



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 73 OF 2013**

**JAYESH AUTOSPARES LTD.....PLAINTIFF**

**VERSUS**

**KAPTERIT RAPID CO. LTD.....1<sup>ST</sup> DEFENDANT**

**JOHN WEPUKHUKU WALIAULA.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

**The Application**

1. The application dated 7/4/2021 and filed in court on the same date has been bought under **Order 42 Rules 1, 2, 3 & 4** of the **Civil Procedure Rules**. The plaintiff seeks the following orders:-

**(1) ...spent**

**(2) That this honourable court be pleased to issue orders for stay of execution of the court's judgment pending hearing and determination of the intended appeal.**

**(3) ...spent**

**(4) Costs be provided for.**

2. The application is supported by the affidavit sworn on 7/4/2021 by **Priteshkumar Jayantilal Patel**, the director of the applicant. The grounds on the face of the application are that a notice of appeal has been filed and the record of appeal will be filed after being supplied with proceedings; that the defendant has set in motion process of execution and that the appeal is likely to be rendered nugatory if the orders sought are not granted.

**The Response**

3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed grounds of opposition on 3/5/2021 and raised five grounds:

**(1) The application dated 7/4/2021 contravenes Order 42 Rule 6(2) of the Civil Procedure Rules hence ought to be dismissed with costs.**

**(2) The application is misconceived and incompetent and defective for having been brought under Order 42 Rules 1, 2, 3 and 4 of the Civil Procedure Rules which do not provide for stay of execution.**

**(3) That the application is misconceived and incompetent and defective for failure to annex a draft memorandum of appeal to enable the court to peruse it and determine whether the appeal is arguable and whether or not the appeal will be rendered nugatory.**

**(4) The application is misconceived as there is no positive order capable of being stayed.**

**(5) The application is misconceived as payment of costs cannot be stayed once taxed as in the instant case.**

4. The plaintiff filed its written submissions on **12/4/2021**. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions on **3/5/2021**.

#### **Determination**

5. I have considered this application, the response and the filed submissions. The issue that arises in the instant application is whether a stay of execution should be granted.

6. Stay of execution is governed by the provisions of **Order 42 Rule 6** of the **CPR** which provides as follows:

**“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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 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 sub rule (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 sub-rule (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.”**

7. The test that has to be applied to determine if an applicant merits stay is therefore comprised of the following elements:

**(i) There is an appeal in place;**

**(ii) The application was made without unreasonable delay;**

**(iii) Substantial loss may result unless the order is made; and**

**(iii) The Applicant is prepared to offer security.**

8. I have noted that the applicant filed a notice of appeal on **23/2/2021**. I therefore deem that the first condition has been satisfied.

9. Regarding whether the application was brought without unreasonable delay I note that the judgment in this suit was delivered on **3/3/2020** and that the application was filed on **7/4/2021**. The respondents rely on the case of **West Kenya Company Vs Luther Angatia [2018] eKLR** and **M/S Port Reitz Maternity Vs James Karanga Kabia Civil Appeal No 63 of 1997**. Despite the fact that the delay is quite inordinate there is nothing contained in the supporting affidavit to explain the delay. For the reason that the delay is inordinate the instant application should fail.

10. I have no doubt that the application is meant to preserve the subject matter in dispute so that the right of appeal of the applicant is exercised. This court has to be convinced that the failure to grant the orders sought would render the appeal nugatory. The defendants rely on the cases of **James Wangalwa & Another Vs Agnes Naliaka Cheseto 2012 eKLR** and **Mukuma Vs Abuoga [1988] KLR 645** which are cited in the case of the **Estate of Alice Kahaki Njoka [2016] eKLR**. I also agree with the submission that the decree herein is not a monetary decree. However, I do not find there to be sufficient evidence by way of affidavit to demonstrate that the applicant may suffer substantial loss that may render the appeal nugatory if the orders of stay are not granted.

11. Finally, in the instant suit the plaintiff claimed against the defendants stating that there was fraud in the acquisition of the suit land but the suit was dismissed. I agree with the respondent's submission, relying on **Devani & 4 Others V Joseph Ngindari Civil Application No NAI 136 of 2004 Western College of Arts and Applied Sciences Vs Orange & Others [1976] KLR 63** and **George Ole Sangui & 12 Others Vs Kendong Ranch Limited [2015] eKLR** to the effect that the order issued by the court being for mere dismissal of the suit there is nothing to stay.

**12.** The conditions for the grant of stay discussed above have to be cumulatively present before a court may even consider the issue of security. As the applicant has failed to establish that two of the conditions exist I do not need to delve into the issue of security. Particularly, the inordinate delay in lodging the application has not been explained and the potential substantial loss has not been demonstrated.

**13.** Consequently I find that the application dated **7/4/2021** lacks merit and the same is hereby dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 11TH DAY OF MAY, 2021.**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**