



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND AT MURANGA

ELC NO. 123 OF 2017

DUNCAN GITHIGA MWANGI.....PLAINTIFF /RESPONDENT

VERSUS

KANU MAENDELEO YA WANA-

WAKE MURANGA BRANCH.....1ST DEFENDANT/RESPONDENT

BETH WANJIRU MWANGI.....2ND DEFENDANT/APPLICANT

MARGARET WAMBUI KIBE.....3RD DEFENDANT/APPLICANT

MARGARET WAMBUI KARIUKI.....4TH DEFENDANT/APPLICANT

MAENDELEO HOUSING COOP-

ERATIVE SOCIETY LIMITED.....5TH DEFENDANT/RESPONDENT

RULING

1. By way of a Notice of Motion dated the 16/4/2021 and filed on the 19/4/2021 the Applicants moved the Court under certificate of urgency seeking the following orders;

a. That the Court be pleased to stay execution of the judgement herein pending the hearing and determination of Civil Appeal No 3 of 2021.

b. The costs of the application be provided.

2. The application is brought under Order 42 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

3. It is also supported by the Applicant's affidavit sworn on the 23/2/2018 and anchored on the grounds stated below;

a. That the Applicants are dissatisfied with the judgement of the Court delivered on the 28/3/2019 and has preferred an Appeal at Nyeri.

b. The Appeal has high chances of success

c. It is prudent to stay the execution of the judgement

d. The application has been brought without delay.

e. That an assessment of costs has been drawn in favour of the Plaintiff/Respondent.

f. That the payment of the decretal amount and costs should be stayed pending the hearing and determination of the Appeal.

g. The execution of the judgement delivered on the 28/3/2019 be stayed.

4. The application is opposed vide the Replying Affidavit of the Plaintiff/Respondent. He states that the Court delivered judgement on the 28/3/2019 in his favour against the Applicants who were ordered to refund the sum of Kshs 5.6 m together with interest until payment in full in addition to payment of the costs of the suit.

5. He added that he had borrowed the funds from Kenya Commercial Bank which bank has embarked on recovery of its monies which now stand in excess of Kshs 10 million. Further that his former Advocates on record have extracted a certificate of taxation with respect to their bill in the sum of Kshs 437,040 which is due from him

6. In the main the Respondent maintains that the application is malafides and is intended to deny him the fruits of his judgement.

7. That it is brought to delay his pursuit of the decretal amount as well as costs which are due to him.

8. That the crux of the Appeal is that the property should vest in him, a position that he states he is not interested as the Court decreed a refund to him with costs.

9. That the application has been brought with inordinate delay and as delay defeats equity, the Applicant is not deserving of the equitable remedy of stay of execution.

10. That litigation must come to an end. That the Applicant's Appeal is geared towards prolonging litigation thus occasioning him great expense and anxiety.

11. Parties filed their written submissions which I have read and considered.

12. 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.”

13. 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: -

a. The application was brought without delay;

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

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

14. Going by the record the judgement of this honourable Court was delivered on the 28/3/2019. This application has been filed after two years and 9 days. The application was therefore filed inordinately. The Applicant has not explained the reasons for the delay in filing this application. Where the Applicant has not tendered any reason for the delay to the satisfaction of the Court, the Court shall have no ground to consider exercising its discretion in favour of the Applicant. This being an equitable remedy, delay defeats equity.

15. The second hurdle an Applicant must surmount to be entitled to the remedy of stay of execution is that the Applicant must demonstrate substantial loss that he is likely to suffer if the orders of stay are not granted.

16. 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.”

17. 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.”

18. 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.”

19. 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. On whether the Applicants will suffer substantial loss, they have stated that they are likely to suffer substantial loss since the Respondent is unlikely to refund the decretal sum. What amounts to substantial was determined by Plat GA J (as he then was) in **Kenya Shell Limited v Benjamin Karuga Kiburu & another [1986] eKLR** where the Court held;

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money”

20. Further in **James Wangalwa supra** as quoted by the Respondent, the Court found that substantial loss is what has to be prevented by preserving the status quo because such loss would render an Appeal nugatory. It is not therefore enough to suggest that the Applicant will suffer loss. This Court has to be furnished with evidence as to the loss that will be suffered. In this case the Applicant submits that the Respondent will be unable to refund the decretal sum should the Appeal be allowed. This is a money decree which arises from an illegal sale of land. The financial strength of each party best rests within themselves. Who then bears the burden of proving the Respondent's inability to pay?

21. Justice F Gikonyo in **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR** opined;

“The substantial loss under Order 42 Rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the Appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. But it is not enough for the Applicant to merely state that the Applicant cannot refund the sum paid. There must be cogent evidence which shows the inability or financial limitation on the part of the Respondent to refund the decretal sum. And, it is only when such prima facie evidence is laid before the Court by the Applicant that the evidential burden shifts to the Respondent”.

22. This was echoed in **Antoine Ndiaye v African Virtual University [2015] eKLR** where the learned judge held;

“Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the Appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the Appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the Court to show that the Respondent is not able to refund the decretal sum should the Appeal succeed”.

23. The burden of proof did not shift to the Respondent to prove his inability to pay. The Applicant has not demonstrated the substantial loss they will suffer, if any.

24. On security for cost, the Applicants have submitted that they will deposit the decretal sum. An order for security is the discretion of Court and is a condition precedent for granting stay. The purpose of security is to act as security for due performance of the decree. See **Nairobi Misc Civ Appl. No. 802 of 2010 Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] eKLR**. The Respondent opted not to submit on this.

25. The Applicants have further submitted that the Appeal is likely to succeed and should stay not be granted the same will be rendered nugatory. There is attached a Memorandum of Appeal filed on 12/4/2021 which the Court notes was filed two years after the Notice of Appeal was filed. This Court cannot determine whether the Appeal has a high chance of success or not as doing so will be sitting on an Appeal of its own judgment.

26. As to whether the Appeal will be render nugatory, The Court of Appeal in Nairobi civ 211 of 2016 **Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others [2018] eKLR** when considering whether to allow an application for injunction and stay pending Appeal looked at the definition of “nugatory” as was defined in **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232**. The Court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.

27. As to whether the Appeal will be rendered nugatory varies from case to case as it depends on what is to be stayed. In the instant case it is a money decree and the Applicants contend that they will suffer immensely as the Respondent is unlikely to refund the decretal sum. The Applicants have not shown that the Respondent is a man of straw and will be unable to pay the decretal sum. It is not without doubt that the person who has suffered grave loss is the Respondent who not only lost land but has continued to experience financial challenges occasioned by the Applicants. Just like proving substantial loss above it is the onus of the Applicants to show how the Appeal will be rendered nugatory. The Applicants Appeal is that the land be reverted to the Respondent a prayer the Respondent objects for the reason that he is no longer interested in the land but monies which the Applicants do not object to receiving.

28. To this end the Applicants have not met the requisite principles to be granted orders for stay of execution and as such the application is unmerited.

29. The Applicants shall bear the cost for the application.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JUNE 2021

J. G. KEMEI

JUDGE

Delivered in the presence of;

Nduiga for the Plaintiff

1st Defendant: Absent

Muturi Njoroge HB for T M Njoroge for the 2nd – 4th Defendants

5th Defendant – Absent

Court Assistant: Alex