



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 77 OF 2004

LOIS HOLDINGS.....PLAINTIFF

VERSUS

NDIWA TAMBOI & 184 OTHERS.....DEFENDANTS

CHESITIA MARKETING CO-OPERATIVE

SOCIETY LTD.....PROPOSED DEFENDANT

RULING

1. Before me is a Notice of Motion dated **13/8/2021**. It was instituted by the Proposed Defendant herein through its Chairperson, one **William Sackton Saikwa**. The Application is brought under **Sections 10 (4) and 39 (2)** of the **High Court (Organization and Administration Act No. 27 of 2015)** and **Rules 16, 17, 18, 19 (1-5)** of the **High Court (OAR) 2016**, **Section 1A, 1B, and 3A** of the **Civil Procedure Act, Cap 21** Laws of Kenya, **Order 42 Rule 6** and **Order 51 of the CPR**.
2. Although the main prayer in the Application is stay of execution of the judgment delivered in this matter in **2014** pending the hearing and determination of an intended appeal from the ruling of this Court which was delivered on **14/7/2021**, it presents a unique situation for the Court. First, I need to set the record straight. The wording of the **prayers 2 and 3** is to the effect that the stay of execution is sought against a judgment delivered by a court different from this one. The prayers are crafted and read, in part, "... **stay of execution of the Judgment delivered by the High Court on 29/9/2014.**"
3. This Court is not sure whether or not the Applicant intended that the orders sought in the instant Application, if granted, should be directed to another matter or court. This is an Environment and Land Court. Even so, from the reading of the totality of Application and submissions thereto, the Application is directed arresting execution in the judgment delivered in this file. As much as the matter was initially filed in the High Court, it ceased to be a High Court one as soon as it was transferred to this Court when the Environment and Land Court was set up in the Station (see the Supreme Court decision case of *Karisa Chengo* i. e. **Republic v Karisa Chengo & 2 Others [2017] eKLR** about the jurisdictions of the superior courts of equal status.
4. Additionally, this Court is neither an Appellate one against its own judgments and rulings when a stay of execution of its order or decree is sought before it nor a separate one by the simple fact that the judge who delivered the judgment is no longer in the Station. Moreover, in **2014**, the judicial officer who delivered the judgment was an ELC judge. Thus, the prayers in the Application could only be directed to this Court. Such errors on simple but clear and easy applications to draft can be avoided if counsel and parties paid attention to their work (of drafting).
5. Having said that, this court takes it that the stay of execution sought is against the judgment that was delivered herein on **29/9/2014**. Therefore, it will proceed to determine the merits of the Application. I hold this view because no other matter was specifically referred to in the phrase impugned or I referred to above.
6. Second, the Application under consideration presents another unique situation because it seeks orders of execution against the judgment which was given on **29/7/2014**. As if the long seven year-period that has elapsed before the stay of execution of the judgment is sought is not puzzling enough, the Applicant depones that its members are residing on the disputed parcel of land since **1990s**. In the earlier Application that sought to set aside the judgment of this Court, the Applicant annexed a Certificate of Incorporation showing that it was incorporated on **21/4/1993**. It also annexed a purchase agreement purported to be made in **1997** between the Plaintiff and they themselves as a registered entity. So, from the Applicant's own words, its members did not obey their orders of this court to vacate the disputed parcel of land after three months as the judgment required.
7. Whereas the Court is under duty to consider as one of the requirements to be satisfied in an application of such a nature, in terms of **Order 42 Rule 6(2)** of the **Civil Procedure**, whether the Applicants would suffer substantial loss, the situation in the instant case makes the Court to wonder aloud whether the legislature and the Rules Committee should not amend the law or rules to cater for such exceptional situations

by considering the substantial loss that a Respondent suffers and not an Applicant only, where a stay of execution pending appeal is sought. This is because of the situation I now explain. In the instant case, the Court gave judgment for the Plaintiff. It then granted a prayer to the Defendants to remain on the land, **LR. No. 5335/2** while pending negotiations for purchase of the land. It is deponed by the proposed Defendants that their members occupy land parcel **LR No. 6416/6** from the early **1990s** but the agreement shows that they attempted to purchase the land on **24/2/1997**. This parcel of land was the one which the Defendants were to vacate within three (3) months of the judgment date. What this presupposes is that **both the Defendants and proposed Defendants' members reside on** the same parcel of land.

