REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO 26 OF 2011(O.S)

IN THE MATTER OF LAND REFERENCE NO. NDIVISI/NDIVISI/1640

AND

IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATIONS

OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

JOSEPH MUMERO WANYAMA .....PLAINTIFF

VERSUS

JARED WANJALA LYANI ..... 1ST DEFENDANT

HESBORN MURULE LUSWETI ..... 2ND DEFENDANT

R U L I N G

When the plaintiff's Notice of Motion dated 9th October 2020 was placed before me on 12th October 2020, I certified it as urgent and directed that it be canvassed by way of written submissions. The same were to be filed on or before 18th November 2020 when the matter would be mentioned to confirm compliance and take a ruling date.

To the credit of the parties, they both filed their submissions within the set timelines and by 3rd November 2020, all the submissions had been filed. It would appear, however, that due to some lapse in the registry, it was not until 14th April 2021 when I was on leave that the file was brought up to the Deputy Registrar for directions.

That explains the delay in delivering this ruling. The same is regretted and the ruling is being delivered soon after my resumption of duties at the end of my leave.

In the case of **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES .V. E. P. ORANGA C.A CIVIL APPLICATION NO NAI 4 OF 1976 KLR 63 [1976 eKLR],** the plaintiff's suit in the High Court had been dismissed with costs. The plaintiff filed an appeal to the Court of Appeal and also filed an application seeking for orders of temporary injunction and stay of execution pending the hearing and determination of the appeal. In dismissing that application, the Court of Appeal, **LAW V.P**, observed as follows: -

> ***"But what is there to be executed under the Judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In WILSON .V. CHURCH the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for a stay, it is so ordered."***

This decision has been followed in many cases such as **KANWAL SARJIT SINGH DHIMAN .V. KESHAVJI JUVRAT SHAH 2008 eKLR** and also**, KENYA COMMERCIAL BANK LTD .V. TAMARIND MEADOWS LTD & OTHERS 2016 eKLR** where Courts

have held that a negative order is incapable of execution save for costs which cannot be stayed. I followed the same path in **KELLEN KARIMI NDUMA NDAMBIRI & ANOTHER** (suing as the Legal Representatives of the Estate of **JAMES NDAMBIRI (DECEASED) .V. ATTORNEY GENERAL & OTHERS 2017 eKLR**.

JOSEPH MUMERO WANYAMA (the plaintiff herein) moved to this Court by his amended Originating Summons dated 19th May 2012 seeking against **JARED WANJALA LYANI and HESBON MURULE LUSWETI** (1st and 2nd defendants respectively), the main order that he had acquired by way of adverse possession the land parcel **NO NDIVISI/NDIVISI/1640** (the suit land) registered in the names of the 1st defendant. He also sought an order that the 2nd defendant is unlawfully occupying the suit land and should be evicted therefrom. Both defendants resisted the claims against them.

Having heard the parties and in a reserved Judgment delivered on 27th May 2020, this Court dismissed the plaintiff's suit and awarded the costs thereof to the defendants. Aggrieved by that Judgment, the plaintiff filed a Notice of Appeal on 10th June 2020.

I now have before me for my determination, the plaintiff's Notice of Motion dated 9th October 2020 and which is the subject of this ruling. It seeks the following orders: -

(a) Spent

(b) Spent

(c) Spent

(d) Upon substantive hearing of this application, this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on 27th May 2020 pending the hearing and determination of the plaintiff's intended appeal to the Court of Appeal.

(e) Costs of this application to abide the outcome of the intended appeal.

(f) This Honourable Court be pleased to issue such other orders and directions as may appear to the Court to be just and convenient.

The application is based on the grounds set out therein and is also supported by the plaintiff's affidavit.

The gist of the application is that the plaintiff was dissatisfied with this Court's Judgment delivered on 27th May 2020 and instructed his then Counsel **MS ANNET MUMALASI** to file a Notice of Appeal which was duly filed on 10th June 2020. Counsel then applied for proceedings to enable him file a Memorandum and Record of Appeal. However, on 2nd October 2020 **MS ANNET MUMALASI** informed him that she was no longer in a position to continue representing him since she was likely to be sworn in as a Judge anytime. This prompted the plaintiff to instruct his current Counsel **MS BRYAN KHAEMBA KAMAU KAMAU & COMPANY ADVOCATES** to represent him. That the 1st defendant has already commenced partial execution of this Judgment by filing his Bill of Costs on 8th July 2020 and therefore if the orders sought are not granted, he will suffer substantial loss. Annexed to the application is a copy of this Court's Judgment delivered on 27th May 2020, the Notice of Appeal filed on 10th June 2020, a letter dated 17th June 2020 requesting for copies of proceedings and Judgment and the 1st defendant's Bill of Costs dated 8th July 2020.

