



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 52 OF 2014

SAID AHMED MAHMUD.....PLAINTIFF

VERSUS

MERCY CASSANDRA M'MBOGA.....DEFENDANT

RULING

1. By this Notice of Motion dated and filed herein on 19th October 2020 Mercy Cassandra M'Mboga (the Defendant) prays for an order of stay of the proceedings herein pending the hearing and determination of her Appeal.

2. The application which is supported by an Affidavit sworn by the Defendant's Advocate on record Ms Jacqueline Waihenya is premised on the grounds: -

i) That the Defendant is dissatisfied with the Ruling of this Court requiring the said Advocate on record to honour an undertaking made to the Plaintiff and has appealed the same;

ii) That the Defendant's appeal has overwhelming chances of success;

iii) That unless a stay of execution is granted, the Plaintiff will proceed with execution of the Ruling delivered on 2nd October 2020 before the Defendant's Appeal is heard and determined thereby rendering the said Appeal nugatory;

iv) That unless there is a stay of execution, the Defendant will suffer substantial loss; and

v) That the Defendant is prepared to offer Kshs 442,038.75/- being the amount that has never been in contention as security herein.

3. Said Ahmed Mahmud (the Plaintiff) is opposed to the application. In his Grounds of Opposition dated and filed herein on 28th October 2020, the Plaintiff asserts that: -

1. The application is totally misconceived and is an abuse of the Court process.

2. The conditions precedent to the grant of the orders sought have not been met; and

3. There is no evidence that the Respondent is a man of straw incapable of refunding the sums paid should the Court of Appeal rule in the Applicant's favour.

4. I have perused and considered the application as well as the Grounds of Opposition thereto. I have also taken into account the rival submissions as canvassed by the Learned Advocates for the parties.

5. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows: -

“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.

6. As Warsame J (as he then was) stated while considering the said principles in **Samuir Trustee Ltd –vs- Guardian Bank Ltd, Nairobi, (Milimani) HCCC 795 of 1997 (unreported): -**

“Every party aggrieved with the decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be an overwhelming hindrance to the exercise of the discretionary powers of the Court... The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exists any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his Judgment; hence the consequences of a Judgment is that it has defined the rights of a party with a definitive conclusion. The Respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

7. In the matter before me, it is submitted by the Applicant that the matter raises a fundamental issue regarding the engagement of an Advocate and that the amount involved is substantial being a sum in excess of Kshs 1.7 Million. It is the Applicant’s case that there is a possibility that the Plaintiff may not be in a position to refund the said amount in the event the Appeal is successful.

8. The circumstances leading to the application before me are well captured in my Ruling delivered herein on 2nd October 2020. Both the Plaintiff and the Defendant entered into a Sale Agreement dated 31st May 2011 pursuant to which the Defendant was to purchase the Plaintiff’s property erected on a parcel of land measuring 0.1 Ha known as Kilifi/Jimba/1323.

9. Pursuant to the said agreement, the Defendant took over possession of the property shortly after the Agreement and has since 28th September 2016 transferred the same to her name. The transfer of the said property was done pursuant to a professional undertaking by the Defendant’s Advocate on record to release the balance of the purchase price as outlined in a Deed of Variation of the Sale Agreement executed by both parties. The Defendant’s Advocate has since declined to honour the undertaking claiming that there were structural defects on the purchased property and that her Client had instructed her to hold lien on the balance for the purchase price to cater for the costs of repair.

10. By a Chamber Summons application dated 6th April 2018, the Plaintiff sought herein an order directing the Defendant’s Advocate to honour the undertaking made in April and May 2015. It is that application that was allowed by this Court and whose execution is sought to be stayed herein on the basis that the Defendant stands to suffer substantial loss.

11. In the circumstances of this case however I am not persuaded that the Defendant who continues to reside in the Plaintiff’s property without paying the full amount agreed to can claim that she stands to suffer substantial loss. As Kimaru J asserted in **Century Oil Trading Company Ltd –vs- Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007: -**

“The word “substantial” cannot mean the ordinary loss to which every Judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to and different from that...”

12. Again, as was observed in **James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012) eKLR: -**

“No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

13. In the premises I am not persuaded that there is any merit in the Defendant’s application. I dismiss the same with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Malindi this 16th day of July, 2021.

J.O. OLOLA

JUDGE