



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC APPEAL NO. 6 OF 2018

DAVID RONO.....APPLICANT

VERSUS

CHIRCHIR PAUL KIPSANG (Suing as the personal representative

of the estate of Tabsabei –Deceased).....RESPONDENT

RULING

1. Before me for determination is an Application via a Notice of Motion dated 14th April 2021 brought under the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A,1B and 3A of the Civil Procedure Act, and all other enabling provisions of the law where the Applicant seeks for Orders of stay of execution of the judgement dated the 18th March 2021 and all consequential orders, pending the hearing and determination of the intended Appeal.

2. The Application is supported by the grounds set on its face as well as on the sworn affidavit of David Rono the Applicant herein, sworn on the 14th April 2021.

3. The said Application was opposed vide the Respondent's Replying Affidavit dated the 29th April 2021 in which the Respondent sought for the said Application be dismissed with costs as the Applicant would not suffer any loss or damage if the judgement executed.

4. By the orders of the court of 15th April 2021, the court directed that the disposal of the Application be by way of written submission wherein parties complied.

The Applicant's submissions.

5. The Applicant's submission was that being aggrieved by a judgment delivered by the court, he had lodged a Notice of Appeal dated the 25th March 2021. It is in this respect thereof that he now seeks for stay of execution of the said judgment pending the hearing and determination of the intended Appeal. The Applicant relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules to submit that the said provision of the law empowered both the courts to which the judgment has Appealed from and the Appellate Court, to grant orders of stay in case of Appeal, subject to conditions thereunder.

6. The Applicant further submitted that he was alive to the fact that the power of the court to grant or refuse stay of execution pending Appeal, was discretionary and went further to submit that that discretion should be exercised in such a way as not to prevent an Appeal or render the Appeal nugatory.

7. That they had filed the Notice of Appeal timeously and without due delay and that their Appeal had high chances of success as the court erred in its judgment by failing to appreciate that the allegations of fraud had not been proved to the required standard. Reliance was placed on the decided case in **Stanley Kangethe Kinyanjui vs Ton Ketter & 5 Others (20130 eKLR)**.

8. That it was not in dispute that there was a permanent storied building on the disputed property which in the event that the execution was allowed to proceed, the building was likely to be demolished which in turn would cause him to suffer loss and damage thus compounding the injury. That the issue of substantial loss was the cornerstone of his Appeal and therefore the execution of the judgment would create a state of affair that will irreparably affect or negate the very essential core of the Applicant as the successful party to the Appeal.

9. That it was in the best interest of justice that the property in dispute be preserved as the Appellant exercises his undoubted right of Appeal which was arguable and not frivolous. The Applicant relied on the case of **James Wangaliwa & Another vs Agnes Naliaka Cheseto (2012)**

eKLR.

10. That the Respondent's response to the present application did not form aspects for consideration in that allegations of previous conduct and rulings of the court had been dealt with in their respective province and should not therefor form part of consideration in the grant or refusal of the stay of execution pending Appeal.

11. That the Applicant had demonstrated that he deserved the orders of stay of execution pending Appeal by timeously filing the notice of motion, demonstrating that the Appeal was arguable and not frivolous and lastly by demonstrating that he was likely to suffer substantial loss should the orders not be granted which in turn would render the Appeal nugatory. The Applicant sought for his application to be allowed with the orders as prayed.

The Respondent's submissions.

12. The Respondent, in opposition to the Applicants application also relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules as well as on the decided case in **Elena D. Korir vs Kenyatta University (2014) eKLR** to frame their issues for determination to wit;

- i. Whether substantial loss may result to the Applicant unless the order is made.
- ii. Whether an order of restriction barring registration of any disposition in the suit properties can issue in the circumstance.
- iii. Whether the Applicant has given security for due performance.

13. On the first issue for determination, it was the Respondent's submission that the Applicant had failed to demonstrate that he will suffer substantial loss unless an order for stay of execution is made. Reliance was placed on the case of **James Wangaliwa** (supra) to submit that the Applicant had only stated that he had done extensive developments on the suit land which may be demolished if the Respondent executed the Decree and/or evicted him therefrom thereby occasioning him loss and damage. The Applicant however did not plead and/or demonstrate how he stood to suffer substantial loss vis a vis the prejudice or loss that would be suffered by the Respondent were the execution of the Decree be stayed. The Respondent urged the court to consider the prejudice already visited upon them by the Applicant's refusal to open up a road of access to the suit property in compliance with the court order of 25th September 2013 to allow access to exhausters to empty pit latrines which now posed a health hazard to the occupants of the properties herein. That he had therefore not shown that the loss would be greater than the prejudice or loss that would be suffered by the Respondent.

14. That further it was not sufficient for the Applicant to insinuate that his Appeal had overwhelming chances of success and shall be rendered nugatory were the orders sought not granted, as was held in the case of **Robert Ngaruiya Chutha vs Joseph Chege Ndungu 92014) eKLR**.

15. The Respondent also asked that the court takes cognizance of the fact that pursuant to the orders of the court of 25th September 2013 which led to the conviction and sentence of the Applicant for contempt of court, he never purged the contempt but continued to construct the storied building which he now ironically seeks orders to prevent its demolition.

