



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELCA NO. 30 OF 2020

SAMUEL NYABIBA NYAKERI.....APPELLANT

VERSUS

PETER OKIBERA OMWENGA.....RESPONDENT

RULING

This ruling is in respect of a Notice of Motion by the Appellant/applicant dated 15th December 2020 seeking for the following orders:

- a) Spent
- b) That pending hearing inter parties and thereafter pending the hearing and determination of Appeal herein this Court be pleased to stay execution of the eviction order issued on 20th November 2020 in respect of title number Nzoia Sisal/ Moi's Bridge Block 1/3406 in Eldoret CMCC NO. 1454 OF 2004 between Samuel Nyabiba Nyakeri v. Peter Okiabera Omwenga.
- c) Any other order the Court shall deem fit to grant
- d) Costs of the application

The court heard the matter under certificate of urgency and ordered that the status quo be maintained pending the hearing of this application inter partes. Counsel also agreed to canvas the application vide written submissions which were duly filed.

APPELLANT/APPLICANT'S SUBMISSIONS

Counsel for the plaintiff submitted that the eviction order was in contravention of Order 22 Rule 18 of the Civil Procedure Rules which provides as follows:

Where an application for execution is made

- (a) more than one year after the date of the decree;
- (b) against the legal representative of a party to the decree; or
- (c) for attachment of salary or allowance of any person under rule 43,

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Counsel submitted that the orders were granted against the rules of natural justice, hence an order of stay of execution should be issued. Counsel further submitted that there is no requirement for a party to prove that he has an arguable appeal or one that chances of success as where a party has satisfied the conditions for stay then the court should exercise its discretion in favour of the applicant.

Counsel relied on the case of **Bhutt –vs Rent Restriction Tribunal (1982) KLR 417** where the Court of Appeal held that discretion must be exercised in a manner that would not prevent an appeal. That the purpose of a stay of execution is to preserve the subject matter so as not to render the appeal nugatory.

Mr Wanyonyi submitted that if the execution proceeds the applicant is likely to suffer irreparable loss as he will be evicted from the suit property. Counsel cited the case of **Moses Kipkurui Bor v John Chirchir (2019) eKLR** where the court referred to the Court of Appeal decision in **M'IKIARA M'RINKANYA & Another v GILBERT KABEERE M'MBIJIWE [2007] eKLR** where the court stated as follows:-

“Lastly, it is logical from the scheme of the Act, that a judgment for possession of land, in particular should be enforced before the expiration of 12 years because section 7 of the Act bars the bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued. By the definition in section 2 (2) (3) of the Limitation Act:”

Counsel further submitted that the court went on to state that:

.....'apart from the above, the application be incompetent for the reason that Order 22 Rule 18 which is precisely similar to Order XXI Rule 18 of the pre-2010 rules provides as follows:-

The judge, arrived at the following conclusion" the above provides inter alia that where a decree is more than one-year-old before executing it, the decree holder needs first to issue a notice to the judgment creditor to show cause why the decree should not be executed.”

Counsel also relied on the case of **David Kimeli Kiprono & another V Hosea K. Kemboi & 2 others (2014) eKLR** where the court stated that:

.....it is easily discernable that the suit ELDORET CMC. Award No. 1 of 2020 did not involve the Plaintiffs or their father. They were not parties to that suit.

Neither were the orders of eviction directed at them. Even if they were parties the orders of eviction were issued in the year 2007, and there needed to be filed an application for notice to show cause, pursuant to order 22 Rule 18, since the execution was being undertaken more than one year after the issuance of the order of eviction”.

Mr Wanyonyi further relied on the case of **Seurex Agencies (k) Ltd Paul Otieno Ambedho (2019) eKLR** where the court held that :

“---from my reading and understanding of rule 18(1) of Order 22, the Respondent was required to apply to court for issuance of a notice to show cause against the appellant before taking out warrants of attachment and sale but did not.”

Counsel therefore urged the court to grant the orders as prayed.

RESPONDENT'S SUBMISSIONS

The respondent opposed the application and filed a replying affidavit dated 16th December 2020. Counsel for the respondent gave a brief background to the case and stated that the appellant and the respondent have been engaged in a land dispute in court since the year 2004. That the case commenced as Eldoret CMCC No. 1454 of 2004 wherein the appellant was the plaintiff and the respondent was the defendant. The defendant in turn filed a counterclaim wherein he sought to have land reference Nzoia/ Moi's Bridge Block 1 (Sisal) /3406 transferred to him.

Counsel stated that the case was heard and the plaintiff was unsuccessful in having the parcel of land Nzoia/ Mois Bridge Block I (Sisal)/3406 declared to be his. The plot was found to belong to the respondent as the exchange agreement had failed since the appellant had taken the plot in Langas Estate Eldoret which he had given to the respondent in exchange of the plot in Matunda Nzoia/Moi's Bridge Block I (Sisal)/3406.

