



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC NO. 181 OF 2012

JOYCE MWELU MULANI.....PLAINTIFF

VERSUS

TABITHA NDUKU MULANI.....DEFENDANT

RULING

Introduction

1. In the Application dated 23rd February, 2021, the Defendant has sought for the following orders:

- a) That this Honorable court be pleased to hear the Defendant/ Applicant's application.*
- b) That there be stay of the main suit herein pending hearing and final determination of the appeal.*
- c) That costs be in the cause.*

2. The Application is premised on the grounds that the Plaintiff obtained a Ruling dated 12th February, 2021 as against the Defendant; that the Plaintiff is likely to proceed with the main suit and that the Defendant stands to suffer substantial loss and damage in the event that the appeal succeeds.

3. The Defendant swore an Affidavit in which she deponed that she is dissatisfied with the Ruling of this court and has filed a Notice of Appeal; that there is no stay at the moment and the Plaintiff/ Respondent may proceed with the main suit herein and that if the Plaintiff/ Respondent proceeds with the main suit, she stands to suffer substantial loss and damages as the said land is still in dispute.

4. The Defendant deponed that as a sign of good faith on her side, she shall move the court to have the appeal heard expeditiously and that the Application has been brought promptly, in utmost good faith and in the best interest of justice to all parties concerned.

5. In response, the Plaintiff/Respondent deponed that even though this Honourable court has the powers to stay proceedings pending an appeal, the stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation and thereby denying the litigant the right to seek recourse to the justice which this Honourable court is mandated to protect and serve.

6. It was deponed by the Plaintiff that the Applicant herein is guilty of filing multiple applications in this matter seeking the same and/or similar orders and that the Applicant started filing applications way back on the 9th day of April 2018 seeking for orders of re-opening of her case which culminated to further applications dated 10th June 2019, 26th October 2019 and now the present application dated 23rd February 2021.

7. It was deponed by the Plaintiff that the court has dismissed all the applications with costs; that the court has always striven to finalize this matter substantively; that one of the applications dated the 10th day of June 2019 sought the same orders as the current application herein but the Applicant never even filed the said intended appeal to date and that the only document that the Applicant has filed is a Notice of Appeal dated the 20th day of February 2021.

8. According to the Plaintiff, the Notice of Appeal by itself does not conform to the rules of procedure because it was not served within the timelines stipulated by the law; that the Notice of Appeal does not act as an appeal by itself and that the Applicant has not annexed a filed Memorandum of Appeal.

9. It is the Plaintiff's case that in any event, the stipulated period of filing the appeal being 60 days has already lapsed and that the Applicant has not even sought leave of the appellate court for an extension of time to file any requisite intended appeal out of time. Consequently, it was deponed, there is no appeal filed and even if there was an appeal to be filed, there is no guarantee that the Court of Appeal would admit the appeal to be filed out of time.

10. The Plaintiff deponed that the reasons advanced by the Applicant herein on the suffering of substantial loss are really far from the truth and that the Applicant has not even disclosed to this court that despite the court having preserved the subject suit until the determination of the matter, the Applicant proceeded to dispose of the same through an agreement dated the 28th day of September 2018 to a third party known as Safaricom Investment Co-operative Society Limited.

11. The Plaintiff deponed that he is the one who will suffer substantial loss as the subject property has unlawfully and illegally been transferred to another person; that the continued pendency of this matter without a determination by this Honourable court may further prompt the subject suit to be unlawfully and illegally transferred to other parties; that the Applicant has not deemed it fit to particularize any damages and loss as may be allegedly suffered by her and that it is not just enough to state that one would suffer damages without particularizing the said damages.

Submissions

12. In his submissions, the Defendant's/Applicant's advocate submitted that the right to a fair trial is clearly envisaged under **Article 50** of the Constitution. Counsel relied on the case of **The Management Committee of Makondo Primary School and Another vs Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, where the Supreme Court of Uganda held as follows:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

13. Counsel for the Defendant/Applicant submitted that the Respondent was not accorded an opportunity to defend herself; that further proceedings will prejudice the fair adjudication of the issues hereinabove and that the appeal will be rendered nugatory. It was submitted that the instant application has been brought without delay as required by law. On the issue of substantial loss, counsel relied on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR** in which the Court of Appeal held as follows:

“I should state that substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution. There is an ample judicial authority on this issue but I need not multiply them except to cite the case of Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 where the Court of Appeal 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”

And substantial loss in the sense of Order 42 rule 6 has been described; see the following rendition in a work of Ogola J in Tropical Commodity Suppliers Ltd (Supra) that:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

14. It was submitted that based on the foregoing, it is only fair and equitable that the Plaintiff's Application dated 23rd February 2021 be allowed as prayed.

