



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 213 OF 2014

JOHN MARK WANDOLO.....PLAINTIFF/RESPONDENT

VERSUS

PAUL NG'ANG'A NAGE.....DEFENDANT/ APPLICANT

RULING

This ruling is in respect of a Notice of Motion dated 31st March 2020 by the defendant/applicant seeking for the following orders:

- a) Spent
- b) That pending the hearing and determination of the application, there be stay of execution of the Judgment and decree of the Environment and Land Court Case No 213 of 2014 delivered on 12th March 2020 and all its consequential orders.
- c) That pending the hearing and determination of the intended appeal there be stay of execution of the judgment and decree.
- d) That the Honourable Court do issue such other directions /or orders as the court may deem just and expedient to grant.

Counsel agreed to canvas the application vide written submissions which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSIONS.

Counsel relied on the grounds on the face of the application together with the applicant's supporting affidavit and submitted that the applicant had lodged a Notice of Appeal dated 13th March 2020 which has been served on the plaintiff/respondent.

It was counsel's submission that the applicant is the registered proprietor of the suit land which forms part of his matrimonial home. Further that he has an arguable appeal which will be rendered nugatory if the orders of stay are not granted..

Mr Angu counsel for the applicant submitted that the court has discretion to grant orders of stay of execution and cited the case of **C anvass Manufacturers Ltd Vs Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**

Counsel also relied on the case of **Carter & Sons Ltd -Vs- Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997** at Page 4 where the Court of Appeal held that:

the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay, the applicant must establish a sufficient cause secondly the court must be satisfied that the substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security and the application must, of course, be made without unreasonable delay."

It was therefore counsel's submission that the applicant must only establish that he stands to suffer substantial loss, that he is willing to deposit security and comply with conditions issued by the court for due performance of the decree. Lastly that the delay in bringing the application is not inordinate or unreasonable.

On the issue of substantial loss, counsel submitted that the applicant has filed a notice of appeal and applied for certified copies of the proceedings and that the judgment directly affects the appeal and in the event the execution proceeds before the appeal is determined, the appeal would be an academic exercise.

Mr Angu relied on the case of **Hassan Guyo Wakalo —Vs- Straman E.A Ltd (2013) eKLR** where the court held that the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds then the same shall be rendered nugatory. Further in the

case of **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** where the court held that

" in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal"

Counsel submitted that the applicant has met the conditions set under Order 42 Rule 6 and that the application was filed 18 days from the date of judgment and cited the case of **Ndumia Gitahi and Another vs Anna Wambui Warugongo (1988) 2 KAR**, where the court citing the decision of Sir John Donaldson M. R. in **Rosengrens vs Safe Deposit Centres Limited [1984] 3 ALLER 198** court of appeal held that:

"We are faced with a situation where judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal

Further in the case of **Mohamed Salim T/A Choice Butcher Nasserpuria Memon Jamal 2013 eKLR**, the court stated that: -

"That right of appeal must be balanced against an equally weighty right that of the plaintiff enjoy the fruits of the judgment delivered in his favour. There must be a just cause. For depriving the plaintiff of that right

Counsel therefore urged the court to allow the application as prayed.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel opposed the application and submitted that this matter was filed in 2014 and the applicant wants to deny the respondent the fruits of his judgment in 2020. Counsel submitted that the application was filed 19 days after the delivery of judgment hence inordinate delay. That the applicant has not established substantial loss he would suffer is the order of stay is not granted.

Counsel relied on the case of **James Wangalwa & Another versus Agnes Naliaka Cheseto [20121 eKLR** where the court held that :

"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...

Counsel further submitted that the court should balance the rights of a successful litigant and that of the applicant who is aggrieved by the judgment and decree of the court. That the applicant has not established the substantial loss hence the application should be dismissed with costs.

Counsel cited the case of **Jason Ngumba Kagu 2 others versus Intra Africa Assurance Co. Limited [20141 eKLR** where the court held that :

"The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of "the appeal will be rendered nugatory", the Prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be Tendered nugatory. Here, it is not really a question of measuring the Prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial Process"

Counsel also relied on the case of **Simba Coach Limited versus Kiriuyu Merchants Auctioneers [20191 eKLR** in illustrating what amounts to an ideal security while placing reliance on the case of **Mwaura Karuga t/a Limit Enterprises versus Kenya Bus Services Ltd & 4 Others [2015]eKLR** was of the view that :

...the security must be one which shall achieve due Performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words "ultimately be binding" are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the Presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the Latter two were not granted which is seldom. The security to be given is measured on that yardstick. "

It was counsel's submission that the applicant has not offered any form of security to deserve the orders sought hence the application should be dismissed with costs to the respondent.

ANALYSIS AND DETERMINATION

The issues for determination in an application for stay of execution are guided by Order 42 Rule 6 (2) of the Civil Procedure Rules 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.

If an applicant meets the threshold, then the court can exercise its discretion in his or her favour. In the case of **Socfinac Company Limited V Nelphat Kimotho Muturi [2013]eKLR, H.C at Nairobi (Milimani), 542 of 2012**, Odunga J. observed as follows;

“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 under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and that 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. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. In this instance the court must strive to achieve the twin principles of equality of arms and proportionality”.

The court should not lose sight of the objective of stay of execution to ensure that an appeal is not rendered nugatory. It should also have in mind that the successful litigant also has a right to enjoy the fruits of the judgment. Litigation must also come to an end at some point.

In the case of **Regional Institute of Business Management v Lucas Ondong' Otieno [2020] eKLR the High Court observed as follows;**

20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.

The core of an application for stay of execution pending appeal is that the applicant must show that he/she will suffer substantial loss if the order is not granted. The applicant has stated that the appeal will be rendered nugatory if he is ordered to transfer the suit land to the respondent. Has the applicant established the substantial loss that he will suffer if the orders are not granted? The applicant states that the nature of the order is that he is required to transfer the suit land to the respondent therefore he will suffer substantial loss.

In the case of **RWW vs. EKW [2019] eKLR**, the court deliberated on the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The implementation of the decree will interfere with the substratum of the case. The purpose of stay of execution pending appeal is to preserve the subject matter in dispute.

On the issue whether the application was filed timeously, the judgment was delivered on 12th March 2020 and the application made on 31st March 2020. It should be noted that this is the time that Covid 19 hit the country and the court still had teething problems with moving to the digital platform. Each case must be dealt with considering the circumstances and not a blanket blame of Covid 19.

In the case of **Utalii Transport Company Limited & 3 others vs NIC Bank & Another (2014) eKLR** the court held:

-

“... whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case ... caution is advised for courts not to take the word inordinate in its ordinary meaning ...”

I find that 18days did not amount to unreasonable delay in the circumstances.

On the issue for security for the due performance of the decree, the applicant has not made any offer on the issue of security. The court has the discretion to order for security to be deposited for the due performance of the decree. In order to preserve the suit land, the court hereby orders that the applicant deposits the title to the suit land in court within the next 14 days and not to part with possession pending the hearing and determination of this suit. If the order is not complied with then the stay order lapses.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF AUGUST, 2021

M. A. ODENY

JUDGE