



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET
ELC CASE NO. 153A OF 2012

MOHAMMED JAMA ABDI.....PLAINTIFF

VERSUS

JIMMY NYAGAKA.....1ST DEFENDANT

RHODA ONYANCHA.....2ND DEFENDANT

JAMES GACHOKI.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

This ruling is in respect of an application by the 4th defendant/applicant dated 10th February, 2021 seeking for the following orders:

- a. Spent
- b. Spent
- c. That there be stay of execution of the Judgment Hon. Justice Anthony Ombwayo delivered on 21st January, 2021 and or the decree extracted therefrom pending hearing and determination of the appeal in the Court of Appeal.
- d. Costs of this application be in the cause.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant gave a brief background to the case and submitted that the Plaintiff/Respondent herein sued the applicant in Eldoret Environment and Land Court case number 153A of 2012 seeking for declaration orders that the land known as Eldoret Municipality Block 7/258 is private land and belongs to him. The 4th defendant applicant filed a defence to that suit and concurrently filed a counterclaim seeking cancellation of the plaintiff/Respondent's title since the land in question is public land with Government houses that was fraudulently registered in the names of the plaintiff.

Counsel submitted that judgment was delivered on the 21st January 2021 allowing the plaintiff's claim and dismissing the 4th defendant's counterclaim. That upon scrutiny of the Judgment, the 4th defendant being dissatisfied with the entire judgment filed a notice of appeal and requested for typed proceedings which are not yet ready for purposes of the appeal.

Mr. Wabwire counsel for the applicant further submitted they filed the current application to preserve the subject matter pending the hearing and determination of the appeal. That the applicant is apprehensive that the plaintiff who has already extracted a decree may commence execution process by evicting the defendants and take possession of the Government Houses standing on the said parcel of land and deal with the subject matter of the appeal in a manner that is incompatible with public interest including demolishing them, notwithstanding pending appeal.

It was counsel's submission that the applicant is further apprehensive that unless stay is granted herein the state stands to suffer substantial

loss and damage as the substratum of the appeal may change in character and form thereby rendering the appeal moot. That the application has been brought expeditiously and without unreasonable delay and it is in the interest of justice that the prayer for stay of execution be granted.

Counsel further relied of the supporting affidavit of Mr. D.M NYAIGO who is the County Director of Housing-Uasin Gishu County who stated that the suit parcel of land herein, otherwise known as LR No. Eldoret Municipality Block 7/258 is Government Land currently under the State Department for Housing and Urban Development and currently has four (4) Government Houses marked as HG 43, HG 44, HG 83 and HG 84 each with a servant quarter and at no time has the said parcel of land or the houses thereon been allocated or sold to any person.

He further stated that the said houses are occupied by the 1st to 3rd defendants as tenants of the Government of Kenya by virtue of being civil servants and are not available for allocation and cannot be appropriated by an order of the Court and neither the plaintiff herein nor any other person has any registrable interest in a public utility and the state stands to suffer substantial loss by losing its prime land and investments to the plaintiffs should an order of stay not be granted pending the appeal to the Court of Appeal. Counsel also submitted that the intended appeal is arguable and has overwhelming chances of success.

Mr. Wabwire submitted on the issue for determination as whether the applicant has raised sufficient reasons to warrant grant of stay of execution of the judgment delivered on 21st January 2021 pending the hearing and determination of the intended appeal.

On this issue counsel submitted that the 4th defendant/applicant has demonstrated that the judgment delivered on the 21st January 2021 has far reaching implications in respect to Government houses erected on land known as Eldoret Municipality Block 7/258 which is a public interest matter where an order of stay pending appeal would be appropriate remedy to safeguard public property.

Counsel submitted that the purpose of stay of execution is to preserve the substratum of the case as was held in the case of **Consolidated Marine. vs. Nampija & Another, Civil App.No.93 of 1989 (Nairobi)**, where the Court stated as follows: -

"The purpose of the Application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory".

Mr. Wabwire further submitted that it is not disputed that the Applicant herein has 4 Government houses and 4 servant quarters on the suit land which are currently occupied by civil servants and the respondent is occupation of one house. Further that even though the orders being sought are discretionary in nature, the discretion must always be exercised judicially with the sole intention of dispensing justice to both and/or all the parties depending on the nature of dispute before court.

On the issue whether the applicant will suffer substantial loss, counsel relied on the case of **Daniel Chebutui Rotich & 2 Ors v. Emirates Airlines Civil Case No. 368 of 2001**, where Musinga, J (as he then was) held that,

"Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted.

