



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 39 OF 2016

SAMUEL NJIRAINI MURAGE.....APPLICANT

VERSUS

JOSEPH KARUBIU MURIITHI.....1ST INTERESTED PARTY

GRACE KAGUU MURIITHI.....2ND INTERESTED PARTY

RULING

Background

The application before me is the Notice of Motion brought under certificate of urgency dated 14th October 2020 seeking the following orders:-

(1) Spent.

(2) That the Honourable Court be pleased to stay the execution of the Ruling and/or orders pending the inter-parte hearing and determination of this application.

(3) That the Honourable Court be pleased to stay the execution of the Ruling and/or orders made on 13th December 2019 until the hearing and determination of Court of Appeal at Nyeri, Civil Appeal No. 45 of 2020.

(4) That the costs of this application be in the cause.

The Application is premised on grounds apparent in the face of the application and the affidavit of the applicant sworn the same application date. The application is further supported by a supplementary affidavit sworn on 2nd December, 2020.

In opposition to the said application the Respondents filed a replying affidavit sworn by Samuel Njiraini Murage on 5th November, 2020.

Summary of Facts

From his affidavit in support of the said application, the Applicant contends that he was aggrieved and dissatisfied with the ruling made by this Honourable Court on 13th December 2019 and has filed a Notice of Appeal on 13th March 2020.

The Applicant further argued that following the ruling aforesaid, the Respondent has started erecting some beacons on the suit land and that the Applicant stand to suffer substantial loss should the Judgment be executed. The Applicant also contends that they are willing to offer such security as the Court may deem proper. In the supplementary affidavit the Applicants also argued that there has not been unavoidable delay in the filing of this application as they filed a Notice of Appeal on 20th December 2019 and were not able to file the Application immediately due to the COVID-19 Pandemic since the Courts were closed and later Court operations were scaled up gradually. The Applicant further contend that the suit plot has not yet been demarcated and annexed paragraphs to that effect.

The Applicant stated that it was their deceased father who developed the plot in dispute exclusively and that the Respondents ought not to benefit from it. It is the contention by the Applicants that they are the ones who have always been collecting rent from the developed part of the plot and the Respondent has never collected. In his replying affidavit the Respondent stated that the suit property belonged to him and his brother Muriithi Mwangi and when his brother died, he made an application to delete his name from the register and he became the sole owner of the plot. However, he continued recognizing the family of his late brother and regard them as co-owners with the interest of 1/2 share of the plot. He stated that the Applicants thereafter made an application for review of the orders of joint tenancy to make the ownership as tenants in common with equal shares which application was allowed.

The Respondent also stated that on 13th December 2019, this Court issued an order to partition the land into two (2) equal portions one portion belonging to him and the other belonging to his late brother which the Applicants are now seeking to stay pending the intended Appeal.

The Respondent argued that the application has failed to satisfy the requirements of *Order 42 Rule 6(2) CPR* in that there has been inordinate delay in filing this application. The Respondent also contends that he has done partition of the suit plot which is now even surveyed on the ground.

Legal Analysis

The principles for stay pending Appeal are set out under **Order 42 Rule 6(2)** which provides as follows:

“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.”

The three conditions for the Grant of Stay pending appeals are that the application must be brought without unreasonable delay from the date the impugned decision sought to be appealed against. Secondly, the applicant must show that he will suffer substantial injury unless the application is granted and finally the applicant must give security for the due performance of the decree or order as may ultimately be binding on him.

The order of this Honourable Court which the applicant is seeking to overturn in the appealable Court was made on 13th December 2019. This application for stay was filed on 14th October 2020. The applicant took ten (10) months to bring this application for stay. The explanation given for the delay is that upon filing the appeal, they were not able to file the instant application immediately because of the COVID-19 Pandemic which necessitated the Courts to be closed and later Court operations were scaled up gradually. If the applicant was able to file this appeal on 20th December 2019, no explanation has been given why they couldn't file the application for stay simultaneously with the appeal. The explanation given to the effect that the Courts were closed due to COVID 19 Pandemic cannot hold as the Court operations were never stopped at Kerugoya during the COVID 19 Pandemic. As regard the second ground, the Applicants have stated that the Estate of Muriithi Murage has laid claim to the suit plot on grounds that he was the one who developed it. The Applicants also contend that they are the ones who are currently collecting the rent from the developed part of the plot and that the Respondent has never collected rent and that the orders sought should therefore be granted. The word substantial loss or injury is derived from the word substantial. The **Black's Law Dictionary Tenth Edition** defines substantial in the following terms:

“Adj.1. Of relating to, or, involving substance, material < substantial change in circumstances> 2. Real and not imaginary; having actual, not fictitious, existence < a substantial case on the merits > 3. Important, essential, and material of real worth and importance < a substantial right > 4. Strong, solid, and firm < a substantial piece of Victorian furniture > 5. At least moderately wealthy possessed of sufficient financial means < a substantial supporter > 6. Considerable in amount or value, large in volume or number < substantial support and case >. 7. Having permanence or near permanence, long lasting < the substantial presence of English-Language books in Libraries Worldwide. 8. Containing the essence of a thing conveying the right Idea even if not the exact details < a substantial portrait of the leader, even if some matters were slighted>. 9. Nourishing affording sufficient nutriment < a substantial meal >.

The Courts in numerous decisions and precedents have held that in a money decree, substantial loss is the inability of the Respondent to refund the decretal sum should the appeal succeed. In Environment and Land related matters, the applicant must show that unless the orders for stay are granted, the Respondent will depose or alienate the subject matter hereby rendering the intended appeal nugatory. In this case, both the Applicants and Respondent are tenants in common with the suit property plot No. INOI/KERUGOYA/250/92. There is no way the Respondent can dispose or alienate the same without the Applicant.

In the case of **Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC No. 795 of 1997, Justice Warsame** (as he then was) expressed himself as follows:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek an 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 overwhelming hindrance to the exercise of the discretionary power of the court. The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist 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. 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 consequence of a judgment is that it has defined the rights of a party with 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 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.....”

Again in the case of *Machira T/A Machira & Co. Advocates Vs East African Standard (No. 2) (2002) K.L.R 63*, the Court held thus:

“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 on 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 common ground for applications for stay pending appeal is that the Court must always weigh the competing rights of the successful litigants vis-a-vis the undoubted right of appeal by the unsuccessful party. In doing so, the Court should always bear in mind that the appeal if subsequently succeeds will not be rendered nugatory.

The Applicant has not demonstrated how the intended appeal will be rendered nugatory if the current application is not allowed. There is no empirical evidence showing that the Applicant will suffer substantial loss if the application is declined.

On the third ground, the Applicant has not given any security for the due performance of the decree/order as may be binding on him. He has not even made an offer to deposit the rent collected from the developments on the suit property in Court pending the hearing and determination of the intended Appeal.

The sum total of my analysis is that the Notice of Motion dated 14th October 2020 lack merit and the same is hereby dismissed with costs to the Respondent. It is so ordered.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 16TH DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Asiimwe holding brief for Magee for the Applicants
2. Ms Wanjiru Waweru holding brief for Maina Kagio for Respondent
3. Kabuta – Court Assistant.