



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. E002 OF 2020

IJILAL YUSUF JUMBE..... APPELLANT

-VERSUS-

JOSEPH GITONGA RUKWARORESPONDENT

RULING

A. APPELLANT'S APPLICATION

1. By a notice of motion dated 14th September, 2020 brought under the provisions of **Order 42 rule 6 and Order 51 rule 1** of the **Civil Procedure Rules (the Rules)** and **Section 3A and 63 (e)** of the **Civil Procedure Act (Cap. 21) Laws of Kenya** and **all other enabling provisions of the law**, the Appellant sought an order for stay of execution of the judgment and decree of the trial court dated 28th August, 2020 in *Nyeri MCL & E No. 62 of 2019 – Joseph Gitonga Rukwaro v Ijilal Yusuf Jumbe* pending the hearing and determination of the appeal.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 14th September, 2020. The Appellant contended that being aggrieved by the said judgment and decree of the trial court he filed the instant appeal. He contended that the appeal raised arguable grounds with a high probability of success and that unless a stay of execution was granted he was in danger of being evicted from the suit property before the hearing and determination of the appeal. The Appellant further contended that should the eviction take place then he shall suffer substantial loss in that he and his family shall be rendered homeless.

B. THE RESPONDENT'S RESPONSE

3. The Respondent filed a replying affidavit sworn on 22nd September, 2020 in opposition to the said application. It was contended that the pending appeal was frivolous and had no chances of success. It was further contended that the Appellant's counterclaim was rightly dismissed by the trial court. The Respondent further contended that he was entitled to enjoy the fruits of his judgment and that he shall continue to suffer loss if the order of stay was granted since he was still serving a loan of over Kshs.6 million which he acquired for the purchase of the suit property. He did not, however, dispute that the Appellant was in possession of the suit property.

C. DIRECTIONS ON SUBMISSIONS

4. When the application was listed for hearing on 24th February, 2021 it was directed that it shall be canvassed through written submissions. The parties were granted 14 days each to file their respective submissions. The record shows that the Appellant filed his submissions on 6th April, 2021 whereas the Respondent filed his on 21st April, 2021.

E. THE ISSUES FOR DETERMINATION

5. The court has perused the Appellant's notice of motion dated 14th September, 2021, the Respondent's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

- (a) Whether the Appellant has made out a case for the grant of stay pending appeal.
- (b) Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

(a) Whether the Appellant has made out a case for the grant of stay pending appeal

6. The court has considered the material and submissions on record on this issue. Whereas the Appellant submitted that he had satisfied the requirements for stay pending appeal as set out in **Order 42** of the **Rules**, the Respondent contended otherwise.

7. The Appellant's application is essentially grounded upon **Order 42 Rule 6(2)** which stipulates 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.

8. In the case of **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365**, the Court of Appeal held that the jurisdiction of the High court to grant a stay under **Order 42 rule 6** of the **Rules** was fettered by at least 4 conditions, namely:

(a) The applicant must establish sufficient cause.

(b) The applicant must demonstrate the risk of substantial loss unless stay is granted.

(c) The applicant must furnish security for due performance of the decree should the appeal eventually fail.

(d) The application must be made without unreasonable delay.

9. In the case of **Butt v Rent Restriction Tribunal [1979] eKLR** it was held that although the power of a court to grant a stay pending appeal is discretionary, it should be exercised in such manner as to prevent a successful appeal from being rendered nugatory. The court is required to take into account the particular circumstances of each case in either granting or refusing stay of execution.

10. An application for stay of execution of a decree usually raises two competing interests in the administration of justice. There is the right of the successful litigant to enjoy the fruits of his judgment on the one hand. On the other hand, there is the right of the unsuccessful litigant to pursue his right of appeal without the risk of the outcome being rendered merely academic and nugatory. The court has a duty to balance these competing but legitimate interests hence the need to adhere to the set down principles for granting a stay pending appeal.

11. The court has noted from the material on record that the Appellant is in occupation of the suit property hence the reason the trial court granted him 60 days to vacate. At any rate, the Appellant's averments that he was in occupation of the suit property and that he shall be rendered homeless if evicted were not controverted by the Respondent. The court is thus satisfied that the Appellant shall suffer substantial loss within the meaning of **Order 42 rule 6(2)** of the **Rules** should he and his family be evicted from the suit property before the hearing and determination of the appeal.

12. The court is further satisfied from the material on record that the instant application was filed without unreasonable delay. The record shows that the judgment of the trial court was delivered on 28th August, 2020 whereas the instant application for stay dated 14th September, 2020 was filed on 16th September, 2020. The court is further of the opinion that in the circumstances of this particular case no security for due performance of the decree is required since the Appellant can easily be evicted should he be unsuccessful in the appeal. He does not hold any title documents to the suit property and there is no risk that he may deal with it in such manner as to make it unavailable upon conclusion of the appeal. The court is thus satisfied that the Appellant has satisfied the requirements for the grant of stay pending appeal.

(b) Who shall bear costs of the application

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since the appeal is still pending determination, the court is of the opinion that the appropriate order to make is that costs shall abide the outcome of the appeal.

G. CONCLUSION AND DISPOSAL

14. The upshot of the foregoing is that the court finds merit in the Appellant's application dated 14th September, 2020 for stay pending appeal. Accordingly, the court makes the following orders for disposal thereof:

(a) There shall be a stay of execution of the judgment and decree of the trial court in Nyeri MCL&E No. 62 of 2019 together with all consequential orders for a period of two years from the date hereof or until determination of the appeal whichever comes first.

(b) Costs of the application shall be costs in the appeal.

Orders accordingly.

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS
3RD DAY OF JUNE 2021**

In the presence of:

Mr. Ombongi for the Appellant

Ms Mbuthia holding brief Mr. Gacheru for the Respondent

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Y. M. ANGIMA

ELC JUDGE