



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 121 OF 2017

ELIUD NJOROGE GACHIRI - PLAINTIFF

VS

STEPHEN KAMAU NGANGA - DEFENDANT

RULING

By way of a Notice of Motion dated the 25/4/2018 and filed on even date, the Applicant moved the Court under certificate of urgency seeking the following orders;

Spent

That this honourable Court be pleased to stay the execution of the decree and judgment of this Court made on the 8/3/2018 pending the determination of the intended appeal in the Court of Appeal.

That the cost of this application be provided for.

The application is brought under Order 42 rule 6 (1) of the Civil Procedure Rules and all other enabling provisions of the law. It is also supported by the Applicant's affidavit sworn on the 23/2/2018 and anchored on the grounds stated below ;

That the Respondent has commenced the process of appealing to the Court of appeal by filing and serving a Notice of Appeal.

That the Applicant is bound to suffer loss if the execution is levied owing to the humongous development on the suit land as well as the sewerage system that is serving his residential building that would have to be abandoned if the sewer systems are cut off. That the sewerage line on the disputed land serves his residential building which houses 30 tenants and if he is evicted then the said building will be rendered uninhabitable by the tenants. That is the loss and damage that will be occasioned to him. The structures over the sewer too have tenants which fetch 25,000/- per month and eviction will stop that line of income.

In the event that he pays Kshs 400,000/- as damages for trespass upto the year 2018 and beyond, he stands to suffer irreparable loss since the Respondent is a man of straw and will be incapable of refunding him in the event the appeal is successful.

The Applicant is ready with such security as the Court will order for the due performance of the decree of this Court.

That unless the Court grants the orders the appeal will be rendered nugatory. The Respondent stands to suffer no prejudice as he has no developments on the land.

The Respondent filed grounds of opposition as thus; the application is premature, incurably defective and does not lie; the application is seeking to maintain and justify what has been declared illegally built; the Applicant has approached this Court with dirty hands; no security for costs has been offered; the intended appeal has no chance.

In his replying affidavit filed on the 21/5/2018 the Respondent deponed that the application is frivolous, an abuse of the process of the Court and incurably defective. Being a money decree, he argued the Applicant should have given security for the decretal amount as security; that there is no draft appeal on record, which is mandatory requirement; That the Applicant is earning Kshs 200,000/- a month from the 4 storey building called Kamau building and not Kshs 25,000/- as deponed by the Applicant.

The Respondent argued that he has suffered damage for and it is only just that the intended appeal if filed be conducted while the illegal structure has been removed. Further that the application is premature as execution of the decree has not commenced.

On the 29/5/2018 the parties through their learned counsels on record recorded a consent on status quo to be maintained to the effect that

execution will not be carried out pending the hearing and determination of the application. Similarly, by consent they agreed to file written submissions which I have read and considered.

The Applicant submitted that in respect to substantial loss if stay is not granted, he stands to suffer as his sewer line that serves his building is connected to the area that was adjudged to be the Respondent's. That he also put up structures on the said portion of land which are rented out. That the loss is quantified as Kshs 225,000/- per month in the event that the sewer is severed and tenants move out of the building. That he has made an offer of security for the due performance of the decree and has agreed to deposit the money in the joint account of both advocates.

He further submitted that the application has been made without undue delay. He argued that under Order 42 rule 6 (4) of the Civil Procedure Rules an appeal is deemed as filed when the notice of appeal has been given. There is therefore no need of a draft appeal as this Court does not need to be determined if the appeal is arguable or not. Finally, he urged the Court to grant stay to enable the Applicant exercise his right of appeal.

The Respondent submitted that the decree before the Court is partly monetary and the other is partly execution decree and therefore the Applicant should have deposited half the decretal amount in Court or a joint interest earning account. He faulted the Applicant on that ground and averred that the application fails the conditions set for stay and is incurably defective. In addition, he submitted that for the Applicant to argue that he has an arguable case there must be a draft appeal. That the Applicant has other structures adjacent to the one to be demolished which is being rented. That the Applicant earns more than Kshs 500,000/- per month and not Kshs. 200,000/- as alleged by the Applicant. That stay of execution is an equitable relief and the Applicant has come to Court with dirty hands. That he stands to be prejudiced if stay of execution is granted.

Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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 the Applicant.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

The application was brought without delay;

Substantial loss may result to the Applicant unless the stay is granted; and

Security for the due performance of the order or decree has been provided.

Going by the record the judgment complained of was delivered on the 8/3/2018. The application for stay was filed on 25/4/2018. The application was filed 33 days after the judgment. The Court finds and holds that there is no delay in bringing this application.

Regarding the issue of substantial loss that is likely to be suffered by the Applicant, the Court pronounced itself in the case of **James Wangalwa & Anor. Vs Agnes Naliaka Cheseto 2012 (eKLR)**, thus:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to

substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process...The Applicant must establish other factors which show that the essential core of the Application as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni [2002] KLR 867** the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

The case of **Absalom Dora vs. Turbo Transporters 2013 eKLR** the Court hold as follows:-

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.”

From the above cases it is clear that the Applicant must demonstrate substantial loss that he is likely to suffer if no stay is ordered. It is not sufficient to make a hollow statement.

In this case, the Applicant has stated in his application that he stands to suffer irreparable damage and /or harm if the Respondents are not stayed from executing the judgment as he is utilising the suit land to service the residential building for which he has tenants as a sewer. He states that he stands to lose rental income of Kshs 225,000/- per month. It is the Courts finding that the Applicant has demonstrated the substantial loss he stands to suffer if the stay is not granted.

As regards provision of security of costs for the due performance of the decree or order as may be binding on the Applicant, the Applicant has categorically stated that he is ready and willing to pay security for costs that may arise out of the application or appeal.

The upshot is that the Notice of Motion dated 23/2/2018 has merit and the Court grants conditional stay on the following terms;

The stay of execution is granted provided that the appeal is filed within 45 days from the date of this ruling. If the appeal is not filed the stay lapses and the Application stands dismissed.

If the appeal is filed then the stay continues until the appeal is heard and determined.

The appellants to provide security for the due performance of the decree in the sum of Kshs 800,000/- which sum should be deposited in an interest earning account in the joint names of both advocates of the parties or a bank guarantee of a similar amount.

Costs of the application in the cause.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 4TH OCTOBER 2018.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Mwangi HB for Kimwere for the Plaintiff.

Defendant/Respondent – Absent.

Irene and Kuyiki, Court Assistants.