That the intended appeal would be rendered nugatory and purely an academic exercise should the stay order not be granted and the plaintiff/respondent disposes off the suit property given its present value, the proceeds thereof may not be recoverable.

Counsel submitted that the application was filed timeously taking into account that the court granted 30 days' temporary stay of execution pending filing of the formal application which was duly filed.

Mr. Wabwire further submitted that the plaintiff/ Respondent stands to suffer no prejudice at all, given the circumstances of this case and the fact that the applicant herein is a public entity and thus protected under order 42 Rule 8 of the Civil Procedure Rules which provides as follows:

"No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."

Counsel submitted that this requirement is not contested by the respondent, however the applicant shall be ready and willing to abide by the terms as the court may order, as a condition for granting stay of execution pending appeal should the court deem it necessary.

Mr. Wabwire also relied on the case of **Nduhiu Gitahi and Another -Vs Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of Sir John Donaldson M. R. in **Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198**

"We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal

Counsel therefore urged the court to allow the application as prayed.

1ST DEFENDANT'S SUBMISSIONS

The 1st defendant filed an affidavit in support of the applicant's application and deponed that the 2nd and 3rd Defendants never entered appearance since they were occupying the suit houses by virtue of being civil servants and/or public servants and by the time this suit was filed they had been either transferred or retired just like the Plaintiff.

The 1st defendant thus averred that the plaintiff has indicated that he has no claim against the 4th defendant and if the orders of stay of execution sought are not granted his family will suffer irreparable loss as the Plaintiff has threatened to evict them. He deponed that since the Plaintiff has never had possession of house ELD/HOU/HG/44 he will not be prejudiced by the grant of orders sought. He stated that the appeal already filed has high chances of success and should there be no stay the appeal shall be rendered nugatory.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel for the plaintiff opposed the application and relied on the replying affidavit of the respondent and stated that the Court dismissed the 4th defendant's claim and in view of that, they cannot ask for a stay of the Courts Order as the order is of a negative nature. That the order against the 1st, 2nd and 3rd defendants was a positive order in which the Court can upon its discretion grant a stay if it deems fit to the three parties only.

Counsel further submitted that the 4th defendant was not the 1st, 2nd and 3rd defendant's advocates and cannot purport to seek stay on their behalf and that the 4th defendant's application is devoid of merit and is a gross abuse of the Court process. Further that there is no threat of eviction since costs of the suit are yet to be filed and it has been held by the Courts that no execution can take place before costs are taxed and no decree has been extracted as alleged by the 4th defendant.

Mr. C. F. Otieno counsel for the respondent submitted that the 1st defendant's affidavit in support of the application was filed on 31st March, 2021 way after the Respondent filed its replying affidavit to the application on 15th March, 2021 and that the it is the intention of the 4th Respondent to circumvent the Court of Appeal directions on negative orders. Further that the 1st to 3rd defendants ought to have personally filed their applications for stay and not relied on the 4th Respondent.

Counsel also submitted that the only positive order is the award of costs to the Plaintiff and the only stay order that the 4th defendant can legally pray for is a stay of the Order of costs and the 4th defendant cannot seek to argue an appeal on behalf of another party that was represented by counsel.

Mr. Otieno relied on the case of **NAIROBI CIVIL APPLICATION NO. 207 OF 2018 (CA) Shade Manufacturers & Intel Ltd Vs. Scrub Mw era Mutuu & 3 Others where the Court cited Kane al Sarjit Singh Dhiman = Vs= Keshavji Jivraj Shah {2008}eKLR** in the following terms:

"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs".

Further in the case of **NYERI CIVIL APPLICATION NO. 9 OF 2017 (UR7/17) Daniel Lomagul Kande & 2 Others=Vs.= Tiamanga Holdings Ltd & 40 Others** where their Lordships found that the jurisprudence was summarized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR** as follows among other grounds:

- i. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- ii. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- iii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.
- iv. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- v. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible *whether damages will reasonably compensate the party aggrieved*.

Counsel submitted that the issue of whether a negative order is capable of being stayed was considered in the case of **GEORGE OLE SANGUI VS KEDONG RANCH LIMITED CA NAI 55 OF 2015** where it was held that negative orders cannot be stayed.

Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION.

The issues for determination are as to whether the order sought to be stayed in a negative order, whether the applicant has satisfied the conditions for stay of execution as envisaged by law and who pays the costs of the application.

The order sought to be stayed arose from the Judgment of this Court delivered on the 21st January, 2020 wherein Ombwayo J. held as follows;

“I do find and hold that the plaintiff followed due process in the acquisition of the suit property and I order that the defendants to give the plaintiff vacant possession of the premises within 90 days, failure of which the 1st, 2nd and 3rd defendants to be evicted and the plaintiff to take possession. I do decline to order for repayment of rent as damages because the plaintiff has not produced any evidence of rent collected before the eviction of his tenants. The counter claim by the 4th respondent is dismissed. Costs to the Plaintiff.”

It is on record that the applicant herein seeks to stay execution of the order allowing the plaintiff's suit and ordering eviction of the 1st to 3rd Defendants. The said orders cannot be said to be negative orders as the court dismissed the applicant's counter claim which was for cancellation of the plaintiff's title to the suit land. It is not correct for the Respondent to pick out only one issue on the counter claim and base his arguments on the sole issue regarding dismissal of the counter claim.

The applicants have a legal right to seek to appeal against a judgment that they are dissatisfied with. In this case, it is the plaintiff who went to court seeking orders against the defendants and the 4th defendant was a party to the suit and is affected by the Judgement and/or order. This means that the 4th defendant has every legal right to appeal against the decision of the Court in order to protect its interests.

On the issue of whether the 4th defendant is acting for the 1st to 3rd defendants, the claim is not justified as the 1st applicant has only filed an affidavit in support of the 4th defendant's application and the application was not filed on their behalf. In any event the affidavit was filed by a law firm that is on record on or the 1st defendant and not the 4th defendant as alluded to by the Respondent. In view of this, the Respondent's submissions that the 4th defendant is acting on behalf of the 1st to 3rd defendants are mere allegations without sufficient evidence in support.

The applicant's application is an application seeking conservatory orders pending the hearing and determination of the appeal before the Court of Appeal. The appropriate legal provision is Order 42 Rule 6 of the Civil Procedure Rules as cited by the applicant in its application.

For an applicant to succeed in an application for stay of execution, an applicant must meet the threshold of provided for under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.

Section 3A of the Civil Procedure Rules, 2010 provides for the inherent powers of court and enjoins the Courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The main issue for determination is therefore whether the Application meets the threshold for grant of stay of execution pending appeal.

In the case of Civil Appeal No.107 of 2015, Masisi Mwita V Damaris Wanjiku Njeri (2016) eKLR, the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs...Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. “

Further in the case of Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991, the Court held that:-

“For the court to order a stay of execution there must be:-

i. Sufficient cause

ii. Substantial loss

iii. No unreasonable delay

iv. Security and the grant of stay is discretionary”.

In considering this application, this Court shall take into account the fact that a successful litigant also has a right to enjoy the fruits of his/her Judgment. The impugned judgment which the applicant seeks to appeal to the Court of Appeal was delivered on 21st January, 2021 and the applicant filed this application on 10th February, 2021 which was about two weeks after the delivery of the judgment. I find that the application was filed timeously as the court had granted 30 days’ stay pending the filing of a formal application.

On the second condition on whether the applicant will suffer substantial loss if the stay order is not granted. It is a requirement that the applicant demonstrates what kind of substantial loss he or she will suffer if the stay order was not made in his or her favour.

In the case of **Mukuma V Abuoga (1988) KLR 645** the court held that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

Further in the case of **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, it was held as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

The Court went further to hold that;

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be" In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding. On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

\In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held that:-

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

It is trite that the Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal and the interests of the Respondent who is seeking to enjoy the fruits of his judgment as was held in the case of **Machira t/a Machira & Co. Advocates vs East African Standard (No. 2) (2002) KLR 63;**

“to be obsessed with the protection of an appellant or intending 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, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

The applicant has to demonstrate the kind of loss it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the Judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay. The applicant has demonstrated that it will suffer if these government houses are demolished and government civil servants are evicted. It would be in the interest of justice to preserve the substratum of the suit so as not to render the appeal nugatory.

On the third condition as to provision of security, the applicant submitted that since it is a public entity which is protected under Order 42 Rule 8 of the Civil Procedure Rules which provides as that:

“No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

The Court of Appeal in *Butt v Rent Restriction Tribunal [1982] KLR 417* gave guidance on how discretion should be exercised 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.

I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the applicant has met the threshold for grant of stay of execution to preserve the substratum of the case pending the hearing and determination of the intended appeal. Costs to abide by the outcome of the appeal.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF JULY, 2021

M. A. ODENY

JUDGE