15. The Plaintiff's advocate submitted that a stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. Counsel relied on the case of **Ezekiel Mule Musembi v H. Young & Company E.A. Limited [2019] eKLR** which considered the case of **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** where Ringera, J stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

16. Counsel submitted that the need for expeditious disposal of a matter is a principle which ought to be considered by this Honourable court; that this court ought to take into consideration that this matter was instituted in the year 2012 and that to date, the court has never rendered a determination on the same. It was submitted that despite the fact that the Defendant herein has the

unfettered right of appeal, which she has sought to exercise, the right ought to be balanced against the right of the Plaintiff to equal treatment in law and to have her case determined without unreasonable delay.

17. On the issue of whether the Defendant will suffer substantial loss, counsel relied on the case of Kalumass Company Limited & Another v Emmanuel Charo Tinga & Another [2016] eKLR where this court stated as follows:

“14. Indeed, the intended appeal based on the grounds that have been raised in the Plaintiff's Application will not be of an academic exercise because those are the same grounds that the Plaintiff may use to challenge the Judgment of this court.

15. In view of the fact that this court has not delivered Judgment in this matter, I do not see the substantial loss that the Plaintiff shall suffer if the Application for stay is not allowed. The Plaintiff has therefore not met the requirement of Order 42 Rule 6 (2) of the Civil Procedure Rules which states that an order of stay of execution can only be made if the court is satisfied that substantial loss may result to the applicant unless the order of stay pending appeal is made.”

18. It was submitted that the Judgment in this matter has not yet been delivered; that as correctly stated by this Honourable court, there shall be no substantial loss to be suffered by the Defendant/Applicant if the stay is not granted and that as matter of fact, the Defendant shall participate in the proceedings hereinafter.

Analysis and finding

19. This suit was commenced by way of a Plaint dated 25th May, 2012. On 13th June, 2012, the Defendant filed her statement of Defence. When the matter came up for hearing on 21st February, 2018, neither the Defendant nor her advocate were in court. The Plaintiff testified on the said date and closed his case on the same day. The court proceeded to close the defence case.

20. The record shows that the Defendant filed an Application dated 9th April, in which she sought to set aside the orders of the court of 21st February, 2018. After hearing the Application *inter partes*, the court dismissed the Defendant's Application on 24th May, 2019. The Defendant then filed an Application dated 26th October, 2019 for the review of the Ruling of 24th May, 2019 which Application was dismissed by this court on 12th February, 2021. After the dismissal of the Application dated 24th May, 2019, the Defendant filed a Notice of Appeal in this court challenging the Ruling of the court. In the meantime, the Defendant has prayed for an order staying the proceedings pending the hearing and determination of the appeal.

21. **Order 42 Rule 6 (1) of the Civil Procedure Rules** allows for a stay of proceedings pending appeal. **Order 42 Rule 6 (2)** provides the circumstances under which the court may grant to the Applicant a stay of proceedings. The said provision 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.”

22. In the case of Mukuma vs. Abuoga (1988) KLR 645, the Court of Appeal stated that the issue of substantial loss is the cornerstone of the jurisdiction of the High Court and the Court of Appeal to grant an order of stay. The court went further to state as follows:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

23. In Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018 the Court of Appeal stated as follows:

“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.”

24. The issue of when an order for stay of proceedings can be granted was discussed in the case of Ezekiel Mule Musembi v H. Young & Company E.A. Limited [2019] eKLR which considered the case of Re Global Tours & Travel Ltd, HCWC No. 43 of 2000 where Ringera, J stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

25. As I have stated above, this suit was filed more than nine (9) years ago. The hearing proceeded in the absence of the Defendant who was duly served with a hearing notice. Indeed, the issue as to whether the court was right or wrong when it declined to review its Ruling in respect to the Defendant's plea of having the *ex parte* proceedings set aside can only be determined by the Court of Appeal.

26. Considering that the issue of whether the *ex parte* proceedings of this court should be set aside will be determined by the Court of Appeal, the Plaintiff will not suffer any substantial loss if this suit proceeds to its logical conclusion. Indeed, even as the Defendant argues its Appeal in the Court of Appeal, there is a need for the expeditious disposal of this old matter. The optimum utilisation of judicial time can only be achieved if the court hears and determines the case, subject to the subsequent decision of the Court of Appeal.

27. That being the case, and in view of the lack of evidence to show the kind of substantial loss that may result unless the order staying proceedings is granted, I decline to allow the Defendant's Application. For those reasons, the Application dated 23rd February, 2021 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 22ND DAY OF OCTOBER, 2021.

O. A. ANGOTE

JUDGE

IN THE PRESENCE OF;

MR. MUSYA FOR THE PLAINTIFF

N/A FOR THE DEFENDANT

COURT ASSISTANT – JOHN OKUMU