



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELCA NO. E002 OF 2021

SYLVESTER NTHENGE.....APPELLANT/APPLICANT

VERSUS

JOHNSTONE KIAMBA KISWILI.....RESPONDENT

RULING

1. The application before this court for ruling is the one dated 28th April, 2021 and filed in court on even date by the counsel for the Appellant/Applicant for orders: -

i. Spent.

ii. Spent.

iii. That there be stay of execution of the Judgement delivered on 12th January, 2021 by Hon. J.O. Magori (SPM) in Makindu SPMCC Civil Case No. 162 of 2014; Johnstone Kiamba Kiswili –vs- Sylvester Nthenge and decree and all consequential orders emanating therefrom pending the hearing and determination of the Appellant’s/Applicant’s Appeal.

iv. That costs of this application be in the cause.

2. The application is predicated on the grounds on its face and is further supported by the supporting and supplementary affidavits of Sylvester Nthenge, the Appellant/Applicant herein, both sworn at Nairobi on 28th April, 2021 and 17th June, 2021.

3. The Respondent herein, Johnstone Kiamba Kiswili, has opposed the application vide his replying affidavit sworn at Nairobi on 31st May, 2021 and filed in court on 3rd June, 2021.

4. The application is an exact replica of the application dated 10th February, 2021 and filed in court on 11th February, 2021 and hence the directions that the two applications be argued together by way of written submissions. By the time of wiring this ruling, it is only the Appellant/Applicant who had filed his submissions dated 2nd June, 2021. He further filed supplementary submissions dated 17th June, 2021.

5. The application is expressed to be brought under Sections 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act Cap 21, Order 42 Rules 6(2), (3), Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 3, 13 (1, 2, 3, 4, 7) 19 and 24 of the Environment and Land Court Act all enabling provisions of the law.

6. Amongst the grounds that the application is predicated on are that the Appellant/Applicant is willing to abide by any reasonable conditions/terms as to deposit of security for the due performance of the court’s order and that the application has been filed expeditiously without unnecessary and undue delay.

7. In his supporting affidavit, the Appellant/Applicant has deposed *inter alia* that unless stay of execution is granted, the Respondent is likely to execute the judgement and decree at any moment.....thereby rending his appeal moot, academic and nugatory hence occasioning the Appellant/Applicant substantial loss of his property, that he is willing to abide by any reasonable conditions/terms as to deposit of security for the due performance of the court’s order and that the undisputed part payment of the land paid to him by the Respondent was Kshs. 60,000/= which he is willing to deposit in a joint interest earning account in a reputable bank and that the application and the appeal have been filed expeditiously without unreasonable delay.

8. In reply the Respondent has deposed in his replying affidavit that he was awarded costs of the suit in the lower court which the

Appellant/Applicant is seeking for stay of execution and that the Appellant/Applicant is misleading the court by alleging eviction which was not an issue in the lower court, that the application for stay cannot issue as the appeal is against a permanent injunction for the portion of the Respondent's land of which the latter is in possession and has proceeded to develop it as shown in his exhibits in the lower court annexed to his replying affidavit and marked as **JKK3** and that he is advised by his advocate on record which advise he verily believes to be true that the appeal has no chances of success and even if it were to be successful, it cannot be rendered nugatory if stay is not granted.

9. In rejoinder, the Appellant/Applicant has deposed in his supplementary affidavit that he is advised by his advocates on record which advise he verily believes to be true and correct that the Respondent is trying to argue the main appeal on the issue of ownership instead of restricting himself to the application for stay pending appeal and that if the stay orders are not granted, he will suffer loss of being evicted from his own land as the Respondent may sell, dispose or alienate the land to third parties and further execute against him for costs for Kshs.81,280/= as per the decree.

10. In his submissions, the counsel for the Appellant/Applicant framed the issue for determination as follows: -

i. Whether the Appellant/Applicant has satisfied the conditions for the grant of order of stay pending the hearing and determination of appeal.

