



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 6 OF 2019

MELISA BULUMA.....APPELLANT

-VERSUS-

JANE ADHIAMBO TAMBO.....RESPONDENT

RULING

The applicant, **JANE ADHIAMBO TAMBO** who is the respondent in the appeal has approached the Court by way of a Notice of Motion Application dated and filed on 10th September 2020 filed under certificate of urgency and premised on Order 42 Rule 6 and Order 5 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of the law. The applicant seeks the following prayers:

- 1. That the application be heard ex-parte in the first instance (*spent*)**
- 2. That this Honourable Court do order a stay of execution of the judgement and order made by this Honourable Court on the 4.9.2020 pending the hearing and final determination of this Application (*Issued by the Court on 6/10/2020*).**
- 3. That this Honourable Court do order a stay of execution of the judgement and order made by this Honourable Court on the 4.9.2020 pending the hearing and final determination of this appeal.**
- 4. That this application be served on the Plaintiff/Respondent and the application be heard inter-parties on such date and time as the Honourable Court may direct.**
- 5. That the costs of this application be provided for.**
- 6. Costs be provided for.**

The application is supported by the affidavit of the applicant's advocate, **MOSES MUNUANG'O** sworn and filed on 10/09/2020. The following are the grounds of the application from the supporting affidavit and the face of the application;

- a) That on 4/09/2020, the Court allowed this appeal, entered judgement against the applicant and ordered for the immediate eviction of the applicant from the suit property, being land parcel number LR NO.16600 (Grant Number IR 59663). That the Court did not give timelines for the eviction, and the respondent has threatened the applicant with eviction.**
- b) The applicant being dissatisfied by the whole judgement and decree intends to appeal and it is thus prudent to grant orders of stay of execution of the judgement noting that if the judgement is executed the entire appeal will be rendered nugatory.**
- c) The applicant has duly filed a notice appeal, annexed and marked *MM-2*.**
- d) The applicant has massively invested in the parcel of Land (*as per the annexed photographs of the applicant's apartment marked MM-3*) in which the Court ordered eviction and if the eviction is left to proceed as it is, then the applicant will suffer irreparably.**
- e) That the learned trial judge framed two issues for determination but only addressed one issue leaving the other unaddressed and as such the intended appeal is plausible with tremendous chances of success.**

- f) That from the proceedings in both the lower court and high court, it was appreciated that the appellant/respondent did not know the extent of encroachment and as such the blanket eviction orders are capable of being abused.**
- g) Unless the application for stay is heard urgently on a priority basis, the Respondent will levy execution against the applicant which will in effect render the instant application and the appeal nugatory and the applicant will suffer irreparable loss and damage.**
- h) That the applicants are ready and willing and ready to abide by this Honourable Court's conditions pending appeal.**
- i) The application has been made without unreasonable delay and ought to be granted in the interest of equity and justice.**

The application has been opposed vide the replying affidavit of **GEORGINE J. MBAYA** (the appellant's advocate on record) filed on 16th November 2020, in which it has been deposed that;

- a) The application is misconceived, an afterthought and an abuse of the Court process. The applicant has neither attached a copy of the decree nor judgement sought to be stayed.**
- b) The applicant has not demonstrated substantial loss and has also not furnished any evidence to demonstrate the threat of eviction allegedly issued by the Respondent.**
- c) Even if the Respondent intends to proceed with lawful execution of the decree, the investment made on the suit parcel of land is quantifiable as such any loss suffered as a result can be compensated.**
- d) That the two issues raised by this Honourable Court, being whether the matter was a boundary dispute and whether the Respondent was entitled to orders sought in light of the fact that her evidence was uncontroverted were addressed in detail whereby this Honourable Court stated that the issue was not a boundary dispute since the grant had confirmed the boundaries on the suit parcel of land; and that the Respondent was entitled to the orders sought as the defence and list of documents filed by the applicant remained mere allegations with no proof.**
- e) The applicant has thus not demonstrated that she has an arguable appeal and has also not provides any security for granting of the orders sought. As such, the applicant has not met the conditions laid down by the law in granting the orders sought.**
- f) The application is thus an elusive and subtle scheme by the applicant to frustrate the respondent from enjoying the fruits of her judgement, and ought to be dismissed with costs.**

When the application came up for inter parties hearing on 11/02/2021, the Court ordered that parties file their submissions.

