



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT ELDORET**

**ELC CASE NO.173 OF 2012**

**JOEL KIPTANUI CHEMWENO.....PLAINTIFF**

**VERSUS**

**JOSEPH K. M. TIREITO .....DEFENDANT**

**RULING**

This ruling is in respect of 2 applications by the plaintiff and the defendant dated 16<sup>th</sup> September 2020 and 5<sup>th</sup> November 2020 respectively. By a notice of Motion dated 16<sup>th</sup> September 2020 the plaintiff herein sought for the following orders:

- a. That the Deputy Registrar of this Honourable Court be pleased to execute transfer instruments in respect of the land parcel known as LR.No. 779/359 in favour of the plaintiff as decreed in the judgment delivered on the 23/4/ 2020 for a portion of 2 acres.
- b. The costs of this application be provided for.

The court will therefore deal with this application first as it was filed before the one for stay of execution.

Counsel submitted that the defendant has refused to sign the transfer forms having written a letter dated 2<sup>nd</sup> June 2020 requesting for the same and relied on the provisions of Section 98 of the Civil Procedure Act which provides as follows:

"Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other documents, or to endorse any negotiable instrument, the court may, on such terms and conditions, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it."

Counsel relied on the case of **Charles Mukoma Kimaru v Johnstone Muchomba Kaguya (2020) eKLR** where it was held;

"20. It has now emerged that after the judgment of the court that the respondent with a view to defeat the execution of the judgment has refused and/or neglected to sign the relevant transfer documents which refusal/neglect is calculated to defeat this court's judgment. The only way the judgment and decree of the court can be effected is by authorizing the Deputy Registrar to sign all instruments of transfer of land to the applicant in place of the respondent within the confines of the law as provided for.

21. I am satisfied in the circumstances that this is a proper case in which the court should exercise its discretion under section 98 of the Civil Procedure Act and do hereby nominate the Deputy Registrar of this court to execute the instrument of transfer in favour of the applicant to enable him enjoy the fruits of the judgment of 4<sup>th</sup> October, 2018."

Counsel urged the court to allow the application as prayed.

It should be noted that both the plaintiff and the defendant were aggrieved by the judgment of the court and are hence appealing.

It is also on record that the plaintiff/applicant has annexed an application in the Court of Appeal seeking for extension of time to lodge and serve a notice of Appeal in respect of the judgment of this court. The applicant has not indicated to the court the current status of the said application. I find this application as an abuse of court process as the applicant is seeking to execute a Judgment that he has appealed against. The same is dismissed with each party bearing his own costs.

On the second application dated 5<sup>th</sup> November 2020 filed by the defendant who sought for the following orders:

- a. THAT this Honourable Court be pleased to order stay of execution of the judgement given on 23/4/ 2020, pending the hearing and determination of this application inter partes.
- b. THAT this Honourable Court be pleased to order stay of execution of judgement given on 23/4/ 2020, pending the hearing and determination of the intended appeal.
- c. THAT costs of this application be provided for.

Counsel filed submissions and relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicant has preferred an appeal against the judgment of this honorable court delivered on 23/4/2020 and that if the plaintiff is allowed to proceed to execute against him, it will amount to him giving out 2 acres twice, first to Elijah Sumbeiywo and second to the plaintiff.

Further that the applicant will suffer irreparable harm if the orders sought are not granted and that the appeal will be rendered nugatory if his application is not allowed. Counsel also submitted that the applicant is willing to abide by the conditions that the court may grant.

Dr. Chebii cited the case of **RELIANCE BANK V. NORLAKE INVESTMENT LTD (2002) 1 EA 227**, where it was stated that;

“there needs to be a balance, based on the claims of both parties. The balance lies in preserving the subject matter of the judgment so that if the Appellant is successful on the appeal, he does not merely get a paper judgment, yet in as far as may be possible, the successful litigant ought to be allowed to enjoy the fruits of the judgment, unless the enjoyment of the same is going to obliterate the subject matter of litigation, or will cause undue hardship to the other party which would be unreasonable in the circumstances of the case. When considering how to exercise its discretion, the court must take into account the various competing interests and several factors that affect the peculiar circumstances of the case. Thus, in a money decree, if the respondent can show that he can repay the money decreed, the general principle is that he should be allowed the benefit of the decree since the subject matter, money, will be lost as he is capable of refunding the same. “

Counsel for the plaintiff opposed the application and relied on the **Court of Appeal case of Carter & Sons Limited v Deposit Protection Board & 2 Others, Nairobi Civil Appeal no. 291 of 1997** where it was held as follows;

"The applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security and the application must of course, be made without unreasonable delay. The mere fact that there are strong grounds of appeal would not, itself, justify an order for stay. "

On the issue of substantial loss, counsel submitted that the defendant has failed to establish that he will suffer substantial loss and as such the decree ought to be executed from his own admission. That the defendant has only deposed that he stands to suffer irreparable loss and damage without giving any particulars of the same and as such the defendant has failed to establish the said loss.