16. That through the Applicant's own admission that he proceeded to complete the impugned building and admit tenants thereto, in itself constitutes further violation of the court's directions issued on 29th April 2016 during his sentencing. That the Applicant was not deserving of the exercise of this court's discretion owing to his conduct. Reliance was placed on the decided case of **David Wanjohi Kamau & Another vs Jane W Gachiengo (2013) eKLR**. The Respondent further submitted that the Applicant had not come to court with clean hands and was therefore undeserving of the exercise of the discretion of the court.

17. On the second issue for determination, it was the Respondent's submission that the Applicant had not expressed his willingness to furnish proper security for due performance of such Decree or order as may ultimately be binding on him which was a key prerequisites to grant an order of stay of execution pending Appeal as per the provisions of Order 42 Rule 6 of the Civil Procedure Rules. That all the three prerequisite conditions set out in the said provision of the law could not be severed and must be met simultaneously.

18. The Respondent sought for the dismissal of the Applicant's application dated 14th April 2021

Determination.

18. I have considered the Applicant's Application for stay of execution of this court's judgement dated the 18th March 2021 and all consequential orders pending the hearing and determination of his intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.

20. The Applicant contends that he would suffer substantial loss if stay is not granted, because he had constructed a permanent structure on the suit land which was likely to be demolished by the Respondent who had already issued him with an Eviction Notice. That his Appeal had overwhelming chances of success and would be rendered nugatory were the orders for stay of execution not granted.

21. The Respondent on the other hand has contended that the Applicant had not demonstrated that his Appeal had overwhelming chances of success and further that the Applicant had not come to court with clean hands as the building he is bent on preserving was constructed on the suit land in complete defiance of court orders and therefore the court should not exercise its discretion in the Applicant's favour.

22. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as

follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except 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.

23. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which :

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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.

24. I find issues for determination arising therein namely:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this Court should make

25. I have considered the submission of both the Applicant and the Respondent. For the Applicant to succeed in the present application the onus was on him to satisfy the conditions as set down under order 42 Rule 6 of the Civil Procedure Rules. Indeed the purpose of stay of execution is to preserve the substratum of the case. 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”.

26. The Applicant’s contention is that if the stay orders were not granted, he stood to suffer substantial loss in that his permanent building was at a risk of being demolished as well as the fact that he would be evicted. I have considered the Applicant’s submissions vis a vis the Respondent’s submission and find that there is no iota of evidence herein forwarded that suggest that the impugned building is at risk of being demolished or that the Respondent intends to alienate the said suit premises beyond the reach of the Applicant in one way or another.

27. I am also alive to the nature of the orders sought by the Applicant. Stay of execution and or injunctive orders are by their very nature discretionary and equitable. For this Court to grant the Applicant those reliefs, it must be satisfied that the Applicant has come to equity with clean hands in line with the maxim that *‘he who comes to equity must come with clean hands’*.

28. This matter was filed in court on the 13th September 2013, on the 26th September 2013 when the same came before Lady Justice L. Waithaka, she had issued preliminary injunctive orders against the Applicant to which he was directed to cease from carrying out any ‘further construction’ on the suit land. He had also been ordered to open up the road of access leading to the suit land. On the 19th August 2014, the court had been informed of the disobedience of its order by the Applicant and further that he had constructed a gate on the suit land. On the 13th November 2014, the court was again informed of the Applicant’s disregard to it orders to the effect that he had continued to construct on the suit land despite there being an injunction issued by the court, in place. Counsel for the Respondent had then been asked to use the necessary legal process to address this issue.

29. Vide a ruling delivered on the 2nd October 2015, the Applicant was found to be in contempt of the court orders (see **Raeli Tapsabei v David Rono[2015] eKLR**) wherein vide a ruling delivered on the 29th April 2016, he had been fined the sum of Kshs. 750,000/= for being in contempt of court and in default, to serve 3 months in jail. (see **Raeli Tapsabei v David Rono [2016] eKLR**) There were further orders that the building built by the Applicant not to be utilized until the suit was finalized. From the chronology of the events as they happened it is quite clear that the impugned building of which the Applicant now seeks to preserve was constructed on the suit land during the pendency of the suit and in utter disrespect of the orders of the court. These assertions have not been dispelled by the Applicant. Can equity, which is based on fairness, come to the aid of the Applicant? The Applicant’s conduct is prejudicial to the Respondent and renders him undeserving of the orders he seeks.

30. In **John Musyoka Musembi (Suing as the legal representative of the estate of Nashon Musembi Musomba (Deceased) v Henry Muli Kisenga [2015] eKLR)**, it was held:

“...the Appellant does not have clean hands, and therefore is not entitled to the equitable remedy he seeks. Discretionary remedies such as injunctions cannot be used to perpetuate deceit and injustice.”

31. In the case of **Patrick Mukiri Kabundu v Miliki Limited [2016] eKLR**, the Applicant therein had sought *for orders of stay of execution pending the lodging, hearing and determination of an intended Appeal*. The Court of Appeal, even after it had found that the grounds of Appeal therein were not *mundane* or frivolous grounds, and that the intended Appeal was arguable, went ahead and dismissed the said application. The reasoning of the Court of Appeal was that the Applicant had not come to equity with clean hands.

32. In the same breath this court finds that this application, not having been brought with clean hands should fail. The same is accordingly dismissed with costs to the Respondent.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 21ST DAY OF OCTOBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE