REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC NO. 957 OF 2012

CALEB K. KIPKORIR BETT.....PLAINTIFF/ RESPONDENT

VERSUS

JOSEPH WANJAU.....DEFENDANT/ APPLICANT

RULING

This ruling is in respect of an application by the defendant/applicant dated 12th February 2021 seeking for the following orders:

a) Spent

b) That pending the hearing and determination of this application this Honourable Court be pleased to stay the execution of the Judgment of 11th December 2019 and decree arising therefrom and/or issue preservatory order maintaining the status quo in respect of LR No. 498/657.

c) That pending the hearing and determination of the intended appeal this Honourable Court be pleased to stay the execution of the Judgment of 11th December 2019 and decree arising therefrom and/or issue preservatory order maintaining the status quo in respect of LR No. 498/657.

d) That costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSIONS

The applicant relied on the supporting affidavit whereby he stated that he has filed a notice of appeal having been aggrieved by the judgment of this court delivered on 11th December, 2019. It is the applicant's submission that he will suffer substantial loss and the appeal will be rendered nugatory if the stay orders are not granted.

Counsel submitted that the application has been brought without delay and urged the court to allow it the interest of justice. Counsel relied on the case of **Chairman Co-Operative Tribunal & 8 Others Ex-Parte Management Committee Konza Ranching & Farming Co-Operative Society Ltd (2014) eKLR** where Odunga J. referred to the case of **Stephen Somek Takwenyi & Another -vs- David Mbuthia Githare & 2 Others Nairobi of 2009**, where it was stated thus :-

> *"The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process, it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process...But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."*

Counsel also cited a quotation from Halsbury's Laws of England, 4th Edition, Volume 37 at paragraph 14, page 23 cited with approval in the

decision of **Madara Evans Okanga Dondo versus Housing Finance Company of Kenya (2005) eKLR, at page 3**, which states as follows;

> *"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law: it is exercisable summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties: it must be distinguished from the exercise of judicial discretion: it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*

Counsel therefore submitted that the application is proper before the court hence not an abuse of court process.

On the issue whether the applicant has met the conditions for stay of execution orders, counsel submitted that the applicant has developed the suit property and has been farming as well as built his matrimonial home. Further that that is the only place that he has known as home hence the eviction and demolition of the structures will cause him irreparable loss

On the issue whether the application was filed without unreasonable delay, counsel submitted that the same was filed timeously and relied on the case of **Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR.**

On the issue whether the applicant is willing to give security, counsel cited the case of **Absalom Dova versus Tarbo Transporters (2013) eKLR** where the court stated:

> *"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage; but administers the justice that the case deserves. This is in recognition that both parties have rights."*

Counsel further relied on the case of **Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd (2019) eKLR**, where the court observed: -

> *"... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails".*

Counsel submitted that the applicant has averred in paragraph 13 of his supporting affidavit dated 12th February 2021 that he will endeavor to abide by any conditions of this Honourable court. Counsel therefore urged the court to allow the application as the applicant has met the threshold for grant of stay of execution.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel for the respondent opposed the application and stated that it is an abuse of court process hence should be dismissed with costs. Counsel relied on Order 42 Rule 6(2) of the Civil Procedure Rules which provides for 3 conditions to be met by an applicant:

a) That the application for stay has been made without unreasonable delay.

b) That the applicant will suffer substantial loss unless stay is granted.

c) Security for the due performance of the decree.

On the first condition on timeliness of filing of the application counsel submitted that judgment in this matter was delivered on 11th December 2019 whereas the instant application was filed on 15th February, 2021. That the application was filed more than 14 months, that is 1 year and 2 months after the date of the judgment.

Mr. Kibii submitted that the applicant has not given any explanation for the inordinate delay in bringing the instant application. Counsel urged the court to find that the delay is inordinate and inexcusable.

Counsel cited the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR** where the court held that:

> *"Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of **Christopher Kendagor v Christopher Kipkorir Eldoret E&L 919 of 2012** the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the*

application ought to have come before expiry of the period given to vacate the land".

Mr. Kibii submitted that the applicant continues to live on the suit land after judgment to the detriment of the decree holder and there is no evidence showing any loss he would suffer if stay is not granted. The respondent has demonstrated the substantial and irreparable loss including loss of use of the said property that he would suffer. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

Applications for stay of execution are governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

> "(1) 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."

An applicant for stay of execution of a decree or order pending appeal must satisfy the conditions set out in Order 42 Rule 6(2) as enumerated

The first issue is whether the application was filed without inordinate delay, the judgment was delivered on 11th December 2019 while the application was filed 12th February 2021. This is 14 months after the delivery of the judgment. From the application and submissions, the applicant has not explained why the application was not filed timeously. One year two months' amounts to inordinate delay as no explanation has been offered to the court to consider use of discretion in the applicant's favour.

In the case of **Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another 2014 eKLR** the Court had this to say:-

> *"Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.*
>
> *Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore caution is advised for courts not to take the word "inordinate" in its dictionary measuring but in the sense of excessive as compared to normality".*

On the second issue whether the applicant will suffer substantial loss, the applicant has to demonstrate the substantial loss that he will suffer if the order of stay is not granted In the case of **Masisi Muita -vs- Damaris Wanjiku Njeri -Muranga Civil Appeal No. 107 of 2015 [2016] eKLR** the Court observed that:-

> *"The cornerstone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted".*

From the record it is noted that despite the applicant having constructed temporary structures on the suit land, the applicant does not reside on the land or conduct any vital business there, or even has the title to the land registered in his name. The applicant has not endeavored to demonstrate any substantial loss that he would suffer if the orders are not granted.

In the case of **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 the court held that:

> *"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".*

On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

> *"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."

Having considered the application, the submissions and judicial authorities, I find that the applicant has not met the threshold for grant of stay of execution and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY, 2021

M. A. ODENY

JUDGE