



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. APPEAL NO. 33 OF 2019

NORMAN NJUE MESHECK.....APPLICANT/APPELLANT

VERSUS

PHILISILA NGITHI NTHIGA.....RESPONDENT

RULING

INTRODUCTION

1. What is before me now for determination is a Notice of Motion dated 15.02.2021 and filed on 15.02.2021. It is expressed to be brought under Article 159 (2) (d) of the Constitution, Sections 1A, 1B, 3A and 63E of Civil Procedure Act (Cap 21), Order 51 Rule 1, Order 42 Rule 6 of Civil Procedure Rules, 2010 and all other enabling provisions. The applicant – **NORMAN NJUE MISCHECK** – is the Appellant in the appeal while the respondent – **PHILISIA NGITHI NTHIGA**– is the Respondent.

APPLICATION

2. The motion came with four (4) prayers but prayer 1 is spent. The prayers for consideration are therefore three (3) _ prayers 2, 3 and 4 _ and they are as follows:

2. That this Honourable court be pleased to grant an order of Stay of Execution of the Judgment delivered on the 28th of October 2019 in Embu CMCC No. 12 of 2015 pending the hearing and determination of the Appellant's Appeal in the High Court.

3. In the alternative, an Order of Status Quo currently is prevailing on L.R No. Evuvore/Nguthi/1935 be maintained pending hearing and determination of the Appellant's Appeal in the High Court.

4. The Costs of this application be provided for.

3. The application is premised on grounds, inter alia, that the Appellant/Applicant is aggrieved by the Judgment delivered on 28th October 2019 and has therefore filed the present appeal which appeal he avers was filed within the time prescribed by the law. The Applicant further avers that the Appeal has overwhelming chance of success and that the Appeal itself and all applications filed in the lower court were filed timeously. It is the Applicant's further averment that if stay is not granted the appeal will be rendered nugatory and he stands to suffer irreparable loss and damage as a result. Additionally, the Applicant averred that the Respondent will not suffer any prejudice by grant of stay of execution. He further reiterated that it is in the interest of justice that the orders sought be granted.

4. In a supporting affidavit sworn by the Applicant, he reiterated the grounds in the notice of motion. It is his position that suit parcel Evuvore/Nguthi/1325 (suit land) was registered in his name as a first registration and that title to the land was issued in his name on 22nd Sep 1981. He further deposed that the suit in the trial court was determined through pleadings and not viva voce evidence and judgment was entered against him on 28th October 2019 prompting the present appeal. He stated that he filed three applications in the lower court, seeking stay of execution pending appeal without any success. He further claimed that all three applications were determined on procedural technicalities without due regard to substantive justice and contrary to Article 159(2) (d) of the Constitution. He alleged that his appeal has high chances of success and further expressed his readiness to furnish reasonable security through a surety by depositing the original title deed for land parcel No. Evuvore/Nguthi/1935. In support of this, he has attached a copy of title deed, valuation report and consent of the registered owner. Also attached are copies of the three rulings with regard to the three applications filed in the lower court.

RESPONSE

5. The respondent made a response to the application dated 15th March 2021. According to her, the Application before the court is

incompetent, frivolous, an abuse of the court process and ought to be dismissed with costs. She acknowledged having sued the Respondent before the trial court for illegally encroaching on her land and stated that the matter was determined on merit and judgment rendered in her favour. She further confirmed that the applicant had indeed filed three applications seeking stay of execution pending appeal. As for the 1st Application dated 22nd Nov 2019, she said that the applicant was granted stay on condition that he pays a sum of Ksh. 300,000/= as security but he failed to do so. The 2nd Application sought expansion of time to deposit the security amount and the Applicant was granted 14 days but prior to determination of the 2nd application the court of its own volition extended the period payment by 23 days. Finally the Applicant brought a third application which he sought to deposit title as security though according to the Respondent he had no consent of the registered owner of the land to which the court declined to grant the application.

6. The Respondent disputes that the Applicant holds title to the land and contends that the title was cancelled and reversed to Ibrahim Nthiga (her husband) and Mathew Mugo by Minister Appeal Case no. 1 of 1976, which decision according to her, was upheld at the high court and court of appeal, which cases she has cited therein. It is her assertion that the appeal has no chance of success and further that no steps have been taken to prosecute the appeal for nearly two years since as she is yet to be served with the memorandum of appeal or record of appeal.