Counsel relied on the case of **Charles Wahome Gethi v Angela Wairimu Gethi, Court of Appeal Civil Appeal. No. Nairobi 302 of 2007 UR 205/2007** in which it was held;

"It is not enough for the applicants to say that live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them. "

Mr Mogambi counsel for the plaintiff further submitted that the defendant cannot suffer substantial loss by complying with the decree as the suit land based on the evidence adduced during the suit is 10 acres and the decree only obligates that the transfer of two acres hence the same cannot be said to be substantial loss and relied on the case of **Rashid K Too v Fred I. Imbatu, (2019) eKLR** in which **Githinji, Okwengu and J, Mohamed JJ. A** held;

"9. From the evidence that was adduced before the lower court, and the facts deposed to in the contending affidavits before us, it is apparent that apart from the disputed portion, subject of the order of specific performance issued by the court, the applicant still has more land and therefore the impression that he gives that his family will be destitute is not accurate. The disputed portion is in fact land that the applicant had attempted to dispose of. In the premises, the applicant has not satisfied this Court that his appeal would be rendered nugatory if the order of stay of execution is not granted. As stated in Ishmael Kanyunyi Thande vs Housing Finance Company of Kenya Limited (supra), in order to succeed the applicant has to establish not only that his appeal is arguable, but also that it is likely to be rendered nugatory if the orders of stay of execution is not granted. Having failed to establish that his appeal would be rendered nugatory, the applicant's motion must fail. It is accordingly dismissed with costs. "

On the issue of sufficient cause, counsel submitted that the defendant has failed to establish the said ground and not demonstrated the grounds of the intended cross appeal. Further, he submits that the decision reached on the decree to award the 2 acres arose out of an admission by the defendant.

Mr. Mogambi submitted that the application was made 6 months after the delivery of the judgment and 5 months after the defendant lodged the notice of cross-appeal and relied on the case of **Jaber Mohsen Ali & Another v Priscilla Boit & Another, (2014) eKLR** in which it was held;

"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent

on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any orders given thereafter. "

As to whether the defendant has offered any security for the due performance of the decree, counsel has submitted that the defendant has made no offer to that effect.

Finally, of the issue of security counsel submitted that the defendant has failed to satisfy this aspect of the conditions for the grant of a stay and cited the case of **Wycliffe Sikuku Walusaka v Philip Kaita Wekesa, (2020) eKLR** in which it was stated;

"The offer for security must of course come from an 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. "

Counsel also relied on the case of **Bildad Simiyu Khakina & 2 Others v Dr. Henry Kerre Wakhungu & 2 Others, (2020) eKLR** where it was observed;

"There is no mention either in the notice of motion itself or the supporting affidavit of any offer of security by the applicants or any indication that they are prepared to abide by any terms that the court may impose as a condition of any orders of stay of execution pending appeal. There can therefore be no sufficient cause to warrant the grant of the orders sought."

Counsel therefore urged the court to dismiss the application with costs.

### **ANALYSIS AND DETERMINATION**

The court has already determined that the application for execution of transfer documents by the Deputy Registrar is an abuse of court process as the applicant has also filed a cross appeal against the judgement that it seeks to execute.

The issue for determination is as to whether the applicant has met the threshold for grant of stay of execution as per Order 42 Rule 6 of the Civil Procedure Rules. Before we deal with the issue of stay of execution, we have to ascertain what the court is staying pending what.

It is trite law and procedure that an appeal shall be deemed to have been filed when under the rules of the appellate court, a notice of appeal has been given and from the record it is evident that the plaintiff a notice was filed on 19/5/2020, that is, 26 days after the delivery of the impugned judgment. And the notice of cross petition was filed on 20/5/2020 which is 27 days after the delivery of the judgment.

As of now both notices were filed out of time and there is no indication that the extension of time sought was granted as per the application for such extension of time which has been annexed. Courts do not give orders in vain and counsel should have appraised the court on the fate of the application for extension of time to file a notice of appeal out of time.

The Notice of Appeal herein and the notice of cross-appeal were therefore filed outside the statutory period of 14 days. It therefore means that there is technically no valid appeal on which a stay of execution order can be anchored. I therefore hold and find that both applications lack merit and are therefore dismissed with each party bearing their own costs.

**DATED AND DELIVERED AT ELDORET THIS 2<sup>ND</sup> DAY OF JUNE, 2021**

**M. A. ODENY**

**JUDGE**