REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 327 OF 2013

CEREMENTINA MASINDE LIBONDA.....1ST PLAINTIFF

FRED NYONGESA LIBONDA.....2ND PLAINTIFF

BRAMWEL MASINDE LIBONDA.....3RD PLAINTIFF

VERSUS

ALBERT MASINDE LIBONDA.....1ST DEFENDANT

FERDINARD MASOLO.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, BUNGOMA.....3RD DEFENDANT

R U L I N G

By a Judgment delivered on 14th November 2019, this Court dismissed the plaintiffs suit against the defendants. It also ordered that the 2nd plaintiff meets the defendants' costs.

The 2nd plaintiff was aggrieved by that Judgment and timeously filed a Notice of Appeal on 18th November 2019.

The 1st and 2nd defendants lodged their bill of costs on 23rd November 2020 (it is erroneously headed as the plaintiffs' bill of costs) and on 11th March 2021, the same was taxed by the Deputy Registrar **HON E. N. MWENDA** in the sum of Kshs. 112,782.00/=. A decree having been extracted, the 1st and 2nd defendants commenced the execution process in respect of their costs and warrants were issued to the firm of **DOMINION YARDS AUCTIONEERS** on 14th June 2021.

I now have before me for determination the 2nd plaintiff's Notice of Motion dated 16th June 2021 seeking the following orders: -

1. **Spent**

2. **That this Honourable Court do issue a temporary order of stay of execution of the decree and Judgment herein.**

3. **That this Court do set aside the exparte Judgment and subsequent orders issued thereto on costs.**

4. **That costs of this application be provided for.**

The application is predicated on the grounds set out therein and although it is stated that it is also supported by the affidavit of the 2nd plaintiff **FRED NYONGESA LIBONDA**, I could not trace any such affidavit in the record.

The gravamen of the application from what is contained on the face thereof is that the 2nd plaintiff was never served with the bill of costs and was surprised when he received a proclamation from **DOMINION YARDS AUCTIONERS** indicating that the defendants' bill of costs was assessed at Kshs. 115,232/=. That if the defendants proceed with the execution of the said bill of costs, he will suffer an act which will not be compensated in terms of money. Annexed to the application is a proclamation notice issued by the firm of **DOMINION YARDS AUCTIONEERS** for the sum of Kshs. 115,232.00/=.

The application is opposed and **MR EDWINS O. KWEYU** an advocate of this Court and who has the conduct of this case on behalf of the 1st and 2nd defendants has sworn a replying affidavit dated 18th June 2021 in which he describes the application as frivolous, vexatious and an abuse of the process of this Court. He adds that this suit was heard on merit and the 2nd plaintiff testified. He was thereafter served with a bill of costs and the affidavit of service has not been challenged.

When the application was placed before me on 21st June 2021. I directed that I would determine it on the basis of the pleadings filed and deliver the ruling on 30th June 2021 in Open Court since the 2nd plaintiff is acting in person and has not availed any e-mail address.

Since I shall not be sitting on 30th June 2021 due to other engagements, the ruling shall now be delivered on 1st July 2021.

The application is not grounded on any known provision of the law. However, since the 2nd plaintiff filed a Notice of Appeal soon after the delivery of the Judgment of this Court, and cognizant of the need to administer justice without any undue regard to procedural technicalities (**Article 159 (2) (d)** of the **Constitution**) and also the right of parties to be heard (**Article 50(1)** of the **Constitution**), I shall do my best to consider it as an application for stay of execution pending appeal and also as an application to set aside an exparte Judgment.

> **Order 42 Rule 6(1)** and **(2)** of the **Civil Procedure Rules** donates to this Court the power to order a stay of execution pending appeal. It provides 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 <u>for sufficient cause order</u> 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."**
> >
> > **6(2) "No order for stay of execution shall be made under sub rule (1) unless –**
> >
> > > **a. the Court is satisfied that <u>substantial loss may result</u> to the applicant unless the order is made and that the application has been made <u>without unreasonable delay</u>;**
> > >
> > > **and**
> > >
> > > **<u>b. such security</u> *as the Court orders for the due performance of such decree or order as may ultimately be binding on him has <u>been given by the applicant</u>."*** 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 JA** (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 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. <u>Substantial loss in it's various forms is the cornerstone</u> 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."**

In **MACHIRA t/a MACHIRA & CO ADVOCATES .V. EAST AFRICAN STANDARD (No 2) 2002 KLR 63**, the Court said: -

> **"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 …… Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay."**

The nearest that the 2nd plaintiff has come to demonstrating substantial loss is in paragraph (d) of the grounds of the application where it is stated thus: -

> **"That if the orders sought will not be granted, the plaintiff/Applicant shall suffer an act which will not be compensated in terms of money."**

He has not shown what is that act which he will suffer and which cannot be compensated in terms of money. Clearly, there is no evidence of what substantial loss, if any, he will suffer if stay of execution is not granted. As was held in **JAMES WANGALWA & ANOTHER .V. AGNES NALIAKA CHESETO 2012 eKLR**: -

> **"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."**

Having failed to demonstrate what substantial loss he will suffer if the order for stay of execution is not granted, this application must be dismissed.

