



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 3 OF 2018

KAMPALI OLE KIOK.....APPELLANT

VERSUS

SIMON H IGECHA WAITHAKA.....RESPONDENT

RULING

What is before Court for determination is the Respondent's Notice of Motion application dated the 31st August, 2020 brought pursuant to sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act as well as Order 42 Rule 6 (1) the Civil Procedure Rules. The 1st Defendant seeks the following orders:

1. Spent
2. That the execution of the Decree given on 26th May, 2020 by the Honourable Lady Justice C Ochieng be stayed pending the inter partes hearing and determination of this application.
3. That the execution of the Decree given on 26th May, 2020 by the Honourable Lady Justice C Ochieng be stayed pending the hearing and determination of the Respondent's appeal.

The application is premised on the grounds on the face of it and the supporting affidavit of ERNEST GITHUKA NDUNG'U the Respondent's Counsel where he confirms that judgement in this matter was delivered on 26th May, 2020, which the Respondent is dissatisfied with. He avers that the Respondent filed a Notice of Appeal dated 2nd June, 2020 and requested for certified copies of proceedings, Judgement including Decree vide his letter dated the 2nd June, 2020. He states that the Respondent has lodged his Record of Appeal on 24th July, 2020 and is still waiting to be issued with an Appeal number. He explains that in the said Judgement, the Respondent/Applicant was directed to effect the transfer of fourteen (14) acres of land out of land parcel number Kajiado/ Loodariak/ 804 to the Appellant (now Respondent) within 90 days failure of which the Deputy Registrar, ELC would execute the said Transfer Forms. Further, that the Ninety (90) days will lapse on 26th August, 2020. He reiterates that the Respondent/ Applicant will suffer substantial loss were the Appellant to unilaterally excise fourteen (14) acres of his land.

The Appellant (Now Respondent) opposed the instant application and filed a replying affidavit where he deposes that sufficient loss is not one of the grounds for stay pending Appeal. He contends that the Application is not made without unreasonable delay, which delay is intentional. He insists the Respondent (Applicant) has failed to make out a case of substantial loss occasioned to him and is guilty of laches. He insists the Respondent (Applicant) has failed to satisfy the mandatory conditions contained in Order 42 Rule 6(2) (b) of the Civil Procedure Rules to give security for the due performance of the Decree. He reiterates that being a second Appeal, the Respondent has failed to show and discuss with proof the error in law made by the Court in its Judgement herein. He sought for the application to be dismissed with costs.

The application was canvassed by way of written submissions but it is only the Respondent (Applicant) who did so. On 22nd April, 2021, the Appellant (now Respondent)'s Counsel intimated in court that he did not see the need of filing written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 31st August, 2020 including the rivalling affidavits and submissions, the only issue for determination is whether the Court should grant a stay of execution pending determination of the second Appeal.

The Respondent (Applicant) in his submissions reiterated his claim and contended that if the Appellant was allowed to execute the Decree,

the substratum of the Appeal would be substantially altered and the Appeal rendered nugatory. He insisted that the application has been brought without unreasonable delay as he had been earlier granted ninety (90) days stay of execution till 26th August, 2020. He claimed the requirement for the Applicant to give security for due performance of the Decree is discretionary. Further, that this is not a money Decree and the Respondent is yet to have his costs taxed. To buttress his averments, he relied on the case of **Butt V Rent Restriction Tribunal (1979) eKLR**.

There are various legal provisions governing stay pending appeal which I will proceed to highlight hereunder.

Section 72 of the Civil Procedure Act makes provisions in respect to second appeal from High Court and stipulates that: **‘ (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely— (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits. (2) An appeal may lie under this section from an appellate decree passed ex parte.’**

Order 42 Rule 6(2) of the Civil Procedure Rules 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.’**

Further, Rule 5 (b) of the Appellate Jurisdiction Act (Court of Appeal Rules) provides that **‘ in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.’**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while dealing with an issue of stay of execution pending appeal held thus:’

- “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.’**

In the current scenario, the Respondent confirms having filed a Notice of Appeal dated 2nd June, 2020 and has lodged his Record of Appeal on 24th July, 2020. He further confirms that the case number is Court of Appeal at Nairobi E 040 of 2020 to which parties have been directed to file written submissions. From the averments in the respective affidavits and noting that this is a second Appeal, the Respondent (Applicant) has not indicated what substantial loss he stands to suffer noting that the Appellant has been on the suit land. Further, he only filed the instant application after the court had already granted him the ninety (90) days stay of execution. It is my considered view that since the Respondent (Applicant) has already lodged an Appeal in the Court of Appeal which gave directions on filing of submissions, the instant application for stay should have been filed in the said Court of Appeal. Based on the facts as presented while relying the legal provisions cited above and associating myself with the decision I have quoted, I find that the Respondent (Applicant) has failed to meet the **threshold set for granting of stay of execution pending the second Appeal and will decline to grant the said orders.**

It is against the foregoing that I find the Respondent (Applicant’s) Notice of Motion application dated the 31st August, 2020 unmerited and will proceed to dismiss it with costs.

Dated signed and Delivered at Kajiado virtually this 28th Day of July 2021

CHRISTINE OCHIENG

JUDGE