APPLICANT'S SUBMISSIONS.

The applicant filed their submissions on 23/04/2021. It is the applicant's submissions that;

- a) Order 42 rule 6(2) of the Civil Procedure Rules sets out only two grounds upon which an application for stay should be premised upon; substantial loss if the orders are not granted coupled with the fact that the application is made without unreasonable delay and offering of security for due performance of the decree or order as may be ordered by the Court.**
- b) The applicant has demonstrated that she has invested in the suit property by building a flat vide the photographs annexed as MM-3. That the respondents have admitted that the investments in the land are quantifiable.**
- c) As to whether the Court should refuse stay on the basis that the investments are quantifiable, the applicant has submitted that the safe and sound position that does not expose both parties herein to a greater risk of injustice is to order for stay pending hearing and determination of the appeal.**
- d) The application has been made without unreasonable delay, judgement having been delivered on 4/9/2020 and the application filed on 10/09/2020.**
- e) That the decree appealed against is not a money decree and as such the applicant has stated that she is willing to abide by any order that the Court may impose as condition to granting stay.**
- f) On arguability of the appeal, the applicant has submitted that from the memorandum of appeal there is an issue on burden of proof and whether it was discharged or not and that the issues framed for determination were not exclusively discussed thus making the appeal arguable by dint of section 107 and 108 of the Evidence Act and Order 21 of the Civil Procedure Rules.**
- g) The applicant urged the Court to exercise the discretion by granting stay of execution pending appeal on such conditions that the Court deems fit to avoid exposing either party to a greater risk of injustice. The applicant relied on the case of ***Halai and Another v Thorton & T Turpin (1963) Ltd [1990] eKLR.*****

h) That the respondent testified that she is a housewife and as such, if the eviction proceeds and the walls and the applicant's flats are demolished, she will not be in a position to reconstitute the applicant to the same state pre execution. The applicant has relied on **West Kenya Company Limited v Luther Angatia [2018] eKLR**.

i) The applicant also relied on the case of **Butt v Rent Restriction Tribunal (1982) KLR 417** to urge this Court to stay execution pending appeal, noting that it is the applicant who is in actual occupation of the disputed land and has massively invested in the land.

RESPONDENT'S SUBMISSIONS

The Respondents filed their submissions on 7/05/2021. It is the respondent's submissions that;

a) The conditions for grant of stay are provided for in Order 42 Rule 6 of the Civil Procedure Rules. The said conditions for the exercise of the discretionary power to grant or refuse stay were also discussed in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417**.

b) On substantial loss that may result to the applicant, the respondent relied on the cases of **James Wangalwa & Another v Agnes Naliaka Chesesto and Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCC 795 of 1997** to submit that the photograph (annexure MM3) does not suffice as proof for substantial loss. Further, the applicant has not demonstrated any special circumstances to warrant the grant of orders sought. That the investments made are quantifiable and therefore if at all any loss will be suffered, the same can be compensated.

c) That the application was filed six days after the judgement and that the inordinate delay of six days has not been explained.

d) The question as to whether or not the applicant has an arguable appeal is a non-issue at this stage and should not be considered by the Court in granting the orders sought. The Respondent has relied on **Mangungu v National Bank of Commerce Ltd [2007] 2 EA 285**.

e) The Court has not furnished the Court with security as condition for stay yet the offer of security must come from the applicant as was stated in **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**.

ANALYSIS AND DETERMINATION

The main issue for determination is whether the applicant has met the requirements to warrant stay of execution of the Court's judgement delivered on 4/09/2020 pending appeal to the Court of Appeal.