But that is not all. The 2nd plaintiff was also required to file the application without unreasonable delay. The Judgment sought to be stayed was delivered on 14th November 2019. This application was filed on 16th June 2021 some 19 months later. That delay is not only unreasonable but has also not been explained at all. In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN (1963) LTD C.A CIVIL APPEAL No 15 of 1990 [1990 KLR] 365** the Court emphasized in the issue delay in the following terms: -

> **"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, <u>the applicant must furnish security</u>. <u>The application must of course be made without unreasonable delay</u>."**

The 2nd plaintiff filed a Notice of Appeal timeously indeed 4 days after the delivery of the Judgment sought to be appealed. He has however not explained why it took him over 1½ years to file this application a delay that is clearly unreasonable.

The 2nd plaintiff has also not furnished any security or stated his willingness to abide by any conditions that the Court may impose as a condition of granting a stay. As was held in **WYCLIFF SIKUKU WALUSAKA .V. PHILIP KAITA WEKESA 2020 eKLR**: -

> **"The offer of security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."**

It is also important to note that in this Court's Judgment delivered on 14th November 2019, the 2nd plaintiff's claim to the land parcel **NO EAST BUKUSU/ SOUTH KANDUYI/195** and the resultant sub – divisions was dismissed. He was then condemned to pay costs. Therefore, what this Court issued was a negative order. It did not order the 2nd plaintiff to do anything. It has been settled that a negative order is incapable of execution save for the order of costs which cannot be stayed – **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES .V. ORANGA & OTHERS 1976 KLR 63**. In any event, I have not heard the 2nd plaintiff claim that the defendants are too impecunious as to be able to refund the taxed costs of Kshs. 115,232.00. should the appeal succeed.

Finally, an order for stay of execution is an equitable remedy and the party seeking it must approach the Court with clean hands. It is instructive to note that the 2nd plaintiff only moved to Court when the execution process in respect of costs commenced and his property was proclaimed on 15th June 2021. He then moved to Court on 16th June 2021. There is no evidence to show that any appeal has been filed to–date. This application can only be viewed as an attempt to keep the defendants away from their costs. That is not the purpose of an application for stay pending appeal.

That limb of the application must therefore fail.

The second limb of the application seeks to set aside what the 2nd plaintiff considers to be an ex – parte Judgment. However, the Judgment delivered on 14th November 2019 was not as a result of any ex – parte proceedings. The record is clear that the 2nd plaintiff, led by his then Counsel **MR IKAPEL** testified in support of his case on 22nd May 2019 and called two witnesses namely **JAMES MISIKO WALUBAYI (PW 2)** and **SYLVESTER WASWA WEKOKA (PW 3)** in support of his case. He then closed his case after which the defendants testified and also closed their case on the same day. Judgment was thereafter delivered on 14th November 2019 in his presence and also in the presence of **MR WERE** who was holding brief for **MR IKAPEL**. It is not therefore proper for the 2nd plaintiff to describe the Judgment delivered on 14th November 2019, or indeed even the proceedings that led to it, as ex – parte. The Judgment delivered by this Court was a final Judgment after all the parties had testified in support of their respective cases. Such a Judgment can only be appealed. Not set aside. At least that is the view that the Court of Appeal took in the case of **KENYA POWER & LIGHTING COMPANY LTD .V. BENZENE HOLDINGS LTD t/a WYCO PAINTS C.A CIVIL APPEAL No 132 of 2014 [2016 eKLR]** when it said: -

> **"Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the Civil Procedure Rule dealing with the setting aside of default Judgments, the Civil Procedure Rules does not have a provision for the setting aside of the final Judgment. <u>A party aggrieved by a final Judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42</u>."** Emphasis added

The prayer for setting aside an ex – parte Judgment is clearly misconceived as there is no such Judgment in this case.

The up – shot of all the above is that the Notice of Motion dated 16th June 2021 is devoid of any merit.

It is accordingly dismissed with costs to the 1st and 2nd defendants.

BOAZ N. OLAO.

J U D G E

1ST JULY 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 1st day of July 2021 by way of electronic mail now that the 2nd plaintiff/Applicant appeared before the Deputy Registrar on 21st June 2021 and availed an e – mail address.

BOAZ N. OLAO.

J U D G E

1ST JULY 2021.