11. The counsel cited Order 42 Rule 6(2) of the Civil Procedure Rules which requires an Appellant/Applicant to demonstrate to the court that: -

i. He/she stands to suffer substantial loss unless the Order of stay is granted;

ii. The application has been made without unreasonable delay;

iii. He has given such security as to costs.

12. The counsel submitted that the Appellant/Applicant will suffer the loss of his land and eviction from the portion of that he occupies if the order of stay is not granted. In support of his submissions, the counsel relied on the case of **Charles Kariuki Njuri –Vs- Francis Kimaru Rwara (Suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased) [2020] eKLR**, the counsel added that if the orders sought are not granted, the suit land may be exposed to adverse and irreversible dealings.

13. Regarding the issue of the application having been brought without unreasonable delay, the counsel submitted that the judgement of the lower court was delivered on 12th January, 2021 upon which the Appellant/Applicant filed the current application on 12th February, 2021 thus there was no unreasonable delay.

14. Regarding such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant, the counsel submitted that the Applicant has offered Kshs. 60,000/= being the amount that he received from the Respondent for the portion that the latter is occupying.

15. The counsel submitted that the orders sought are discretionary and urged the court to exercise its discretion in favour of the Appellant/Applicant. The counsel relied on the case of **Patrick Kithaka Borici & Another –Vs- Shadrack Nyaga Njeru [2019] eKLR**.

16. In his supplementary submissions dated 17th June, 2021 and filed in court on 22nd June, 2021, the counsel for the Appellant/Applicant reiterated his submissions on substantial loss that the Appellant/Applicant is likely to suffer if orders sought are not granted, that the application was filed without unreasonable delay and the willingness of the Appellant/Applicant to offer Kshs. 60,000/= as security for costs.

17. The discretion of this court in determining whether the Appellant/Applicant has satisfied the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 is guided by the case of **Butt -Vs- Rent Restriction Tribunal [1982] KLR 417** where the Court of Appeal held as follows;

“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 grant 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 and unique requirements. The special circumstances in this case were that there was a large amount of rent in despite 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.”

18. Regarding substantial, the uncontested facts are that the Appellant/Applicant sold two acres to the Respondent herein out of the portion of

plot number 120 Kai Settlement Scheme for the sum of Kshs. 100,000/=. The Respondent paid the Appellant/Applicant Kshs. 60,000/= leaving a balance of Kshs. 40,000/=. However, there is a contestation as to whether the outstanding balance is Kshs. 30,000/= or Kshs. 40,000/= of which the Appellant/Applicant has the undoubted right of appeal. The Respondent herein was awarded costs of Kshs. 81,280/= vide the decree annexed as **SN6b** to the Applicants replying affidavit. He has threatened to execute for the same vide his letter dated 19th April, 2021 annexed as **SN6a** to the Appellant/Applicant replying affidavit. Even though I am not satisfied as to the substantial loss the Appellant/Applicant will suffer if stay is not granted, I see no overwhelming hindrance to bar me from granting stay so that he can pursue the appeal.

19. On the application being made without unreasonable delay, I do note that the lower court's judgement was rendered on 12th January, 2021, the instant application was filed on 11th February, 2021. That is a span of 30 days which in my view is not inordinate.

20. As for security for the due performance of the decree, I do note the Appellants/Applicant has offered Kshs. 60,000/= which in my view is not appropriate since by doing so, the Appellant/Applicant would be seen to be arguing the appeal. Nevertheless, he has expressed his willingness to abide by the conditions that this court may order. I will order that he deposits Kshs. 81,280/= in an interest earning account in the joint names of the Advocates on record for the parties herein.

21. Arising from the above, I hereby proceed to grant prayer 3 of the application on condition that the Appellant/Applicant shall deposit Kshs. 81,280/= into an interest earning account in the joint names of the Advocates on record for the parties within 45 days from the date hereof on default of which the Respondent will be at liberty to execute.

SIGNED, DATED AND DELIVERED VIA EMAIL AT MAKUENI THIS 29TH DAY OF JULY, 2021.

.....

MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi.