



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CAUSE NO. 475 OF 2017

PAMELA MONYANGI BITANGE.....1ST PLAINTIFF

DANIEL N. KIMORO.....2ND PLAINTIFF

GEORGE KIBASO MOKONGI.....3RD PLAINTIFF

VERSUS

DAVID KASYAKU.....1ST DEFENDANT

MALUNI MUIA.....2ND DEFENDANT

MUNINI MATOLO.....3RD DEFENDANT

DAMIAN KYENGO MWANGANGI.....4TH DEFENDANT

JOSEPH NZETI KATUE.....5TH DEFENDANT

RULING

What is before court for determination is the Plaintiffs' Notice of Motion dated the 23rd October, 2020 brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act; Order 22 Rule 22; Order 42 Rule 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules. The Plaintiffs seek the following orders:

1. Spent
2. That the Honourable Court be pleased to stay execution of its judgement and decree dated 29th September, 2020 pending the hearing and determination of this application.
3. That the Honourable Court be pleased to stay execution of its judgement and decree dated 29th September, 2020 pending the hearing and determination of the intended appeal.
4. The costs of this application be provided for.

The application is premised on the grounds on the face of it as well as the supporting affidavit of the 2nd Plaintiff PAMELA MONYANGI BITANGE where she deposes that they are dissatisfied with the judgement of this court dated the 29th September, 2020 and intend to appeal against the said decision. She contends that the appeal is at risk of being rendered nugatory and the substratum of the appeal which is the suit property will be lost if stay of execution is not granted. She claims they stand to suffer immense loss and prejudice if the Defendants execute the Decree before the hearing and determination of the intended appeal. Further, that the application has been filed without delay and they are keen to filing the appeal as soon as the record of appeal is complete since they have already obtained typed proceedings. She confirms that they are ready to abide with any conditions that the court would set in granting the prayers sought in the application. She reiterates that stay of execution is therefore necessary and important in aiding them to canvass the intended appeal with the subject matter still intact. Further, that the Defendants do not stand to suffer any prejudice at all.

The Defendants/ Respondents in opposing the instant application filed Grounds of Opposition dated 16th November, 2020 where they contend that the application is frivolous, incompetent, vexatious, bad in law, incurably defective, an abuse of the court process and an afterthought. They insist the application is brought with the sole purpose of denying the Defendants/ Respondents the fruits of their lawfully obtained judgement. Further, the Plaintiffs/ Applicants have not demonstrated how they will suffer immense loss and prejudice if the order of

stay is not granted by the court since the process of execution has not been put in motion by the Respondents. They aver that the Plaintiffs / Applicants have not annexed a copy of the Memorandum of Appeal to enable the court ascertain if the same has high chances of success or if the same will be rendered nugatory. They reiterate that there was inordinate delay in filing the Application since the same was filed immediately after the stay granted by the court lapsed. Further, the Plaintiffs / Applicants have not offered a deposit of security for the Appeal.

The Application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of Notice of Motion dated the 23rd October, 2020 including the supporting affidavit, Grounds of Opposition and rivaling submissions, the only issue for determination is whether the Court should grant a stay of execution of its judgement dated 29th September, 2020 and decree issued therefrom, pending the hearing and determination of the intended Appeal.

As whether the Court should grant a stay of execution of its judgement dated 29th September, 2020 and decree issued therefrom, pending the hearing and determination of the intended Appeal. The Plaintiffs have sought for a stay of execution of the Judgment and Decree pending the hearing and determination of the intended appeal, which application is opposed by the Defendants. In their submissions they contend that they will suffer substantial loss if twenty-one (21) acres are hived off their land. Further, that the Appeal will be rendered nugatory if the order of stay of execution is not granted. To buttress their averments, they have relied on the case of **Kajiado High Court Succession Cause No. 48 of 2017, In the estate of Nasokotoni Ole Sane Alias Nasotokin Lesane**. They reiterate that they are ready to abide by any conditions the court would prescribe.

The Defendants/ Respondents in their submission insist the Plaintiffs have not satisfied the requirements set by the law under Order 42 Rule 6(2) of the Civil Procedure Rules. They aver that the Plaintiffs have not demonstrated the substantial loss or prejudice they stand to suffer if the stay of execution is not granted. To support these averments, they relied on the case of **James Wangalwa & Another Vs Agnes Naliaka Chesolo ELC Misc Application No. 42 of 2012**. They contend that the Plaintiffs have not offered any security for the due performance of the decree as required by law. Further, that the Plaintiffs have not demonstrated the seriousness in lodging the Appeal which has only been lodged to buy time and deny them from enjoying the fruits of their lawfully obtained judgement. To support this argument, they have relied on the case of **Kenya Shell Ltd Vs Kibiri & Another (1986) KLR**. They reiterate that in the event the Court allows the Plaintiffs' application, they should be directed to deposit security for costs for Kshs. 500,000/= within Thirty (30) days from the date of the Ruling. To support this argument, they relied on the case of **Paul Kamura V John Peter Nganga (2019) eKLR**.

Granting of stay pending Appeal is provided for under Order 42 Rule 6 which stipulates that:

6. (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."

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated that:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.'

While in the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, the court held that: **"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 CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... 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."**

See also the case of Multimedia University & Another –Vs- Professor Gitile N. Naituli (2014) eKLR.

Rule 5 (b) of the Appellate Jurisdiction Act provides that' **in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.'**

In the current scenario, the Plaintiffs filed a Notice of Appeal dated the 29th September, 2020. They have confirmed that the proceedings are ready. I note even though the Plaintiffs' suit was dismissed, the suit land is still registered in their names. Further, the Court held that the Defendants who are resident in the suit land are entitled to get their respective portions therefrom. The Defendants/ Respondents have stated that they have not commenced the process of executing the Decree. In the supporting affidavit, the Plaintiffs claim they will suffer irreparable harm but have not demonstrated it. I further note that this Court had already granted the Plaintiffs thirty (30) days stay of execution on 29th September, 2020 after which they filed the instant application when the period was about to lapse. I opine that the Authority cited by Plaintiffs is persuasive and not binding on this court. Based on the facts as presented while relying on Rule 5 (b) of the Appellate Jurisdiction Act cited above and associating myself with the decisions quoted, I find that the Plaintiffs have failed to meet the threshold set for granting stay of execution and will decline to grant the said orders.

It is against the foregoing that I find the Plaintiffs' Notice of Motion dated the 23rd October, 2020 unmerited and will proceed to dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 4TH MAY, 2021

CHRISTINE OCHIENG

JUDGE