



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

CIVIL APPEAL NO. E002 OF 2020

NUR OLOW FARAH A.K.A OLOW FARA A.K.A DIRIYE MOHAMED OLOW.....APPELLANT

-VERSUS-

MUDA ARALE FARAH.....1ST RESPONDENT

COUNTY GOVERNMENT OF WAJIR.....2ND RESPONDENT

RULING

The Applicant/Appellant vide a Notice of Motion dated 4th December, 2020 sought the following orders;

1. Spent

2. This Honourable Court be pleased to grant an order for stay of execution of the order made on 27th November, 2020 by the Principal Magistrate Court in Wajir Magistrate Court Case No. 17 of 2015 pending the hearing and determination of this application.

3. This Honourable Court be pleased to grant an order for stay of execution of the order for eviction made on 27th November, 2020 by the Principal Magistrate Court in Wajir Magistrate Court Case No. 17 of 2015 pending the hearing and determination of this application.

4. This Honourable Court be pleased to grant an order for stay of execution of proceedings in Wajir Magistrates Court Case No. 17 of 2015 pending the hearing and determination of this application.

5. This Honourable Court be pleased to grant an order for stay of proceedings in Wajir Magistrate Court Case No. 17 of 2015 pending the hearing and determination of this Appeal.

6. That costs of this application be in the cause.

GROUND IN SUPPORT OF THE APPLICATION

1) That The Magistrate Court sitting in Wajir in Magistrate Court Case No. 17 of 2015 has made an order for eviction against the Appellant/Applicant.

2) That the Appellant/Applicant is aggrieved by the order for eviction and has brought this appeal against the whole of that decision.

3) That the Applicant has an arguable appeal with a high likelihood of success.

4) That the Applicant is ready and willing to abide by any reasonable order for security as a condition for grant of the order for stay of execution.

5) That it is in the interest of justice and fair hearing that the orders sought herein be granted.

APPLICANT'S SUMMARY OF FACTS.

The Applicant in his supporting affidavit and supplementary affidavit sworn on 4th December, 2020 and 17th February, 2021 and deposed as follows;

- (1) That the 1st Respondent herein filed a suit being Wajir Magistrate Court Case No. 17 of 2015 vide a plaint dated 13th August, 2015 and later amended on 11th March, 2019 against me seeking several remedies. (Attached herewith and marked "DMO1" is a copy of the 1st Respondent's plaint dated 11th March, 2019).
- (2) That I filed a statement of defence dated 21st February, 2015 (Attached herewith and marked "DMO2" is a copy of the statement of defence.)
- (3) That judgment was delivered on 27th November, 2020. The magistrate court made an order for eviction against me.
- (4) That I am aggrieved by the orders made by the Magistrate Court sitting in Wajir in Magistrate's Court Case No. 17 of 2015 and I have filed an Appeal against the said orders.
- (5) That I am advised by my Advocates on record, which advice I verily believe to be true, that the lodging of an Appeal by a party neither operates as a stay of execution of the orders appealed from nor does it stay proceedings in the court which made the order.
- (6) That I am apprehensive that the Respondent might take our execution proceedings in Magistrate Court Case No. 17 of 2015 thereby occasioning me grave loss and detriment.
- (7) That if the order for stay of execution of the order for stay is not granted, my appeal to this Honourable Court will be rendered nugatory.
- (8) That it is in the interest of justice and fair hearing that an order for stay of execution of the order for eviction is granted pending the hearing and determination of this application and the appeal.
- (9) That I am ready and willing to abide by any reasonable order for stay made by this Honourable Court as a condition for the grant of the order for stay of execution.
- (10) That I have an arguable appeal with high chances of success.
- (11) That the balance of convenience tilts in favour of granting me the orders sought.
- (12) That the Respondents will not be prejudiced in anyway by the grant of the orders sought herein.
- (13) That I am advised by my Advocates on record, which advice I verily believe to be true, that the temporary stay of execution issued by the trial court did not need to lapse before I could make a formal application for an order of stay of execution before this Honourable Court.
- (14) That it is not true that I collect a sum of Kshs.100,000/= from the suit property as rent. The 1st Respondent(s) deposition is false and unsupported by any evidence.
- (15) That my application and the Appeal filed before this Honourable Court are meritorious and have a high likelihood of success.

THE 1ST RESPONDENT'S SUMMARY OF FACTS

The 1st Respondents filed a replying affidavit sworn on 14th December, 2020 and deposed as follows;

- 1) That I am shocked by the Applicant's move to make an application for stay vide the cited application.
- 2) That in response to paragraph 6,7 and 8, I wish to depone that on 27th November, 2020 after the court rendered the judgement in issue, the Applicant applied for stay before the trial court and a stay of 30 days was granted and the same has not lapsed.
- 3) That the instant application is extremely in bad faith, an abuse of court process, a waste of judicial time for the Applicant to mischievously conceal the fact that they are enjoying stay from the Lower Court and cleverly wood wink this Honourable Court into granting another stay albeit ex-parte.
- 4) That the Applicant has upped his game of ensuring that the Respondent, decree holder herein must never enjoy his ownership rights over the suit property and currently denying him the enjoyment of his rights to the fruits of litigation conferred by the judgment.
- 5) That the Applicant has mischievously not utilized the 30 days' stay granted by the trial court towards fast tracking the

finalization of this dispute so as to continue causing more delay.

6) That in response to paragraph 10, the remote and extreme event that the court is inclined to grant stay, which we are opposed since they are enjoying stay from the Lower Court, this court should order that all rent collected on the suit property totaling to Kshs.100,000/= (Kenya shillings one hundred thousand) be deposited into a joint interest earning account to be jointly opened by counsel for the Appellant and the Respondent's counsel.