8. If what is pleaded by the proposed Defendants is anything to go by, they have been in occupation of the Plaintiff's land since **1990's** and even after the judgment of **29/9/2014** to the Plaintiff's exclusion. The Plaintiff has and continues to suffer loss due to the actions of the Defendants. What should the Court do when faced with such a situations? I sympathize with it but my hands are tied. But as to whether the law should be amended to consider that thought, that is food for thought for another day. As the law is, I will have to consider as one of the requirements to be satisfied, whether the Applicant will suffer substantial loss if stay is not granted.

9. The Proposed Defendant seeks for orders inter alia:-

(1) ...spent

(2) ...spent

(3) **That there be stay of execution of the Judgment delivered by the High Court on 29/9/2014 pending the hearing and determination of this application.**

(4) **That there be stay of execution of the Judgment delivered by the High Court on 29/9/2014 pending the hearing and determination of the intended appeal.**

(5) **That the cost of the application be provided for.**

10. The Applicant moves the Court through one who describes himself as the Chairman of the proposed defendant. He swore an Affidavit on **18/3/2021** and a Supplementary one on **29/9/2021**, in support of the Application. The averments in the affidavits echo the grounds on the face of the Application. To the affidavits were attached **five (5)** Annexures, to the Supporting Affidavit and none to the Supplementary one.

11. The Applicant restates the fact that on **14/7/2021** this Honourable court delivered a ruling by which its Application dated **3/3/2021** was dismissed. The Application dated said **3/3/2021** sought orders for Chesitia Marketing Co-operative Society to be enjoined as a party to this suit and the setting aside of the Judgment delivered on **29/9/2014**, among other orders. Aggrieved by the ruling, the applicant preferred an appeal against it. Before then he seeks this court to issue an order of stay of execution of its judgment dated **29/9/2014**.

12. The Applicant's contention, as asserted in the Affidavits, is that the members of the proposed defendant are occupants of the suit property; that if stay is not granted, the Plaintiff may execute the judgment any time against its members who have lived on the suit land since the **1990's**; that the proposed defendant intends to appeal against the ruling; and that they have an arguable appeal which will be rendered nugatory if stay is not granted and that the application has been brought without undue delay.

13. The application is opposed. The Respondent, through its Director, one **Lois Nyegera Kimbui**, swore a Replying Affidavit dated **14/9/2021**. His response is that the Court found that the applicant failed to pay full consideration of the purchase price despite being in occupation of the land; that the applicants were given an opportunity to be enjoined as a party to the suit but squandered that chance; that no substantial loss can be suffered by the members of the Applicant if they are evicted from the suit land; that the applicant has not offered any security for the loss to be suffered by the applicant for the continued non-user of land; that the Memorandum of Appeal does not raise any arguable grounds and that the Respondent is entitled to justice just like the applicant. He prays that the application be dismissed.

14. In a quick rejoinder, the Applicant filed a Supplementary Affidavit dated **29/9/2021**. His response is that the members of the Applicant stay on the suit land having paid a deposit of the purchase price and with the consent of the Respondent as they negotiate on payment of the remaining balance; that the members of the Applicant will suffer substantial loss if they are evicted from the suit land which they have been in occupation since **1990's** where they have known as their only home therefore the application will be rendered nugatory if the orders for stay are not granted at this juncture and that in respect to the issue of security of costs, the court has the discretion to decide whether or not to grant the stay orders without security of costs but pray that if the court is inclined to issue an order for payment of security of costs, the same should be reasonable in the circumstances.

15. This honourable court issued directions requiring the application to be canvassed by way of written submissions. These were filed by the parties, with the Applicant doing so on **4/10/2021** and the Respondents did likewise the same day.

Analysis, Issues and Determination

16. I have considered the application, the affidavits both in support of the application and in opposition, the submissions filed as well as the authorities cited.

17. The main issue for determination is:

(a) ***Should the court grant stay of execution of the judgment dated 29/9/2021 pending appeal?***

18. In determining the issue, this court is guided by **Order 42 Rule 6** of the **Civil Procedure Rules** which sets out the principles that should

be considered in deciding whether or not to grant stay of execution pending appeal. The guiding principle under the Rules is that the fact that a party has preferred an appeal from an order or decree of the Court is not a guarantee that stay of execution or proceedings shall be granted. It is not a matter of course or right as many parties tend to believe. There is a higher standard to reach, especially where a party has earned a judgment through a proper and full trial of a suit. For that reason, the Civil Procedure Rules give certain conditions to be fulfilled by a successful applicant.

19. The conditions to be met before such a stay is granted are basically three. They are provided for by the **Rule 6 (2)** of the **Civil Procedure Rules**. The sub-rule stipulates as follows:

“No order of 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 applicant 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.”

20. **Sub-rule 1** that is referred to in the above Sub-rule is the one that introduces the idea of a party who has preferred an appeal from an order or decree seeking a stay of execution by virtue of the fact that he has decided to appeal. By the said Sub-rule, the party may move the court that issued the order or decree to stay execution thereof or ask the court appealed has been made to consider granting stay of execution. Thereupon, the Sub-rule that gives conditions to be considered in case an application of that nature is made then sets in. That is **Order 42 Rule 6(2)**.

21. The said **Sub-rule 1** read in-depth refers to an Application for stay of execution of an Order or Decree that has is to be executed. Is this the kind of order which was issued on **14/7/2021**? The simple and straight answer is NO. On that date the Court dismissed an Application that sought to set aside the judgment of this court delivered in **2014** and leave to enjoin the Applicant. Then, the Applicant preferred an appeal therefrom. An order of such a nature is one among those orders which as not capable of execution. It is a negative order of the court. Such orders do not form a basis for applications for stay of execution. Thereafter, the Applicant sought an order for stay of execution of the judgment which he sought to set aside. But I wish to point out that the proper prayer in the said Application dated **03/3/2021** which should have been sought first for determination before the Court was “for leave to be enjoined as a defendant” and nothing more, and my brother judge was right in his finding on it. But since that Application was determined by my brother judge, it is water under the bridge.

22. The appeal or intended appeal is not against the judgment delivered on **29/9/2014** but against an order that left the judgment intact. This Court is of the view that the instant Application is one of those merry-go-round ‘seats’ used by players to complete circular movements in such games. The Court shall not mount onto such a seat.

23. The discretion of the court to grant orders for stay of execution in such circumstances in not as wide as in other circumstances. It is fettered. Thus, in summary, under **Order 42 Rule 6 (2)**, the court will have to consider four issues, namely:

(i) Establishment of sufficient cause;

(ii) Demonstration of substantial loss;

(iii) Furnishing of security;

(iv) Making of Application without unreasonable delay.

24. In **RWW -Vs- EKW [2019] eKLR**, the Court addressed its mind to the purpose of an order for stay of execution pending appeal. In so doing, it 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.”

9. 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.”

25. The entry point in determining whether or not this application succeeds is to consider whether it has been brought without undue delay. From the record, considering that the Application was filed on 13th August, 2021 only one (1) month after this Court issued the orders sought to be appealed from on **14th July, 2021**, the period of a month is not inordinate delay, as was submitted by both the Applicants and the Respondents. But if it would be considered that the Application is against execution of a judgment which was issued on **29/9/2014**, seven years is immense and unreasonable delay.

26. The Court then needs to determine whether the Applicant has established that it will suffer substantial loss if stay of execution of its judgment is not granted. What amounts to substantial loss was explained in the case of **Century Oil Trading Company Ltd -vs- Kenya Shell Ltd Nairobi (Milimani) HCMCA No. 156 of 2007**, Kimaru J observed as follows: -

“The word “substantial” cannot mean the ordinary loss to which every Judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to all and different from that which is ordinary. Where execution of a monetary decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his Judgment.”

27. In another decision, substantial loss was described as follows: ***“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.”*** This is in the persuasive authority of ***James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR.***

28. On substantial loss and on the considering whether the applicant has satisfied the requirement that he has an arguable appeal, the Appellant submits that it will suffer substantial loss if the execution process is not stayed and that the intended appeal shall be rendered nugatory if it succeeds. The nature of the loss is that its members are likely to be evicted from the suit land which they have been occupying since 1990's and have known the suit land as their only home. It further submits that the object of the orders for stay is for the preservation of the suit land pending hearing and determination of the appeal.

29. The respondent on the other hand submits that the applicant cannot aver that they will suffer substantial loss because they were given a chance to be enjoined but chose not to participate in the suit; that the respondent has been kept out of the land for **21 years** and the applicants were unable to buy therefore do not have any justification to be on the land and cannot suffer loss if the orders of stay are not granted.

30. This court is called upon to balance the interests of both the applicant and the respondent while determining whether or not to grant the stay orders. In so doing, the court is under the duty to determine whether execution has taken off or not. And even where it has been commenced or is already completed, that does not result to any substantial loss if compensation is possible since the execution itself is a lawful process. It is clear herein that execution was about to commence and when it could not be effected the Respondents set in motion the process of moving the Court for orders of eviction. This was arrested by the filing of the instant Application. The applicants are still residing on the land.

31. The applicants state in the supplementary affidavit that they are negotiating some terms of payment of the last payment with the respondent. Having been in occupation of the land up to now, they believe that eviction will result in substantial loss. But any parties that are on the parcel of land to the exclusion of the successful party in the suit, are only there by virtue of permission by the court through its judgment sought to be impugned earlier herein. How about the loss that the successful party in the judgment is experiencing by being denied occupation of the land all the years since the time of judgment, and for the period the Appeal and any other processes may take? The Plaintiff will suffer more than the Applicants. The court is alive to the fact that the law regarding considering the “substantial loss” an Applicant may suffer in the event an application for stay of execution pending appeal is not granted does not call for balancing as to which of the parties will suffer more loss than the other. It will not do so. However, it has been cajoled to wonder whether it should not ask itself how much prejudice a Respondent would suffer where an Applicant challenges a seeks to stay execution of a seven-year old judgment. But it shies off from using this as a yard stick to determine this requirement for in so doing it would be against the law.

32. This court being a court of law it is of the view that, balancing the competing arguments and interests the parties, the Applicants will not suffer so much substantial loss that cannot be compensated by way of damages if the execution of the judgment of the court is not stayed. Eviction from a parcel of land is not substantial loss. But in the interest of justice, the loss though not so substantial that the Applicants have demonstrated they will suffer is sufficient to convince the court to order otherwise.

33. In regard to the requirement of security of costs, the applicants have deponed in the Supporting Affidavit that they are ready to furnish security for the due performance of the decree as directed by the court. They, however, became argumentative in **paragraphs 7, 8, 9** and **10** of their Supplementary Affidavit regarding the issue. In short, they failed to demonstrate to the Court that they are willing to furnish security even though they averred paragraph 10 that the security if so directed by the court ought to be reasonable and manageable. The Respondents on the other hand submitted that in the unlikely event that the Court were to order that security be given, then a sum of **Kshs. 5,000,000/=** should be deposited in a joint interest earning account within **14 days** of the Order of the Court.

34. In **Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another (2018) eKLR** the court stated that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”

35. In the instant case, the applicant has demonstrated the willingness to do so. The respondents seem to agree to this scenario. This Court is enjoined to take into account the interests of all parties, the special circumstances of the case and the fact that litigation ought to be speeded upon. Justice delayed is justice denied. For that reason, if the Court is to exercise its discretion in favour of the Applicant, it must also have regard to the fact that a party should not be granted opportunity to abuse its process by lying comfortable for reason of favourable discretion. Thus, the Court is not bound to agree with the submissions of either counsel on the amount to be furnished as security. Therefore, bearing in mind that the decree sought to be stayed has been in existence for over seven years, and the land in dispute is vast, and that the Applicants are the ones who, by evidence from their Application, are in occupation thereon and therefore using it to the exclusion of the Respondents, and the Court is convinced that the loss that the Applicants will suffer is not substantial as such, the Court exercises its discretion to grant a

conditional order of stay on the terms that the applicant to deposit their sum of Kenya Shillings Ten Million **Kshs. 10,000,000/=** in a joint deposit account to be opened in the names of counsel for the parties herein within the next **twenty (21) days** from the date of this ruling. At the same time, the Record of Appeal should be prepared, filed (in the Court of Appeal Registry) and served on the respective parties within the said **Sixty (60) days** and an Affidavit of Service thereof filed in this Court. Failure to observe any one or both of the conditions, or the second one irrespective of whether the first one had been complied with, the orders (of stay pending appeal) shall lapse automatically and the Respondents will be at liberty to move the Court on their Application for eviction.

36. In conclusion, for the reasons given in **paragraph 22** above the Application dated **13/8/2021** should have been denied and therefore dismissed but balancing all interests of justice it is hereby allowed on condition of satisfaction of the two conditions set out in **Paragraph 35** above.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 21st day of October, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.