Mr. Momanyi submitted that the decision of the subordinate court in Eldoret CMCC NO. 1454 of 2004 was the subject of an appeal in Eldoret High Court Civil Appeal which was later reassigned a new number upon the establishment the Environment and Land Court as Eldoret Environment and Land Court Appeal No. 2 of 2015. The appeal was heard and the decision of the subordinate Court was set aside and the parcel of land reference number Nzoia/Moi's Bridge Block I (Sisal)/3406 awarded to the appellant. The respondent thereby lost both the plot in Langas as plot no.3406.

It was counsel's submission that the respondent appealed to the Court of Appeal in Eldoret CACA No.46 of 2015 whereby the appeal was heard and the decision of the Honourable Court was set aside and confirmed the decision of the subordinate court.

Mr Momanyi further submitted that the appellant then filed an application in the Court of Appeal seeking to have the court interpret its judgment and the Court stated in its ruling on the application that it gave the entire parcel of land (number 3406) to the respondent. That the appellant has again moved the Court of Appeal to have the court review its decision and that it only gave the respondent a portion of the land. The appellant has also sought stay of the enforcement of the judgment while the application has neither been heard nor has the Court of Appeal granted any order staying the execution of the decree

Counsel finally submitted that the instant appeal and application is an abuse of the Court process as the appellant has exhausted his avenues of redress upto the Court of Appeal. Further that the decision having been enforced has been overtaken by events and urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issue for determination in this application is whether the applicant has met the threshold for grant of stay of execution orders. The Appellant seeks an order of stay of execution of the eviction order issued on 20th November, 2020 pending the hearing of the instant Appeal.

Applications for stay of execution pending appeal are anchored under Order 42 Rule 6(2) which provide as follows:

- (a) that substantial loss may result to the applicant unless the order is made,
- (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

The purpose of stay of execution pending appeal is to preserve the subject matter of the appeal so as not to render the appeal nugatory as was held in the case of **HGE V SM [2020] eKLR** where the Court cited the decision in **RWW vs. EKW [2019] eKLR**, and stated as follows:

“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.

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.”

Further in the case of **PETER KAEKA MUTIE & ANOTHER V PATRICIA NDUNGE MWANZIA [2020] eKLR** the Court cited with approval the decision in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where the Court expressed itself as follows:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

An applicant must meet the threshold for grant of stay of execution pending appeal. The cornerstone of an application for stay of execution is that the applicant must establish and demonstrate that he or she will suffer substantial loss and what kind of loss it is. Has the applicant demonstrated to the court what loss if any he is likely to suffer if the order of stay is not issued? Substantial loss is not merely stating that if the order is not granted a party will suffer loss. The applicant must endeavour to explain and demonstrate clearly the nature of the loss. It is trite law that he who alleges must prove.

In the current case, the applicant is just ranting about how aggrieved he is with the order for eviction but not clear on the substantial loss part. In fact, the applicant is on a path of arguing the appeal at the application stage

In the case of **JAMES WANGALWA & ANOTHER VS. AGNES NALIKA CHESETO [2012] eKLR**, observed that a definition for substantial loss can be couched as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ...

The main contention between the Appellant and the Respondent is the ownership of Nzoia Sisal/ Moi's Bridge Block 1/3406. The Appellant and the Respondent have had a protracted Court battle before the Chief's Magistrates' Court, the Environment and Land Court and the Court of Appeal. The Court of Appeal pronounced itself on the matter when it delivered its Judgment on 1st March, 2018.

The Appellant's Appeal relates to the ruling of the Chief Magistrates' Court in Eldoret Civil Case No. 1454 of 2004 dismissing his Application to have the eviction orders issued on 20th November, 2020 set aside and or stayed. The Appellant's case is that the eviction orders contravenes the provisions of Order 22 Rule 18 of the Civil Procedure Rules that require that a Notice to Show Cause be issued where a party wishes to execute an order that was issued more than one year since the delivery of the order.

The respondent gave a chronology of the protracted dispute between the two parties and the pending application for review before the Court of Appeal together with the pronouncements in respect of the case. Litigation must come to an end at one point where one party has to lose or a compromise entered into. Parties cannot be litigating forever where the court has given its verdict and where the parties have used all the avenues of redress. Parties should not use courts to avoid implementation of court orders.

In the case of **JOSEPH MEME & ANOTHER V REUBEN MURUNGI [2006] eKLR** the Court held that:

“What I am saying in simple terms is that the Applicants have resiliently fought eviction but on all fronts they have not been successful... Land is a truly sensitive subject and eviction from it quite a painful pill for the victim but the route of law is sometimes very painful indeed and the Applicants must face it squarely... Stay of execution in my view is not an order in perpetuity and cannot be conclusive of the rights of parties”.

Having considered the application, the submissions by counsel, I find that the application lacks merit and is therefore dismissed with costs. The applicant should not be allowed to use the courts to avoid the implementation of an order which is long overdue due to the protracted litigation for many years.

DATED AND DELIVERED AT MALINDI ELECTRONICALLY THIS 22ND DAY OF SEPTEMBER 2021

M. A. ODENY

JUDGE