7. She states that the Respondent is not deserving of the remedies sought. She has protested the request for status quo as the continued stay on her land has made her life impossible. She views the present appeal as a delaying tactic and an attempt to frustrate her. She implores on the court to dismiss the application.

SUBMISSIONS

8. The application was canvassed by way of written submissions. The applicant filed his submissions on 4.6.2021. He reiterated the grounds in his application and partly those in the Respondent's replying affidavit with regard to the three applications filed. He alluded to the Judgment of the trial court delivered on 28th October 2019 where the court allowed his eviction on condition that strict provision of Section 152 of the Land Registration Act are complied with.

9. The Applicant has submitted that he is the registered owner of the suit property since 3rd August 1979. He claims to have attached a copy of official search and title deed in support of this but the same is not on court record. He has relied on Sections 24, 25(1) and 26 of the Land Registration Act to the effect that his title is indefeasible and conclusive evidence of proprietorship of the land unless proven otherwise. He emphasized that he is entitled to protection of his title to the suit land and further that his appeal has high chances of success and his application therefore should be allowed. He also went ahead to critique the ruling by the trial court and submits that the suit was not Res Judicata to Embu HCC 165 of 2008 and Civil Appeal 110 of 2011 at Nyeri. He outlined the rules that apply in a case of Res Judicata and averred that the trial court misdirected itself on the doctrine and that his application should be allowed as his appeal has high chances of success.

10. There was emphasis that the applicant had brought the Application without any delay. He said that there is sufficient cause for allowing the application as the appeal raises triable issues of law and fact and has high chances of success. He alleged that the appeal will be rendered nugatory if the orders sought are not granted and relied on the case of **Selectica Limited Vs Godrock development Limited (2015)** where the court stated that the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so as to safeguard the rights of the Appellant and also that if the appeal is successful it is not rendered nugatory. He reiterated that he would suffer substantial loss if stay is not granted, he said that he is on the verge of being evicted from his land which has been his permanent home from the year 1979. He further stated that he is apprehensive that the Respondent would not be in a position to compensate him should the appeal be successful as he doubted the Respondent's financial capability given that she has no known assets or income. On those grounds he submitted that it is in the interest of justice that the execution be stayed pending determination of the appeal. He relied on the case of **John Mwangi Ndiritu Vs Joseph Ndiritu Wamaitha (2016) eKLR** which was cited with approval the case of **Silverstein Vs Chesoroni 1 KLR 867** to emphasize on the need to prevent substantial loss by preserving status quo as such loss would render the appeal nugatory. There was emphasis that the applicant had brought the application without unreasonable delay as the initial application for stay of execution in the trial court had been filed immediately after delivery of the Judgment. The applicant averred that he is willing to abide by the conditions imposed by the court and that he has a surety who is willing to deposit original title for Land Parcel Evuvore/Nguthi/1935 valued as Kshs. 1,600,000/= which is to act as security. He urged the court to allow the application as he had demonstrated sufficient grounds for grant of the application.

12. The respondent's submissions were filed on 8th June 2021. She reiterated her averments in her response to the application. She then cited the case of **Reliance Bank Ltd (in liquidation) Vs Norlake Investments Ltd _ Civil Appl. No. Nai. 93/02 (UR)**, which outlined the principles that guide the court in determining an application for stay of execution. She disputed that Applicant was the owner of the land as his title had been cancelled by the court and that the suit was Res Judicata. With this, she averred that the appeal had no chance of success.

13. Further the Respondent averred that the Applicant had failed to tender evidence that he will suffer substantial loss and relied on the case of **David Kipkoskei Kimeli V Titus Barmasi {2019}** where the court held, inter alia, that it's important for an applicant to show proof of substantial loss and mere mentioning or alleging of such loss is not sufficient. She further argued that the applicant had delayed in bringing the present application and therefore not deserving of the orders sought. She expressed her concern on the applicant consistent failure to furnish security as ordered by the court and prayed for the application to be dismissed with costs.

ANALYSIS

14. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. The Applicant has filed this application seeking orders of Stay of execution of Judgment pending appeal or status quo to be maintained pending determination of the appeal. The law on Stay of execution pending appeal is provided for in Order 42 Rule 6(2) of Civil Procedure Rules, 2010, which states:

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.