I think it is important to note at this early stage that the respondent has indicated that the applicant has neither attached a copy of the decree or judgement sought to be stayed. I do not think this is fatal as the Court has had the opportunity of reading the typed copy of the judgement which is available on the Court Record. The decree is also there on the Court record and was issued on 16th September 2020, after the application had been filed.

Grant of stay pending appeal is provided for in Order 42 Rule 6(2) of the Civil Procedure Rules which provides that:

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.

The said conditions were discussed by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** (quoted in the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** and also relied on by the petitioner/respondent in their submissions) where the Court gave guidance on how the Court should exercise its discretion in deciding whether or not to grant stay pending appeal. The court held that:

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

Whether the Applicant will suffer any substantial loss if the Orders are not granted

The applicant has stated at paragraph 6 of the Supporting Affidavit that she has invested in the parcel of land and if eviction proceeds, the applicant will suffer irreparably. The applicant has annexed photos MM-3. I have looked the said photos. They show that the applicant has put up flats therein going up to second floor. They look occupied.

The Respondent has not denied the said investments. She has instead stated that the investment is quantifiable and any loss suffered as a result can be compensated. The applicant has further stated that the respondent stated in her evidence in the lower court that she is a house wife and if the walls and flats are demolished, the respondent will not be in a position to reconstitute the applicant to the same state pre execution. I have confirmed from the typed proceedings that the Respondent stated that she is a housewife. The Respondent has not made any comment or rebutted the applicant’s allegation that she is not in a position to reconstitute the applicant if eviction proceeds.

The centrality of substantial loss was discussed in the case of *James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR* in the following terms;

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. “...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

I agree with the applicant that if execution proceeds, she will suffer substantial loss as the said flats and the perimeter wall will be demolished. It is not in dispute that it is the applicant who put up the flats. As stated above, the Respondent has not made any comment or rebutted the applicant’s allegation that she is not in a position to reconstitute the applicant if eviction proceeds and in the event the appeal succeeds.

In my view, while it is true that the Respondent is entitled to the fruits of his judgment, it is equally true that if the Respondent is allowed to proceed with execution of the decree arising out of this Court’s judgment and before the appeal is heard and determined, the applicant is likely to suffer substantial loss as stated above and which would render the appeal nugatory.

In the circumstances, I find that it is just and safe to have the status quo maintained so that the applicant does not suffer loss and the Respondent is not burdened with reconstituting the applicant in the event eviction proceeds and the appeal succeeds.

Whether the Application has been made without unreasonable delay

The judgement herein was delivered on 04/09/2020. The application was made six days later on 10/09/2020. The applicant has explained that an oral application for stay was made on the day of the delivery of the judgement but the Honorable Judge directed that a formal application be made.

In the circumstances, I do find that the application was made without unreasonable delay.

Security for the due performance of the decree arising out of the judgement of the Court.

With regard to security for the due performance of the decree, it is stated in paragraph 13 of the supporting affidavit that the applicant is willing and ready to abide by the Court’s conditions pending appeal.

I have noted that the decree sought to be appealed against is not a money decree. The Court in *Anthony Warui Wanjiru v David Niyibizi & another; Nairobi High Court Civil Appeal No. 748 of 2019; [2020] eKLR* held that;

‘On the third condition touching on the provision of security for the due performance of the decree, as earlier noted, this being a non-monetary decree, the issue of security does not arise. The applicant cited a few authorities that have restated this position, including the case of *Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR* where the court held the following:

“The case in the Tribunal was not about rent. This being a non-monetary decree, the condition of security for due performance of the order does not arise. Refer to the case of *Praxades Okutoyi v Medical Practitioners and Dentists Board (2008) eKLR* where Visram, J (now JA) stated that:

“As this is not a monetary decree, no financial obligations are involved on either side, the issue of security does not arise...”

Similarly, the Court finds that the issue of security does not arise herein as the decree sought to be appealed against is a non-monetary decree.

Based on the above, I DO find that the application is meritorious and should be , and is hereby allowed in the following terms; That there shall be a stay of execution of the judgment delivered on 4th September 2020 and the consequent decree pending the hearing and

determination of the appeal and the costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE