



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CASE NO. 441 OF 2013

EUNICE WAMBUI NDERITU.....PLAINTIFF

- VERSUS -

KENNETH KIMARI GITERE.....1ST DEFENDANT

JORETH LIMITED.....2ND DEFENDANT

CONSOLIDATED WITH

ELC NO 706 OF 2014 (OS)

KENNETH KIMARI GITERE.....PLAINTIFF

- VERSUS -

JORETH LIMITED.....1ST DEFENDANT

EUNICE WAMBUI NDERITU.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 15th March 2021 brought under order 42 rule 6, order 51 rule 1 and order of the Civil Procedure Rules.

2. It seeks orders:-

1. Spent.

2. Spent.

3. There be a stay of execution of the judgment and decree dated 17th December 2020 pending the hearing and determination of the 2nd defendants intended appeal to the Court of Appeal.

4. The cost of this application be in the cause.

3. The grounds are on the face of the application and are:-

1. That the applicant intends to lodge and appeal against this courts judgment dated 7th December 2020.

2. That the plaintiffs has threatened and actually attempted to evict the 2nd defendant from the suit property LR NO 13330/246.

3. That the plaintiffs stand to suffer substantial loss if this application is not allowed.

4. That the applicants appeal has high chances of success and the intended appeal.

5. That this application has been filed without delay.

6. That the applicant is willing to give security as the court may require of him.

4. The application is supported by the affidavit of Kenneth Kimari Gitere, the 2nd defendant/applicant herein sworn on the 15th March 2021.
5. The application is opposed. There is a replying affidavit sworn by Eunice Wambui Nderitu, the plaintiff/respondent herein, on the 19th April 2021. There are also grounds of objection filed by the 2nd defendant/respondent dated 26th April 2021.
6. On the 27th April 2021, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Plaintiff's Submissions

7. Order 42 rule 6 (4) of the Civil Procedure Rules presupposes that before this court can exercise its jurisdiction, there must be an existence of a valid appeal which ought to be instituted vide a notice of appeal filed within fourteen (14) days from the date of judgment. It is clear that the Notice of appeal herein was filed out of time. There is no valid appeal pending.
8. The current application if allowed will prejudice the plaintiff's interest and right and ownership to the suit property. The 2nd defendant/applicant is not in occupation of the suit property as alleged. The plaintiff purchased the suit property way back on 2011 and to date she is yet to utilize the land. The 2nd defendant seeks to delay it further.
9. The 2nd defendant/applicant has not demonstrated what irreparable loss he stands to suffer if the orders are not granted. She has put forward the case of **Michira t/a Michira & Co. Advocates vs East African Standard [2002] eKLR**.
10. The application is not merited as there is no valid appeal filed within time to enable the honourable court to exercise its discretion.
11. The 2nd defendant/applicant has not satisfied the conditions for grant of orders sought as he has failed to demonstrate what irreparable loss he stands to suffer.
12. He has offered no security as required by law. She prays that the application be dismissed with costs.

The 1st Defendant's Submissions

13. A court of law shall not make orders in vain and accordingly it cannot issue a stay where there are no positive orders to be stayed. It has put forward the case of **George Ole Sangui vs Kedong Ranch Ltd CA Nai 55 of 2015**. In the judgment delivered on 17th December 2020 the plaintiff was declared the lawful registered owner of all that property known as LR NO 13330/246 and is currently in possession thereof.
14. In light of the fact that the plaintiff is in possession of the suit land, and for the maxim that equity does not act in vain, there lacks a practicable order to be stayed. It prays that the application be dismissed with costs.

The 2nd Defendant's Submissions

15. The court has unfettered jurisdiction to order stay of execution pending appeal from its order and decree. He has put forward the cases of **Re: Global Tours and Travels Ltd [2000] LLR 1061; Francis Njakwe & Another vs Daniel Toroitich Arap Moi t/a Moi Education Centre [2006] eKLR**.
16. Under order 42 rule 6(4) of the Civil Procedure Rules for the purpose of an application for stay of execution pending an intended appeal to the Court of Appeal an appeal shall be deemed to have been filed once a Notice of Appeal has been given.
17. The applicant stands to suffer substantial loss as he is in possession of the suit property. The plaintiff/respondent conceded at the trial that she had not taken possession of the suit property.
18. Unless a stay is granted the applicant would suffer substantial loss as he stands to lose the suit property. The plaintiff may dispose of the suit property and in which event the intended appeal would be an academic exercise as there would be nothing left, if the appeal were successful.
19. The applicant has undertaken to give such security as the court may order against him as a condition for granting of orders of stay. A stay of execution if granted will in any event be in the nature of the maintenance of the status quo obtaining at the trial which would preserve the suit property pending hearing of the intended appeal.
20. The effect of refusal to grant stay is to permit the plaintiff to take possession and deal with the suit property which she hitherto did not enjoy and to the prejudice of the applicant. He prays that the application be allowed.

21. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of objection, the replying affidavit and the annexures. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

i. Whether the 2nd defendant's/applicant's application meets the threshold for grant of orders of stay of execution pending appeal.

ii. Who should bear costs of this application?

22. The principles guiding the grant of orders of stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil Procedure Rules, 2010 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.”

It is clear from the above provisions that for an order of stay of execution, pending appeal to be granted, specific conditions must be met by the applicant.

23. I have considered the notice of motion herein and I find that it has been brought without undue delay.

24. It is the 2nd defendant's/applicant's case that he stands to suffer substantial loss if these orders are not granted. That he is in possession of the suit property and the plaintiff/respondent has not taken possession. It is his fear that if the plaintiff/respondent is allowed to take possession she might deal with the suit property to his detriment.

25. The plaintiff/respondent on the other hand contends that the 2nd defendant/applicant is not in occupation of the suit property. That granting orders of stay will prejudice the plaintiff's interest as she has been unable to utilize the suit property since she purchased it in 2011.

26. The 1st defendant/respondent supports the plaintiff's position that this application ought to be dismissed with costs

27. I have considered the rival submissions above. In the case of **Samvir Trustee Ltd vs Guardian Bank [2007] eKLR** the court held thus:

“It is my humble view that for the applicant to obtain a stay of execution it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertions of substantial loss, there must be empirical or documentary evidence to support such contention.....”

Similarly in the case of **Michira t/a Michira & Co. Advocates vs East African Standard [2002] eKLR** the Court held thus:

“to be obsessed with the protection of an appellant or intended appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other in contrary to sound principle for the exercise of judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of their judgment.....and in order for an unsuccessful party to obtain a suspension of further proceedings or execution he must satisfy the court on an affidavit or on some other evidential material, that substantial loss may result to him and the kind of loss likely to be sustained must be specified, detail or particulars thereof must be given, moreover, a court will not order a stay upon a mere vague speculation, there must be clearest ground of necessity disclosed” and in this case it is clear the applicant has not satisfied the ground to warrant issuance of the order as sought apart from alleging that he has been in occupation of the suit property and that his appeal will be rendered nugatory without giving specific and particulars of how the appeal will be rendered nugatory and substantial loss and it is therefore clear the plaintiff stand to suffer more harm and prejudice incase the application is allowed.”

I am not satisfied that the 2nd defendant/applicant has demonstrated that he will suffer substantial loss if these orders are not granted.

28. By a Judgement dated and delivered on 17th February 2020, this court entered judgment in favour of the plaintiff as follows:-

“... ..that the 2nd defendant has failed to prove that his possession of the suit property has been open and notorious. I find that his claim for adverse possession fails.

...that an order of permanent injunction is hereby issued restraining the defendants, their agents and/or servants from trespassing encroaching, developing, alienating, disposing, selling and/or in any other manner whatsoever dealing with that property known as LR No 13330/246.

...That the plaintiff shall have costs of the suit”.

29. It is clear from the above findings that the 2nd defendant/applicant failed to make a case for adverse possession and his counterclaim was dismissed. In the case of **George Ole Sangui vs Kedong Ranch Limited [2015] eKLR** the Court of Appeal stated as follows:-

“....In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order...it does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent...it was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

30. I am guided by the above authority in finding that there is no order capable of being stayed.

31. In conclusion, I find that the 2nd defendant/applicant’s application has failed to satisfy the conditions set out in order 42 rule 6(2) of the Civil Procedure Rules. I find no merit in this application and the same is dismissed. Each party do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF JULY, 2021

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Gachuhi for the Plaintiff

No appearance for the 1st Defendant

Mr. Kingara for the 2nd Defendant

Phyllis - Court Assistant