The 1st defendant through the firm of **J. W. SICHANGI & COMPANY ADVOCATES** filed grounds of opposition on 26th October 2020 describing the application as lacking in merits. Further, that the application does not meet the requirements of **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules** and following the dismissal of the suit, the only execution is for costs and the plaintiff can deposit half of the costs with the Counsel for the decree holder. The plaintiff has not made any offer for security and is not entitled to a blanket stay of execution.

The 2nd defendant did not file any response to the application.

Submissions were thereafter filed by Counsel for both parties.

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions by Counsel.

Guided by the decision in the case of **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES** (supra) which I referred to earlier in this ruling, it is clear that this application must collapse for the simple reason that the plaintiff's suit having been dismissed, all that is pending execution is the defendants' Bill of Costs. This Court's Judgment did not order the parties herein to do or refrain from doing anything. It was basically a negative order dismissing the plaintiff's suit but ordering him to pay costs to the defendants. And as is now well settled by Judicial authorities cited above, an order for costs is not one that can be stayed. In anycase, I did not hear the plaintiff to state that the defendants are so impecunious as to be unable to pay his costs should his appeal succeed.

Having said so, however, I shall consider the application on it's merits.

Order 42 Rule 6 (1) and **(2)** of the **Civil Procedure Rules** provides 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 in so far as the Court appealed from may order but, the Court appealed from may <u>for sufficient cause</u> 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 <u>substantial loss may result</u> to the applicant unless the order is made and that the application has been made <u>without unreasonable delay</u>; and***
>
> ***(b) <u>such security</u> as the Court orders for the due performance of such decree or order as may ultimately be binding on him has <u>been given by the applicant</u>.*** Emphasis added.

It is therefore clear that to justify the grant of order of stay of execution pending an appeal, the Applicant must satisfy the following: -

1. **Show sufficient cause.**
2. **Demonstrate that he will suffer substantial loss unless the order is made.**
3. **Approach the Court without unreasonable delay.**
4. **Offer security**

Those are the conditions that govern this Court's power in granting an order of stay of execution pending appeal. In **HALAI & ANOTHER .V. THORNTON & TURPIN 1963 LTD 1990 KLR 365**, the Court of appeal described this Court's powers as follows: -

> ***"The High Court's discretion to order stay of execution of it's order or decree is fettered by three conditions. Firstly, the applicant must establish a <u>sufficient cause</u>, secondly the Court must be satisfied that <u>substantial loss</u> would ensue from a refusal to grant a stay and thirdly the applicant must <u>furnish security</u>. <u>The application must of course be made without delay</u>."***

Starting with the issue of delay, the Judgment being appealed was delivered on 20th May 2020 by way of electronic mail and it is clear from the plaintiff's own affidavit that he became aware about the Judgment on that day. He immediately instructed his then Counsel **MS ANNET MUMALASI** to file a Notice of Appeal which was done on 10th June 2020 as required by **Rule 75** of the **Court of Appeal Rules**. This application was however filed on 9th October 2020 some five (5) months from the time the Judgment being appealed was delivered. That delay is clearly unreasonable and no explanation has been offered for the same. The plaintiff appears to be suggesting in paragraphs 4 and 5 of his supporting affidavit that his then Counsel applied for certified copies of the proceedings and Judgment to enable him move to the Court of Appeal. However, he did not require the typed proceedings to enable him file this application. The delay is so inordinate as to disentitle him to the order of stay of execution.

It is also not lost to this Court that the plaintiff only filed this application after the 1st defendant filed his Bill of Costs in July 2020. That is clear from paragraph 8 of his supporting affidavit. He did not have to wait until the 1st defendant filed his Bill of Costs before moving to Court with this application. This can only serve to demonstrate that the plaintiff's priority is to stall the taxation of the 1st defendant's Bill of Costs.

The plaintiff was also required to demonstrate that unless the order of stay of execution is granted, he may suffer substantial loss. In **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410**, **PLATT Ag J.A** (as he then was) stated as follows about the need to prove substantial loss: -

> ***"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. <u>Substantial loss in it's various forms is the cornerstone of both jurisdictions for granting stay</u>. 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."*** Emphasis added.

