



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 70 OF 2005 (OS)

ERIC MBUGUA CHIIRA.....PLAINTIFF

VERSUS

1. PETER KIMANI CHEGE

2. SAMUEL MWANGI CHIIRA

(Sued as joint administrators of

the estate of HELLEN THIRA CHIIRA).....DEFENDANTS

RULING

The full facts of this case are set out in the judgment that was delivered by the court on 28th November, 2019. The plaintiff instituted this suit by way of Originating Summons dated 10th January, 2005 seeking a declaration that he had acquired all that parcel of land known as Lari/Kijabe/245(hereinafter referred to as “the suit property”) by adverse possession and in the alternative, that the defendants held the suit property in trust for him. The plaintiff sought a further order that he be registered as the proprietor of the suit property. The Originating Summons was opposed. In a judgment delivered on 28th November, 2019, the court found the Originating Summons to be without merit and dismissed the same with costs to the defendants. On 6th February, 2020, the defendants filed a Bill of Costs for taxation. The same was taxed at Kshs. 345,711.67/- on 27th August, 2020.

What is now before me is a Notice of Motion application dated 24th February, 2020 filed in court on 26th February, 2020 in which the plaintiff has sought the following orders;

1. That the court be pleased to order a stay of execution of the decree herein and taxation of the defendants Bill of Costs pending hearing and final determination of an appeal to the Court of Appeal.
2. That costs of the application be provided for.

The application which is supported by the affidavit of the plaintiff sworn on 24th February, 2020 was brought on the grounds that the plaintiff was dissatisfied with the judgment of the court delivered on 28th November, 2019 and had filed a Notice of Appeal against the same to the Court of Appeal. The plaintiff averred that the defendants had filed a Bill of Costs for taxation and that the plaintiff stood to suffer great prejudice if the defendants proceeded with taxation and thereafter executed for the recovery of the taxed costs. The plaintiff averred that the cost claimed by the defendants in their Bill of costs was huge and he could not afford to pay the same. The plaintiff averred further that even if he was able to pay the costs, he was unlikely to recover the same from the plaintiffs in the event that he succeeded in the intended appeal. The plaintiff averred that he was ready to furnish security for the performance of his obligations under the decree.

In his affidavit, the plaintiff stated that he was unemployed and had no income. The plaintiff averred that he had been cultivating the suit property for his subsistence and that the 1st defendant had attempted to take possession of the property. The plaintiff averred that if the defendants take possession of the suit property, his intended appeal to the Court of Appeal would be rendered nugatory.

The application was opposed by the defendants through a replying affidavit sworn by Samuel Mwangi Chiira on 10th September, 2020. The defendants averred that the limb of the application seeking to stay taxation of the defendants’ Bill of Costs had been overtaken by events since the said bill had already been taxed. The defendants averred further that that application was filed after unreasonable delay the same having been filed 3 months after the delivery of the judgment execution of which is sought to be stayed. The defendants averred further that the plaintiff had not demonstrated that he stood to suffer substantial loss unless the stay sought was granted. Finally, the defendants contended that the plaintiff who admitted that he was unemployed and without any source of income had not furnished any security for the due performance of the decree.

The application was argued by way of written submissions. The plaintiff filed submissions dated 6th October, 2020 while the defendants filed submissions dated 2nd November, 2020.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendants in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties. The plaintiff's application was brought out under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

“No order for stay of execution shall be made under sub-rule 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 ultimately be binding on him has been given by the applicant.”

In Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018 the court stated that:

“It is usually a good rule to see if order 41 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. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

I am in agreement with the argument by the defendants that the limb of the application seeking a stay of taxation of the defendants' Bill of Costs has been overtaken by events since taxation has already taken place and as such the same cannot be stayed. That leaves the limb of the application seeking a stay of execution of the decree of the court pending the intended appeal to the court of appeal. From the judgment of the court, the defendants can only file an application for execution in respect of their taxed costs in the sum of Kshs. 345,711.67/-.

I am not persuaded that the plaintiff would suffer substantial loss if the stay sought is not granted. The fact that the plaintiff is unemployed and has no source of income is not a ground for granting a stay of execution in favour of the plaintiff. The plaintiff did not also place any evidence before the court showing that the defendants are impecunious and as such would not be able to refund the taxed costs if paid to them. The plaintiff has also not indicated what security he is ready to furnish as a condition for the stay sought. The plaintiff has admitted that he is unemployed and has no source of income. It has been left for the court to determine the nature of security to be furnished by the plaintiff should the court grant the stay sought. It would be difficult for the court to determine what security should be furnished by a party who is unemployed and has no source of income. Such a party in my view has no security to offer and it is no wonder that none has been disclosed. Having found that the plaintiff would suffer no substantial loss and that he has not indicated what security he is prepared to furnish for the due performance of the decree, it is not necessary for me to consider the other issues raised by the defendants such as; whether the application was brought without unreasonable delay and whether a decree for costs can be stayed.

The upshot of the foregoing is that there is no merit in the Notice of Motion dated 24th February, 2020. The application is dismissed with costs to the defendants.

DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Ms. Tuwei h/b for Mr. Kirimi for the Defendants

Ms. C. Nyokabi-Court Assistant