



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO. 5 (B) OF 2019

EMMANUEL LEKAKENY KAYO.....PLAINTIFF

-VERSUS-

ORAMAT OLE SENTU.....DEFENDANT

RULING

The Notice before this court is dated 6/7/2020 in which the Appellant is seeking the following Orders:-

1. Spent.
2. That there be a stay of execution of the decree issued in Kilgoris Principal Magistrate ELC No. 23 of 2018 pending the hearing and determination of this Application interpartes.
3. That there be a stay of execution of the Decree issued in Kilgoris PM ELC No. 23 of 2018 pending the hearing and determination of this Appeal. That there be an Order reviewing, varying and or setting aside the Order of the trial court directing the Appellant from depositing the sum of Kshs, 100,000/= within 30 days as a condition for stay.
4. That the costs of this Application be provided for.

The Application is premised on the grounds that the Appellant is aggrieved by the Ruling of the trial court particularly the conditions of stay granted. That the Appellant has deposited the sum of Kshs. 100,000/= albeit late and that the Application is brought without unreasonable delay and failure to grant the Orders sought will result to the appeal being rendered nugatory. Most importantly is that the conditions for stay is onerous.

The Application is supported by the Affidavit of the Applicant Emmanuel Lekakeny Kayo sworn on 6/7/2020 in which he avers that his application for stay of execution was heard and determined at the trial court with conditions. That he deposits Kshs. 100,000/= within 30 days effective 5/12/2019. He avers that if the court does not vary the orders issued by the trial court, the Appeal will be rendered nugatory and the Respondent will institute Application for execution of the Decree. The Applicant has annexed a copy of the Memorandum of Appeal dated 28/5/2019 and marked as EK1, copies of receipts deposited in court on diverse dates namely Kshs. 27,000/= on 7/1/2020, Kshs. 10,000/= on 21/1/2020, Kshs, 37,000/= on 7/2/2020, Kshs. 14,400/= on 17/2/2020 and Kshs. 11,600 on 27/2/2020 and a copy of amended Notice of Motion dated 11/3/2020 marked as EK3.

The Application is opposed by the Replying Affidavit of Oramat Ole Sentu sworn on 14/7/2020 in which he contends that sometime in the year 2012, he lodged a suit against the Appellant vide Kisii ELC No. 525 of 2012 which was later transferred to Kilgoris PMC ELC Case No. 23 of 2018 in which Judgment was rendered in his favour on 16/5/2019. That the Appellant being dissatisfied with the decision of the trial court, lodged an Appeal namely Narok ELC No. 5 'B' of 2019. That after filing the Appeal in Narok, the Applicant proceeded to file a stay of execution pending hearing and determination of the instant Appeal vide Kilgoris PMC ELC Case No. 23 of 2018. Indeed the trial court granted the Appellant 30 days from 5/12.2019 to deposit Kshs. 100,000/= as deposit for security of costs. That failure to deposit the amounts of money as directed by the trial court amounted to disobedience of court Orders. In any case, the Appellant should have sought leave of the court to extend the time for payment of the balance immediately upon lapse of 30 days. The Respondent further contends that this court lacks jurisdiction to set aside, or vary a decision, the same can only be done by the trial court. That if this honourable court allows the stay of execution of the decree, the same would amount to disobedience of the lawful orders issued on 5/12/2019. Finally, that the Appellant has not demonstrated any substantial loss that he would suffer in the event the Orders sought are not granted. He further contends that the Application does not meet the threshold to warrant stay of execution and the same ought to be dismissed.

I have read and carefully analysed the Notice of Motion Application, the Replying Affidavit and the Submissions filed by both parties. The issues for determination at this stage is whether the Appellant is entitled to stay of execution, the effects of late payment of Kshs. 100,000/=, whether the conditions set by the trial court is onerous and whether this court can vary, set aside or review the Orders of the trial court.

The principles guiding the grant for a stay of execution pending appeal are well settled. **Order 42 rule 6 of the Civil Procedure Rules** provides as follows:-

(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.

The Court of Appeal in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** provides guidance on how a court should exercise discretion and held 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 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 or rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse’.

As to what substantial loss is, it was observed in ***James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR***, 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.”

In the instant case the Appellant herein is contesting the boundaries of Land Reference Transmara/Olomismis/769 instead of Transmara/Olomismis/766 which he claims if not properly addressed would amount to substantial loss. On whether the Appeal has been filed without unreasonable delay, I do note that the Ruling was delivered on 5/12/2019 and the instant Application filed on 6/7/2020. The period in between indicates roughly six months which I find no extreme unreasonable delay.

On whether there is overwhelming hindrance, the court, in ***RWW vs. EKW [2019] eKLR***, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

In the case ***Butt v Rent Restriction Tribunal [1982] KLR 417*** (supra) **The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse’.** In the instant case, I am alive to the fact that the Appellant herein has also filed a similar application 19/8/2020 in which he has made deposit of Kshs. 100,000/= on diverse dates. For the reasons above I find that the amount directed by the trial court is reasonable as the Appellant has deposited the said amounts therefore the issue on whether the condition as directed by the trial court to deposit Kshs. 100,000/= is not onerous.

On whether this court can vary, set aside or review the decision of the trial court, I am guided by Order 45, Rule 2 (1) which provides:-

‘An application for review of a decree or order of a court, upon some ground or other discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed’. This court therefore cannot assume the role or the function of the trial court by abdicating itself the function to review, vary or set aside the Orders of the trial court delivered on 5/12/2019.

The upshot of the above is that the Appellant has met the threshold of Order 42 Rule 6 of the Civil Procedure Rules, the conditions set out by the trial court that the Appellant deposits Kshs. 100,000/= is fair and reasonable and from the records it indicates that the Appellant has made the payments.

The Application is allowed in terms of prayer number 3.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 29TH DAY OF JUNE, 2021

MOHAMED N. KULLOW

JUDGE

29/6/2021

In the presence of:

CA:Chuma

N/A for the parties and advocates