



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELCA NO. E052 OF 2021

LETSHEGO KENYA LIMITED.....APPLICANT

VS

SAMUEL KUNYIHA MURIITHI.....1ST RESPONDENT

GEORGE MUHORO THUKU.....2ND RESPONDENT

ROBERT GITAU NDURUMA.....3RD RESPONDENT

LANDLINK INVESTMENT.....4TH RESPONDENT

RULING

1. The Applicants filed the instant application dated 23rd June 2021 seeking orders of stay of execution of the judgement delivered on the 3/6/2021 in SPM ELC NO.57 of 2020 by the Hon. Learned PM J. A. Agonda.
2. The application is premised on the grounds annexed thereto and the supporting affidavit of the Applicant sworn on the 23/6/2021. The Applicant avers that judgement was entered in favour of the 1st Respondent for the cancellation of the title and all consequent transfers over Ruiru East Block1/5359 (suit land). That it is aggrieved with the said judgement and has filed an appeal. That the appeal has high chances of success.
3. The Applicant stated that the stay orders given on the 3/6/2021 expired on the 3/7/2021 and it is apprehensive that unless the stay is granted the 1st Respondent might sell the suit land thus rendering the appeal nugatory.
4. The 1st Respondent opposed the application vide his Replying affidavit sworn on the 15/7/2021. The 1st Respondent contended that the Applicant was granted a stay by the trial Court for 30 days which stay lapsed. Further that the Applicant has not taken steps to prosecute the appeal.
5. Further he urged the Court to decline the orders of stay on account that the Applicant has not demonstrated what substantial loss it stands to suffer. He stated that he was ready to give an undertaking that he will not transfer the property to third parties. That he is prepared to compensate the Applicant for any loss should his appeal succeed. That the application is a delaying tactic to prevent him from enjoying the fruits of the judgment.
6. On the 7/10/2021 parties elected to canvass the application by way of written submissions. The 1st Respondent filed written submissions on the 19/10/2021 while the Applicant failed to do so despite directions from the Court.
7. The 1st Respondent submitted that the suit land is registered in the names of third parties that were sold the land by the Applicant in a public auction. That the auction was carried out 4 days after the suit in the lower Court had been filed. That since the suit land is in the names of third parties, granting stay of execution will in no way preserve the subject matter. That the suit land is better off in the name of the 1st Respondent. That the Applicant has not demonstrated that it deserves the orders of stay.
8. The key issue is whether the Applicant is deserving of the orders sought.
9. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order 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.

(2) No order for stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

10. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

a) The application was brought without delay;

b) Substantial loss may result to the Applicant unless the stay is granted; and

c) Security for the due performance of the order or decree has been provided.

11. Going by the evidence on record the Court is persuaded that the application was filed timeously.

12. Regarding the issue of substantial loss that is likely to be suffered by the Applicant, the Court pronounced itself in the case of **James Wangalwa & Anor. Vs Agnes Naliaka Cheseto (2012) eKLR, thus:-**

“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 Civil Procedure Rules. This is so because execution is a lawful process...The Applicant must establish other factors which show that the essential core of the Application as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni (2002) KLR 867** the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

13. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

14. The case of **Absalom Dora vs. Turbo Transporters (2013)eKLR** the Court hold 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 the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.”

15. The Applicant has sought to explain substantial loss in this manner; that if the 1st Respondent executes the judgement, he is likely to sell the land thus exposing it to claims of refunds from the third party buyers. That if the appeal succeeds the 1st Respondent will not be able to refund the money nor the costs of the suit.

16. This Court agrees with the 1st Respondent that if stay is granted there is no guarantee that the third party purchasers who are not party to the suit will not dispose of the property as there will be no orders binding them. Should this be the case, the Court is unable to understand why these parties were not enjoined to the suit in the first place.

17. The Court has considered the 1st Respondents undertaking not to transfer the suit land to third parties, an undertaking that the Applicant appears not to have embraced.

18. Going by the decision of **James Wangalwa** above the reason adverted by the Applicant on account of contemplated execution is not sufficient to show substantial loss, it being a lawful process. There is no evidence led by the Applicant to show that the 1st Respondent is a man of straw and will be unable to refund back the costs should the appeal succeed. In any event the Court notes that this is not a money decree.

19. With respect to the third limb, it is to be noted that the Applicant did not provide any security for the due performance of the decree or orders of this Court.

20. Having carefully considered the application, the affidavit evidence and the written submissions of the 1st Respondent and the material placed before the Court, the Court is not satisfied that the application is merited.

21. It is dismissed with costs to the 1st Respondent.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF OCTOBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

M/s Kiplangat for the Applicant

Ms. Mugo for the 1st Respondent

No appearance for 2nd, 3rd and 4th Respondents

Ms. Phyllis Mwangi – Court Assistant