In the case of **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR** the court of appeal stated that

“Thus the Superior Court’s discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

15. The grant of the order for stay pending appeal is discretionary and in discussing the such discretionary power on whether to grant or refuse to grant an order of stay. The Court of Appeal in the case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417**, held that:

1. The power of the court to grant and refuse an application for stay of execution is discretionary, that is discretionary power. To stay execution must however be exercised in such a way as not to prevent an appeal;
2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion;
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings;
4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

16. The court shall seek to establish whether the applicant has established substantial loss for grant of the orders sought.

What is substantial loss was discussed in the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, that:

“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 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.”

17. The Applicant in this case has submitted that he will suffer substantial loss as the suit parcel of land is his permanent home where he has been residing since the year 1979. The Respondent has cited various case laws to the effect that the specific nature of what is substantial loss should merely not be stated but specifically proven and has decried that such proof has not been furnished by the Applicant. The Court agrees with the Respondent as was held by the court of Appeal in the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

18. This has been upheld to be the position as the court needs to balance the interest of the Applicant seeking to preserve the stay of execution pending the determination of the Appeal so as to ensure the Appeal is not rendered nugatory and the interest of the Respondent who has a right to enjoy the fruits of his judgment. The court appreciates that the Judgment of the trial court regarding the suit parcel of land is to the effect that the Applicant is to be evicted from the suit parcel of land upon compliance with the strict provisions of Section 152 of the Land Act. The Respondent acknowledges that the Applicant is currently in occupation of the land and has been in possession of the land for a while. The assertion that the Applicant has been on the land from the year 1979 has not been rebutted. This being the case, if the orders sought are not granted then the Applicant has to vacate the suit land and this is despite him having filed the present appeal urging the court to review the orders in the trial court.

19. **In the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

The court is of the view that in the circumstances, the Applicant having been in possession of the land then he might suffer substantial loss if the orders sought are not granted, hence need to preserve the suit parcel of land.

20. The second issue the court needs to consider is whether the application has been brought without unreasonable delay. It is noted that the Judgment was delivered in 2019. However the appeal has been brought more than a year later after delivery of the Judgment. That notwithstanding, the court appreciates that the Applicant had filed similar applications in the trial court and the first application was filed on 22nd November 2019 while judgment was delivered on 28th October 2019. The Applicant has submitted that he filed three applications in the trial court prior to filing the present application. Being that the law has granted an Applicant leeway to file an application for stay of execution pending appeal in either the lower court or the high court, then the court finds that the application has been brought without undue delay.

21. The last prerequisite for grant of orders for stay of execution pending appeal is the provision of security by the Applicant.

In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

The Applicant has pledged his willingness to deposit the title deed for land parcel Evuvore/Nguthi/1935 with the court as security for due performance of any decree that may be binding on him. To this, he has attached a current search, valuation report and consent of the owner of the land. The Respondent on her part has submitted that the Applicant has demonstrated lack of enthusiasm in complying with the court's conditions regarding furnishing of security and will likely not meet with the conditions set by the court if granted the orders for stay of execution.

22. Though this is not an appeal, the court wishes to comment on the conduct of the Applicant in the trial court where in the two applications, he sought stay of execution which he was granted on condition he pays Kshs. 300,000/= as security, an amount he failed to pay within the stipulated period of time. He then later sought for time to be extended upon which he sought to pay, such time was extended but he still failed to pay up again and instead sought an application to substitute the amount with a surety and place a title deed as security. It seems clear that the applicant is unable to pay the cash amount ordered as security.

23. As alluded in earlier in the analysis the grant of an order as the order sought by the applicant is discretionary.

I think this a deserving case where an order of stay should be granted and the security proposed by the applicant be accepted. It seems clear to me that he is unable to raise the Ksh. 300,000/- cash ordered to be paid as security proposed by the applicant together with the accompanying valuation report are accepted. But that is not enough. The owner of the security has to give a sworn undertaking that a portion of his land can be sold if need be to realize costs should he loose the appeal. If this is not done within the next 60 calendar days, the order of stay granted herein will automatically lapse. Costs of this application should abide the outcome of the entire appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF OCTOBER, 2021.

In the presence of M/s Njenga holding brief for M/s Mukami for respondents and in the absence of Kimathi for applicant/appellant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

25.10.2021