



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 25 OF 2017

JAMES GATHITU MWAURA.....1ST PLAINTIFF /APPLICANT

LUCY WANJIRU MUTURI..... 2ND PLAINTIFF/APPLICANT

VERSUS

PETER NJOROGE MWANGI ALIAS NJOROGE MWANGI....1ST DEFENDANT /RESPONDENT

DISTRICT LAND REGISTRAR, MURANGA.....2ND DEFENDANT/RESPONDENT

RULING

1. The judgement of the Court was delivered in this suit on the 30/1/2020 where the Court found that the Plaintiffs/Applicants failed to prove their case and were condemned to pay costs in favour of the 1ST Defendant, the Respondent in this application.
2. The Applicants aver that they are aggrieved with the said judgement and have proffered an appeal in the Court of appeal. A notice of appeal filed on the 3/2/2020 was annexed to the application.
3. The 1ST Defendant then proceeded to tax his bill in the sum of Kshs 160,620/- as per the certificate of taxation dated the 23/9/2020.
4. Thereafter the 1ST Defendant sought execution by way of notice to show cause why the judgement debtor cannot be arrested and committed to civil jail. See the notice to show cause dated the 14/1/2021.
5. Faced with the possibility of arrest in satisfaction of the decree aforesaid, the Applicants moved the Court via a notice of motion filed on the 23/2/2021 seeking the orders stated as follows;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That the Court be pleased to grant stay of execution of the judgment dated the 30/1/2020 pending the hearing of the Civil Appeal No 5 of 2020.
 - e. That in the alternative the Court be pleased to grant orders of stay of the proceedings in the cause pending the determination of the appeal.
 - f. The application is supported by the grounds on the face of the application as well as the supporting affidavit of the Applicants dated the 23/2/2021.

7. They aver that the stay will be necessary to stop the 1ST Respondent from executing the judgement and pursuing the costs till the appeal is heard and determined. That interalia they have an arguable appeal with high chances of appeal and that if the same is not granted their appeal will be rendered nugatory. That they stand to suffer irreparable loss and damage if the execution is allowed by way of committal to civil jail. That they are willing and ready to abide by the conditions set by the Court. That the Respondents are not going to be prejudiced if the application is allowed.

8. The application is opposed vide the Replying affidavit filed on the 7/6/2021 and sworn by the 1st Respondent on the 2/6/2021.

9. The 1st Respondent contends that the Applicants failed to object to the decision of the taxing officer to tax the bill and the decision of the taxing master stands unchallenged to date. That the Applicants have failed to pay the costs despite the notice to show cause having been issued. That the Applicants are not entitled to the orders sought in this application by reasons that they have not showed any substantial loss that they stand to suffer. Further that noting has been placed before the Court to show that the 1st Respondent will not be able to pay back should the appeal succeeds.

10. Parties elected to canvass the application by way of written submissions which I have read and considered.

11. Order 42, rule 6 (2) of the Civil Procedure Rules provide as follows;

(2) 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.

12. Upon analysis of the application, this application has been filed after 13 months post judgement therefore the delay is inordinate. The Applicants did not find any necessity to explain the reasons for the delay.

13. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“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.”

14. Have the Applicants shown substantial loss that they are likely to suffer? The straight answer is found in the reasons advanced by the Applicants in their Replying affidavit. That the substantial loss is the likelihood of being committed to jail for failure to pay the costs as per the certificate of taxation adduced on record. That they have an arguable case in the Court of appeal and that if stay is not granted it will be rendered nugatory.

15. This may be compared with the decision of the Court in **JAMES WANGALWA & ANOTHER -Vs- AGNES NALIKA CHESETO [2012] eKLR** where the Court stated that the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. The reason is because execution is a lawful process

16. Further in the case of **Carter & Sons Ltd - Vs- Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997** at Page 4 the Court of Appeal held as that :

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

17. The totality of the above cases is that substantial loss is the key to being granted an order of stay. The Applicant must demonstrate the actual loss that he stands to suffer. It is not enough to stay that execution is likely to be made or that it is underway. In this case execution of costs is underway. It is trite that in money decree the burden shifts to the Applicant to demonstrate that should the appeal be successful, the Respondent will be unable to refund the monies. The Respondent has averred in his affidavit that he runs a modest business and thereof capable of paying the monies should the Court decided otherwise.

18. In an application for stay the Court would be looking to balance the right of the successful party to enjoy the fruits of his judgement and the equally important right of the Applicant to pursue an appeal.

19. The application is allowed on the following conditions;

a. The Applicant to deposit the sum of Kshs 160,620/- in an interest earning account in the joint names of the advocates for the parties within a period of 15 days from the date of this ruling, pending the hearing and determination of the appeal.

b. In default the orders of stay granted herein shall lapse automatically.

c. The costs of the application shall be in favour of the Respondent.

20. It is so ordered.

DATED, DELIVERED AND SIGNED AT MURANGA THIS 29TH DAY OF JULY 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

1st & 2nd Plaintiffs – Absent

Ms Macharia Advocate HB for Uvyu Defendants

Kuiyaki/Alex, Court Assistants