffer if stay of excution is not granted and neither has he attached a memorandum of appeal to show what he is complaining about in the judgement; that the applicant has never occupied

the suit property and will suffer no prejudice if the judgement is enforced and that since the respondent has not taken any steps to execute the judgment, the application is premature.

5. In a rejoinder, the applicant swore a 'replying affidavit' on the **31st May, 2018** in which he admitted citing the wrong provisions of the Law but urged the court to be guided by **Article 159** of the Constitution, **Sections 1A, 1B** and **3** of the Civil procedure Act. He avers that he will be highly prejudiced if the respondent is allowed to proceed and prepare his bill of costs considering that he has already served him with a notice of appeal.

6. When the application came for hearing on 18th June 2018, the applicant reiterated what is deponed in his affidavits. Counsel for the respondent submitted that the applicant had not met the threshold for granting an order of stay of execution. He stated that the applicant had not demonstrated what substantial loss he would suffer if the order was not granted and neither had he demonstrated that he was in the process of filing an appeal or that he had applied for typed proceedings. He informed the court that the respondent had not filed a bill of costs to warrant the fears expressed by the applicant and urged the court to dismiss the application with costs.

Analysis and determination:-

7. I have considered the application, the affidavits filed in support and opposition and submissions by both parties. I find the sole issue for determination to be whether the applicant has made up a case for granting the order sought (stay of execution pending appeal).

The Law applicable to the application:-

8. The guidelines for grant of an order of stay pending appeal are provided for under **Order 42 sub Rule (2)** of the Civil Procedure Rules which provides as follows:-

“Order 42 Rule 6(2) No order for stay of execution shall be made under subrule (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 applicant.”**

9. According to the pleadings/documents filed in this application, the judgment appealed from was delivered on 26th February, 2018 and the current application filed on 12th March, 2018 less than one month after delivery of the judgment appealed from. Under the circumstances, I find the applicant has met the first condition to file his application without delay.

10. With regard to the requirement for security, the applicant has not expressed willingness to furnish security for due performance of such decree as may ultimately issue against him.

11. On whether the applicant has demonstrated that he stands to suffer substantial loss if the orders sought are not granted, I note that the applicant has merely stated that he stands to lose irreparably without demonstrating what loss if any he would suffer.

12. As pointed out above, it is not enough for the applicant to allege that if the judgment is executed he stands to suffer substantial loss. The applicant is under a legal obligation to, by way of evidence, prove that he indeed stands to suffer substantial loss. It has been held, in many cases, that the mere fact that the subject matter of the appeal is land is not proof that that the applicant will suffer substantial loss. See the case of **Sammy Some Kosgei v. Grace Jeel Boit (2013) eKLR** where it was observed: -

“...The relevant provisions in relation to stay pending appeal are contained in order 42 Rule 6(2) of the Civil Procedure Rules, 2010..... The more critical issues herein are whether the applicant stands to suffer substantial loss if the order is not granted and the question of

security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal.” (emphasis supplied).

And the case of **Daniel Kihara Murage v. Jacinta Karuana Nyangi & Another (2015)e KLR** where it was stated:

“To justify the grant of stay, the applicant must show or establish facts to satisfy the court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant’s case as the successful party in the appeal... The applicant ought to have placed before the court facts to show to the satisfaction of the court that if no stay is granted, he will suffer a loss that is substantial. The mere fact that land is concerned does not make any loss substantial.” (emphasis supplied).

13. Applying the aforesaid principles to the circumstances of this case, I find that the applicant has failed to demonstrate what substantial loss, if any, he stands to suffer if stay of execution is not granted and has not expressed willingness to furnish security for due performance of such decree as may ultimately issue against him. Consequently, the application for stay pending appeal fails and is dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered in open court at Nyeri this 2nd day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

David Macharia Gakuyu – defendant/applicant

Ms Macharia h/b for Mr. Kimunya for the plaintiff/respondent

Court assistant - Esther