



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC (PETITION) No. 360 OF 2017

COVE INVESTMENTS LIMITED.....PETITIONER

VERSUS

JOHANA KIPROTICH RONO & JOSEPH RONO LANGAT AS THE

LEGAL REPRESENTATIVES OF THE ESTATE OF

MATHIAS KIMNYOLE LANGAT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Judgment was delivered in this matter on 18th May 2021 in the following terms:

a) The petitioner to deposit in court the sum of KShs 782,425 (Seven Hundred Eighty-Two Thousand, Four Hundred Twenty-Five) being balance of the purchase price due to the 1st respondents. The deposit to be made within 21 (twenty-one) days from the date of delivery of this judgment.

b) Time within which to apply for consent of the Land Control Board in respect of the transaction over the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 comprised in the Agreement for Sale dated 1st December 1999, between Mathias Kimnyole Langat and the petitioner herein, is hereby extended for a period of 6 (six) months from the date of delivery of this judgment.

c) The 1st respondents to execute all necessary forms and transfer instruments necessary for obtaining the said consent of the Land Control Board within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute all such necessary forms and transfer instruments on behalf of the 1st respondents.

d) A declaration is hereby issued that the 1st respondents hold the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 in trust for the petitioner.

e) The 1st respondents are hereby directed to formally transfer the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 to the petitioner and to execute the transfer document within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute the transfer document on behalf of the 1st respondents.

f) Upon transfer being registered in favour of the petitioner and issuance of title in the name of the petitioner, the sum of KShs 782,425 (Seven Hundred Eighty-Two Thousand, Four Hundred Twenty-Five) referred to under order number a) above be released to the 1st respondents.

g) Costs of the petition are awarded to the petitioner and shall be borne by the 1st respondents.

2. Not satisfied with the judgment, the 1st respondents filed Notice of Appeal on 24th May 2021. A week later, they filed Notice of Motion dated 31st May 2021, the subject of this ruling. They pray that this court grants "an order of stay of execution and or implementation of its judgment delivered on 18th May 2021 pending the Hearing and determination of the applicant's appeal in the Court of Appeal against the

whole of the said judgement”.

3. The application is supported by an affidavit sworn by Johana Kiprotich Rono. He deposed that unless stay is granted, the 1st respondents will suffer substantial loss since the petitioner may dispose of the whole of the suit property or subdivisions thereof to third parties thus making it impossible for them to recover the land in its current state should the appeal succeed. He stated that the respondents shall abide by the court’s directives as regards security and offered to deposit taxed costs as security.

4. The petitioner responded to the application through a replying affidavit sworn by Mr Kenneth Kiplangat and Grounds of Opposition. The upshot of the two documents is that petitioner contends that the applicants will not suffer any substantial loss since the petitioner does not intend to transfer the property to any third party and since the applicants’ interest in the suit property cannot be defeated during the pendency of the appeal by reason of the doctrine of *lis pendens*. The petitioner further took the position that it can retransfer the suit property to the applicants if the appeal succeeds. The petitioner also took the overall position that the application does not satisfy the criteria for granting stay of execution pending appeal.

5. Both parties relied entirely on the material on record and urged the court to render a ruling.

6. I have carefully considered the application, the affidavits and the grounds of opposition. The parameters applicable to an application for stay of execution pending appeal are set by **Order 42 rule 6** of the **Civil Procedure Rules, 2010** which provides:

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.

7. Thus, an applicant seeking stay of execution pending appeal under the above provisions must satisfy the court that substantial loss will befall it if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. In terms of **Order 42 rule 6 (1)**, the court should make such order on the application as it deems just. A major part of the of the consideration of the justice of the case is balancing the interests of the parties in such a way that the applicant can exercise his right of appeal while the respondent who has a decree in his favour also gets a measure of protection. See **Nation Newspapers Limited v Peter Baraza Rabando [2007] eKLR**.

8. The judgment sought to be appealed against was delivered on 18th May 2021 while the present application was filed two weeks later. There was thus no unreasonable delay in filing the application.

9. Regarding the issue of substantial loss, I note that enforcement of the judgment will essentially result in ownership of the suit property being transferred from the 1st respondents to the petitioner. The petitioner has argued that there would be no substantial loss since the doctrine of *lis pendens* would ensure that the 1st respondent’s interest in the suit property is not defeated during the pendency of the appeal and that it does not in any event intend to transfer the property to any third party.

10. The applicant seeks to stay execution of the judgment. In other words, the applicant seeks to stop transfer of the suit property to the petitioner pending determination of its appeal. In such circumstances, it would not be an adequate answer to simply tell the applicant that the suit property would be transferred anyway and that it can be transferred back if the appeal succeeds. It is the very transfer that the applicant wishes to stop. I am persuaded that a transfer to the petitioner during the pendency of the appeal would constitute substantial loss.

11. An applicant seeking stay pending appeal is required to provide such security as the court orders for the due performance of the decree. The applicants have indicated that they shall abide by the court’s directives as regards security. I found in the judgment that the petitioner had paid to the applicants KShs 15,976,000 which constitutes over 95% of the purchase price. As noted at paragraph 26 of the judgment, the applicants claimed that the petitioner had only paid to them KShs 6.5 million towards the purchase price. I will therefore set security at KShs 8 million, which is midway between the two figures.

12. I am satisfied that the application has merit. To ensure that there is no undue delay in the prosecution of the appeal and that the petitioner is not unduly kept from the fruits of its judgment, I will limit the lifespan of the stay orders.

13. In the result, I make the following orders:

a) Pending the hearing and determination of the 1st respondents’ appeal to the Court of Appeal, I grant stay of execution of the judgment delivered herein on 18th May 2021.

b) The stay is conditional on the 1st respondents depositing in an interest-bearing account in the joint names of counsel on record for the petitioner and the 1st respondents, in a reputable bank, the sum KShs 8,000,000 (eight million) as security, within 21 (twenty-one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse and Notice of Motion dated 31st May 2021 shall stand dismissed with costs to the petitioner.

c) The stay orders shall, if the 1st respondents timeously comply with the condition in (b) above, remain in force for a period of only 1 (one) year from the date of delivery of this ruling, unless otherwise extended by the Court of Appeal.

d) Regarding costs, I note that the order in the judgment was that costs of the petition were awarded to the petitioner and were to be borne by the 1st respondents. Consequently, the 1st respondents shall also bear costs of the present application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF JUNE 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Karanja Mbugua for the 1st respondents/applicants

Mr Kairaria for the petitioner/respondent

No appearance for the 2nd respondent

Court Assistants: B. Jelimo & J. Lotkomoi