In the same case, **GACHUHI Ag J.A** (as he then was) added as follows: -

> ***"In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted."***

And in **MACHIRA T/A MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD NO 2 2002 2 KLR 63**, the Court held that: -

> ***"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."***

Among the grounds upon which the application is anchored is paragraph 7 of the Notice of Motion which states: -

> ***7 "However, in the intervening period, the defendants are likely to commence execution of the Judgment delivered on 27th May 2020 hence subjecting the applicant to substantial loss."***

And in paragraph 9 of his supporting affidavit, the plaintiff has deponed: -

> ***9: "That unless this application is heard urgently and orders granted as prayed, I stand to suffer substantial loss."***

The plaintiff should have gone further and shown what substantial loss he will suffer if the order of stay of execution is not granted. It is not enough to merely allude to the words "***substantial loss***" as used in **Order 42** of the **Civil Procedure Rules** without stating in clear and factual terms what kind of loss he is likely to suffer and that it will be indeed substantial. This is such a key element in an application of this nature that it cannot be left to speculation. The only attempt to establish substantial loss has been made in the submissions by plaintiff's Counsel at page 4 as follows: -

> ***"Second, my Lord, it is our submission that the applicant herein will suffer substantial loss if stay of execution of Judgment and consequential orders issued on 27th March 2020 is not granted. This is so because there is nothing to stop the 1st defendant/respondent, in whose name the suit property is registered, from disposing it to third parties and thus permanently deprive him of the same with the result that the applicant will be left with a have decree if he succeeds in the Court of Appeal. This was the position adopted by the Court of Appeal in NAKURU CIVIL APPLICATION NO 32 OF 2005, MALCOM BELL .V. DANIEL TOROITICH ARAP MOI & ANOTHER 2006 eKLR in which the Court not only granted a stay of execution of the Judgment dismissing a claim for adverse possession, but also ordered that the suit property should neither be disposed of, changed or in any way dealt (sic) until the intended appeal against the decree was determined."***

That may very well be so. However, submissions, no matter how persuasive they may be, are not evidence upon which a Court of Law can rely on as proof of any fact that has been placed before it for determination. If the plaintiff intended to prove to the Court that the 1st defendant is likely to dispose of the suit land before the appeal is heard and determined and which would therefore result in him suffering substantial loss, that is a matter that ought to have been deposed in his supporting affidavit. It is not sufficient to simply allude to it in submissions. As was stated by the Court of Appeal in **DANIEL TOROITICH ARAP MOI .V. MWANGI STEPHEN MURIITHI & ANOTHER 2014 eKLR**: -

> ***"Submissions cannot take the place of evidence. The 1st respondent has failed to prove his claim by evidence. What happened in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties "marketing language" each side endeavouring to convince the Court that it's case is the better one. Submissions, we reiterate, do not constitute evidence of all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."***

Clearly therefore, the plaintiff has not surmounted the hurdle of proving that he will suffer substantial loss if the order of stay of execution is not granted.

The plaintiff was also required to furnish security – **HALAI .V. THORNTON & TURPIN** (supra). As was held in **WYCLIFF SIKUKU WALUSAKA .V. PHILIP KAITA WEKESA 2020 eKLR**: -

> ***"The offer of security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."***

The plaintiff has not made any offer of security for the due performance of any decree or order as may ultimately be binding upon him. And as already stated above, he only moved to Court after the 1st defendant filed his Bill of Costs, a clear indication that his intention is to keep the 1st defendant away from his costs. Bearing in mind that what is being executed in this matter is only the costs, the Court would have expected that even an offer to deposit part of the costs would have been a significant demonstration that this application is being pursued in the interests of justice and not meant to keep the defendants from what they are justly entitled to. In short, there is no sufficient cause shown to warrant the orders sought and primarily because, this Court's Judgment and the subsequent decree was a negative order that cannot be stayed.

The up – shot of the above is that the plaintiff's Notice of Motion dated 9th October 2020 is devoid of merit. It is dismissed with costs to the 1st defendant.

BOAZ N. OLAO.

J U D G E

10TH JUNE 2021.

Ruling dated, signed and delivered at **BUNGOMA** by way of electronic mail this 10th day of June 2021 in keeping with the **COVID – 19** guidelines.

BOAZ N. OLAO.

J U D G E

10TH JUNE 2021.