7) That in response to paragraph 11 that I have been advised by my advocates on record which advice I believe to be true, that the application and the appeal is frivolous, vexatious and an abuse of court process. The Respondent's memorandum of Appeal does not disclose an arguable appeal since the same are mere statements prima facie.

8) That in response to paragraph 13, the 1st Respondent is greatly prejudiced, Appellant is enjoying an unfair advantage over the property owner as he continues to collect rent amounting to Kshs.100,000/= (Kenya shilling one hundred thousand) on a property that is not his and the Respondent may never recover the same.

9) That at an opportune time in compliance with Section 79 A of the Civil Procedure Act, we shall be constrained to plead that the court strikes the Appeal out.

10) That secondly in alternative and in consideration of interest of justice, the court should issue directions that the Appellant to utilize the remainder of the stay granted by the trial court to file the record of Appeal and set down the same for directions.

11) That I swear this affidavit before this court.

THE 2ND RESPONDENT'S SUMMARY OF FACTS

The 2nd Respondent through its County Secretary one Abdullahi Maalim filed a replying affidavit and stated as follows;

(1) That the averments in paragraphs 2,3, and 4 of the replying affidavit is true.

(2) That I have been informed by my Advocates which information I rely on that though the Applicant has the right of Appeal for a stay of execution to must place security in court.

(3) That the Applicant has gone back to the Wajir Magistrate's Court in miscellaneous Application No. 3 of 2021 (through DCI Wajir East through Municipal Manager of Wajir County whereby ex-parte order was issued that;

(i) Temporary occupation licence register of plot No. R 2664 Mude Aralle Farah dated 1/1/1982.

(ii) A temporary occupation licence register of plot No. R 2664 Diriye Olow Farah dated 1996.

Be issued in original copies to Sgt Peter Mutiso for purposes of investigating. (Annexed herewith and marked "AM 1" is a true copy of the court order dated 15/1/2021.

(4) That the orders were set aside upon application by the Respondents and hearing of the matter is coming up on 29th April, 2021 before Principal Magistrate's Court Wajir.

(5) That the application in the Wajir Principal Magistrate's Court Miscellaneous Application No. 3 of 2021 was orchestrated by the Applicant/Appellant who reported to the police on the matter without disclosing that the matter is in Civil court determined and judgement appealed.

(6) That the parties herein are relative of the same clan impasse on land and protracting the matter in the appeal fester tension that is unnecessary.

(7) That the intended interested party/Applicant will not suffer prejudice should they not be joined in the petition herein.

LEGAL ANALYSIS AND DECISION

I have considered the Notice of Motion dated 4th December, 2020 and the supporting affidavit of Nur Olow Farah A.K.A Olow Farah A.K.A Diriye Mohamed Olow sworn the same date. I have also considered the replying affidavit by both the 1st and 2nd Respondents and the submissions by the counsels. The applicable law guiding the grant of stay pending appeal is Order 42 Rule 6(2) CPR which stipulates 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 requirements for the grant of stay pending appeal are as follows;

1. The court must be satisfied that substantial loss may result to the Applicant unless the order is made.
2. The application has been made without unreasonable delay and
3. Such security as the court orders for the due performance of such decree or order has been given by the Applicant.

The three pillars have been restated by the superior courts overtime in applications for stay filed before them. In the case of Tabro Transporters Ltd –Vs- Absalom Dora Lubasis (2012) e KLR, the court held as follows;

“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 justice that the case deserves.”

Again in the case of Halal & another –Vs- Thornton & Turpin Ltd, the Court of Appeal held as follows;

“The High Court’s discretion to order stay of execution of its order or decree fettered by three conditions, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.”

In determining whether or not an appeal will be rendered nugatory, the court has to consider the conflicting claims of both combatants in the dispute and each case has to be determined on its merits.

In the instant application, the Applicant in his supporting affidavit has annexed copies of pleadings in the trial court and a copy of the impugned judgement by the trial magistrate. It turns out that the subject of the dispute between the parties before the trial court is an unsurveyed plot describ ed as R 2664 situated at Bulla Jogoo near Giriftu stage Wajir. From the affidavit evidence and the annexures thereto, it is not in dispute that the Applicant/Appellant was in occupation of the disputed property prior to the impugned decision where he had made substantial developments in rental houses where the respondent alleged that he receives rental income of Kshs.100,000/=. Though these allegations have not been supported by any evidentiary proof, it is apparent that the subject property is developed and in possession of the Applicant/Appellant.

An application for stay is actually a balancing act between the rights of the Respondent who is the successful litigant and the undoubted right of Appeal by the Applicant/Appellant. If the Applicant/Appellant who is in occupation and possession of the suit property is evicted, he will definitely suffer substantial loss. Since the Applicant/Appellant does not intend to dispose sub-divide and/or alienate the suit property or any part thereof or take any action that may substantially change the character of the suit property. I am of the view that the interest of justice will be better served if the Applicant/Appellant shall remain in the suit property pending the intended appeal.

For the aforementioned reasons, I find the Notice of Motion dated 4th December,2020 merited and the same is allowed as prayed. The costs of the application shall abide the appeal. It is so ordered.

Read, Delivered and Signed in the Open Court this 2nd day of July, 2021

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E. C. Cheronu (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Njenga for the Applicant
2. M/S Njagi holding brief Kinaro for the 1st Respondent.
3. Mr. Arunda for the 2nd Respondent.
4. Fardowsa; Court Assistant