



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT BUNGOMA

ELC CASE NO. 156 OF 2017(OS)

JOHN BARASA MATIFARI.....PLAINTIFF

VERSUS

SIMON WANJALA MABONGA SUBSTITUTED WITH

AMOS WANDABWA MABONGA.....DEFENDANT

R U L I N G

This Court delivered its Judgment in this case on 28th January 2021 and made the following disposal orders with respect to the land parcel NO EAST BUKUSU/SOUTH NALONDO/2862 (the suit land): -

- 1. The plaintiff is declared to have become entitled by adverse possession to the land parcel NO EAST BUKUSU/SOUTH NALONDO/2862.**
- 2. The defendant's rights in the said land parcel NO EAST BUKUSU/SOUTH NALONDO/2862 have been extinguished by operation of the law.**
- 3. The defendant shall within thirty (30) days of delivery of this Judgment execute all the necessary documents to facilitate the transfer of the land parcel NO EAST BUKUSU/SOUTH NALONDO/2862 in the names of the plaintiff.**
- 4. In default of (3) above, the Deputy Registrar of this Court shall be at liberty to execute such documents on behalf of the defendant.**
- 5. The plaintiff shall have costs of the suit.**

Aggrieved by that Judgment, the defendant timeously filed a Notice of Appeal on 29th January 2021.

The defendant has now moved to this Court by his Notice of Motion dated 1st March 2021 and filed herein on the same day seeking the following orders: -

- a. Spent**
- b. Spent**
- c. Pending the hearing and determination of the intended appeal by the defendant, there be a stay of execution of the decree herein.**
- d. Costs of this application be provided for.**

The application is premised on the grounds set out therein and is also supported by the defendant's affidavit dated 1st March 2021.

The gravamen of the application is that being aggrieved with this Court's Judgment, the defendant filed Notice of Appeal which appeal is not frivolous or vexatious. That he has since applied for copies of the proceedings and Judgment which are not yet ready for collection. That it is fair and equitable that the decree herein be stayed to enable the defendant exercise his legal right of appeal. That the plaintiff has

threatened to sell the suit property to third parties and that would result in irreparable and substantial loss to the defendant and in any event, the plaintiff will not suffer any prejudice. That the appeal shall be rendered nugatory if it succeeds and the suit land is in the hands of third parties. That the defendant undertakes to furnish a security for the due performance of the decree herein.

The application is opposed and by his replying affidavit dated 24th May 2021, the plaintiff describes the application as defective, lacking merit and which has not meet the threshold set out in **Order 42 Rule 6** of the **Civil Procedure Rules**. That the defendant has failed to demonstrate that the appeal is arguable as no Memorandum of Appeal has been shown to the Court. Further, that the application has been filed four months from the date of delivery of the Judgment and so the defendant is guilty of laches. That the application has been over – taken by events and the process of transfer of the suit title is well in the final stages and complete. That the defendant has not demonstrated what substantial loss he will suffer yet he has never set foot nor settled on the suit land at all. That even the time for filing an appeal has lapsed and this application has only been filed to keep this litigation which is 20 years old in this Court.

The application has been canvassed by way of written submission. The same were filed both by **MR OCHARO KEBIRA** (now Judge) instructed by the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** for the defendant and by **MR J. W. SICHANGI** instructed by the firm of **J. W. SICHANGI & COMPANY ADVOCATES** for the plaintiff.

I have considered the application the rival affidavits and annexures thereto as well as the submissions by Counsel.

The application is premised on **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules**. That provision states that: -

6(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 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.”

6(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” Emphasis added.

From the above, it is clear that in an application for stay of execution pending appeal, the Applicant must satisfy the following conditions: -

- 1. Demonstrate sufficient cause.**
- 2. Show that if the order for stay is not granted, he might suffer substantial loss.**
- 3. File the application without unreasonable delay.**
- 4. Offer security for the due performance of any decree or order that may ultimately be binding on him.**

In **KENYA SHELL LTD .V. BENJAMIN KIBIRU 1986 KLR 410, PLATT Ag J A** (as he then was) said the following on the need to establish substantial loss: -

“It is usually a good rule to see if Order XLI rule 4 of the Civil Procedure Rule 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 it’s various forms is the cornerstone 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.” Emphasis added.

In the same case, **GACHUHI Ag J.A** (as he then was) added the following: -

“In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted.”

Similarly, on the same issue of substantial loss, the Court stated as follows in **MACHIRA ¹/_a MACHIRA & CO ADVOCATES .V. EAST AFRICAN STANDARD (NO 2) 2002 KLR 63: -**

“If the applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer

substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree of the applicant's business (e.g. appeal or intended appeal)."

In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN 1963 LTD C A CIVIL APPEAL No 15 of 1990 [1990 KLR 365]**, the Court stated that this Court's jurisdiction in an application of this nature is circumscribed by the following: -

"Thus, the superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay."

The starting point must therefore be whether or not this application was filed without unreasonable delay.

As stated above, the Judgment sought to be appealed was delivered on 28th January 2021. This application was filed on 1st March 2021 just about one month later. Whether a delay is unreasonable is of course a matter to be determined by the circumstances of each case. It is not correct, as deponed in paragraph 5 of the plaintiff's replying affidavit, that the defendant is **"guilty of laches"** as the application has been brought four months from the date of delivery of Judgment. The defendant having filed a Notice of Appeal one day after the Judgment and this application a month later, I am prepared to find, which I hereby do, that the application was filed without unreasonable delay. The term unreasonable is defined in **BLACK'S LAW DICTIONARY** as: -

"Not guided by reason; irrational or capricious. Not supported by valid exception to the warrant requirement."

In making the finding that this delay of one month is not unreasonable, I also take cognizance of the fact that six (6) months after the delivery of the Judgment herein, and even after this Court had authorized the Deputy Registrar to execute all documents on behalf of the defendant should he fail to do so, I have not seen any request by the plaintiff forwarding any documents to the Deputy Registrar for execution on behalf of the defendant. The plaintiff himself appears not to be in a hurry to execute paragraph 4 of this Court's final orders on disposal of this matter. In the circumstances, I am prepared to save this application by finding that the delay of one month is not unreasonable in the circumstances.

On whether the defendant has demonstrated that he will suffer substantial loss, in **JAMES WANG'ALWA & ANOTHER .V. ALNES NALIKA CHESETO 2012 eKLR**, the Court said: -

"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. This is what substantial loss would entail."

In defining the term substantial, **BLACK'S LAW DICTIONARY** employs the following words which are relevant for the purposes of this application: -

"Considerable in amount or value; large in volume or number

Having permanence, long lasting"

In paragraphs 16 and 17 of his supporting affidavit, the defendant has averred, inter – alia, that the plaintiff has been threatening to sell the suit land to third parties and this would amount to substantial loss. Although the defendant did not provide any evidence to prove that indeed the plaintiff has threatened to sell the suit property, I did not hear the plaintiff rebut that averment. Should that happen and the suit land is sold to third parties, it may be beyond the reach of the defendant if his appeal prevails. The defendant may be forced also to mount other litigation to reclaim it and that, in my view, will be substantial loss. On that basis, the defendant is entitled to the order of stay of execution pending the hearing and determination of the appeal.

On the issue of security, the defendant has averred in paragraph 22 of his supporting affidavit that he is prepared to furnish any security for the performance of the decree herein as the Court may deem just and reasonable. In the circumstances of this case, the plaintiff is in occupation and possession of the suit land. The only prejudice he will suffer following an order of stay is that he will have to wait a little longer to have the title to the suit land in his names. However, as I have already stated above, he does not appear to be in any hurry to have the transfer documents executed by the Deputy Registrar notwithstanding that this Court granted him that order as far back as 28th January 2021. He can therefore wait a little longer now that a Bench of the Court of Appeal will be reporting to **KISUMU** soon. I shall be making an appropriate order for security shortly.

Ultimately therefore, and having considered the application herein, I am persuaded that it meets the threshold under **Order 42 Rule 6** of the **Civil Procedure Rules**. I accordingly allow it in the following terms: -

1. There shall be a stay of execution of this Court's Judgment dated 28th January 2021 and all subsequent orders following therefrom.

2. The defendant shall within 7 days of the delivery of this ruling deposit with the Deputy Registrar of this Court the title deed to the land parcel NO EAST BUKUSU/SOUTH NALONDO/2862 with transfer documents duly executed. These shall only be released to the party that prevails on the appeal.

3. In default of (2) above, this order of stay of execution shall lapse and execution may proceed.

4. There shall be no orders as to costs.

BOAZ N. OLAO

J U D G E

15TH JULY 2021

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JULY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

BOAZ N. OLAO

J U D G E

15TH JULY 2021