



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 253 OF 2015

[FORMERLY MOMBASA HCCC NO. 270 OF 2008 (OS)]

JAMES KAMAU & 42 OTHERS.....APPLICANTS

VERSUS

LEONID LIMITED.....RESPONDENT

RULING

(Application for stay pending appeal; principles to be considered; substantial loss; proof of substantial loss needs to be provided; no evidence of what loss the applicants will suffer given in the supporting affidavit; not for the court to speculate on the loss; no proof of substantial loss; application dismissed)

1. The application before me is that dated 2 November 2020 filed by the unsuccessful plaintiffs. It is an application seeking orders of stay of execution pending appeal. The application is opposed.

2. To put matters into perspective, through an Originating Summons filed on 17 June 2008, the applicants filed this suit, seeking orders for a declaration that they are entitled to the land parcel LR No. 2380/V/MN, registered in the name of the respondent, by way of adverse possession. The matter was heard and judgment delivered on 21 September 2020 by Omollo J. The suit of the applicants was dismissed with costs. In the judgment, the Honourable Judge also ordered the applicants to vacate the suit land within 90 days of delivery of the judgment and in default the respondent be at liberty to demolish their structures. Aggrieved, the applicants filed a Notice of Appeal on 25 September 2020, and this application was subsequently filed on 3 November 2020. The supporting affidavit is sworn by James Kamau. It is a brief affidavit, and in it, he inter alia beseeches the court to grant stay pending appeal and states that he has an appeal that has high chances of success.

3. The application is opposed by the replying affidavit of Abdul Gafoor Vaiani, a director of the respondent. He has deposed inter alia that the applicants have not shown that their appeal has a high chance of success and that the applicants have not demonstrated how their appeal will be rendered nugatory. He has deposed that the applicants have not satisfied the legal requirements for stay of execution.

4. Counsel agreed to dispense of the application through written submissions and I have taken note of the submissions of Mr. Tindi, learned counsel for the applicants, and of Mr. Hassan, learned counsel for the respondent.

5. This being an application for stay pending appeal, I stand guided by the provisions of Order 42 Rule 6 (2) which provides as follows :-

(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.

6. I note that Mr. Tindi in his submissions, cited the case of *Multimedia University & Another vs Professor Gitile N. Naituli (2014) Eklr*, but that was a decision of the Court of Appeal while considering an application for stay pending appeal under Rule 5 (2) (b) of the Court of Appeal Rules. The grounds for grant of stay under Rule 5 (2) (b) of the Court of Appeal Rules are not similar to the grounds for stay pending appeal under Order 42 Rule 6 (2). I will stick to the requirements of Order 42 Rule 6 (2) and the same are that an applicant needs to demonstrate substantial loss if the stay order is not made; be ready to offer security for the due performance of the decree; and demonstrate

that the application has not been made after unreasonable delay. I observe that there were arguments on the chances of success of the appeal, but again, that is not a consideration under Order 42 Rule 6 (2).

7. Though Mr. Hassan submitted that there is delay in filing this application, I think the application was filed timeously as the applicants had been given a 90 day window to vacate the land. This application was filed before expiry of that period and I do not think that there has been unreasonable delay.

8. The next issue is whether the applicants have demonstrated that they stand to suffer substantial loss. I already mentioned that the supporting affidavit is very brief. It contains seven paragraphs in total. The first paragraph introduces the deponent. The second paragraph states that judgment was delivered on 21 September 2020 and that on 29 September 2020 the respondent moved to approve the decree. The third paragraph repeats that judgment was delivered on 21 September 2020. The fourth paragraph states that there is intention to appeal and the notice of appeal and draft memorandum of appeal are annexed. In the fifth paragraph, the deponent requests the court to grant stay of execution pending appeal, as the appeal has a high chance of success. The sixth paragraph beseeches the court to grant stay otherwise the intended appeal shall be rendered nugatory. The seventh and last paragraph is the statement that what is deposed in the affidavit is true.

9. It is incumbent upon an applicant to demonstrate, within the application for stay pending appeal, that he stands to suffer substantial loss if stay is not granted. In other words, the applicant needs to inform the court exactly what loss he stands to suffer if stay is not granted so that the court may assess whether this loss meets the standard of substantial loss. Thus evidence of such loss must be provided by the applicant, ordinarily within the affidavit in support of the application, and it is not for the respondent, or the court, to speculate on the loss the applicant stands to suffer if stay is not granted. I have described what is deposed in the supporting affidavit and I am afraid that nothing in that affidavit provides any evidence, of any loss, that may be occasioned to the applicants if stay is not granted, and I cannot speculate on the loss that they may suffer. I am thus not persuaded that the applicants have met the test of demonstrating substantial loss, and with that, this application must fail. It is hereby dismissed with costs. The result is that the respondent is at liberty to proceed with execution as the 90 days given in the judgment are now long gone.

10. Orders accordingly.

DATED AND DELIVERED THIS 18TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA