



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 114 OF 2013

MIRIAM KUBAI.....PLAINTIFF/RESPONDENT

VERSUS

MARGARET NEKESA MOSES.....1ST DEFENDANT/APPLICANT

PHILIP WACHILONGA.....2ND DEFENDANT/APPLICANT

CHRISTINE WANJALA WABOMBA.....3RD DEFENDANT/APPLICANT

RULING

The Application

1. The Applicants sought stay of execution of the judgment in this matter via a Notice of Motion dated **19/7/2021**. The Motion was brought under **Section 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act, Order 40 Rules 1, 3, 4 and 10** of the **Civil Procedure Rules**. However, the relevant provision of the law applicable is **Order 42 Rule 6 (2) of the Civil Procedure Rules**. The applicants sought for orders as follows:-

a) ...spent

b) ...spent

c) THAT at the *inter partes* hearing hereof the orders granted in prayer (b) above do operate as a stay of execution till the appeal to the court of appeal is heard and determined

d) THAT costs of this Application be provided for.

2. The Honourable Court dismissed an application which was filed by the **2nd** and **3rd** Applicants herein who are also the applicants in the instant application. The ruling that dismissed the Application was delivered on **29/6/2021**. Being dissatisfied with the ruling, the applicants preferred an appeal against it. They sought an order for stay of execution this court's decree pending hearing and determination of this application *inter partes* and the intended appeal.

3. The Application is based on the grounds that the Applicants have lodged a Notice of appeal in this court; they were not accorded an opportunity to be heard when the Court closed their case without their knowledge and/or consent, and without taking their evidence; they were condemned to pay costs without being heard; if the Respondent proceeds to obtain costs from them (applicants) the appeal shall be rendered nugatory hence need for stay; and that they have an arguable appeal.

4. The application is supported by an affidavit sworn by **Philip Wachilonga** - the **2nd Applicant** on the **19/7/2021** on his behalf and on behalf of the **3rd Applicant**. The affidavit largely echoes the contents of the grounds in support of the application.

5. The application is opposed. The Respondent filed a Replying Affidavit that she swore on the **30/7/2021**. Her response is that the application is fatally defective, incompetent, untenable and devoid of merit and should be dismissed; the application does not satisfy the conditions for granting stay of execution pending appeal as no security has been offered or produced for by the applicants and that no substantial loss has been demonstrated by the applicants; the respondent has executed the judgment and got the suit land in possession and title documents; the defendants were represented by counsel at trial who closed their case without calling witnesses; the applicant has not attached a memorandum of appeal to indicate the seriousness on pursuing the intended appeal; the dismissal of the review was well founded

on evidence adduced before the Honourable judge; the applicants' intention is to protract this matter unnecessarily by preventing the respondents from recovering her costs in the concluded suit and that there is no pending suit to be re-opened/set aside on review as the respondent has executed the decree and is only pursuing costs.

Submissions

6. Parties filed their submissions as directed by the court. The Applicants filed on the **29/09/2021** while the Respondent filed on **30/09/2021**.

Determination

7. The Court has carefully read through the Application, the affidavits in support and in opposition, the submissions thereto and the case law relied on. I find that the only issue for determination is: **Whether the Applicants have satisfied the requirements for grant of an order for stay of execution pending appeal.**

8. I stated at the outset that the Applicants brought the Application under other provisions other than the relevant ones. It is not wise, learned and open for litigants to lump provisions of law in a manner as make a 'cocktail' of such, thereby leaving the Court to look for the right ones in order to relate them to the facts and arrive at the right decision. Actually, it is upon the parties to state their case properly so that the Court makes a finding. For instance, the Applicants in this matter ought to have made up their mind stated their case succinctly about what they need (the **Issue** - by asking themselves, "what are the issues that I have?") the laid down the provisions that support their issues (**Rule** - by asking, "what are the provisions of law that relate to my issues?") and the (relevant) facts of their case that apply to the rule (**Application** - by asking, "how does my case/facts that I have apply to the law?") and then give their proposed result (**Conclusion** - by answering, "what do I make of the above three steps and hence the Court should do/give?"). This simple method of using the Issue, Rule, Application and Conclusion (**IRAC**) is what was taught in law schools at the elementary level of understanding the law. To show how the Applicants did the opposite, this court notes that a number of provisions which I call a 'cocktail' were 'paraded' to the Court at the heading of the Application. Thereafter, was no analysis of how each were applicable/ "helpful" to the instant Application. The Applicants submitted only on **Order 42 Rule 6** of the **Civil Procedure Rules**. What then was the need of all the provisions cited in the Application? A scarecrow to scare the other side? So, it was left upon the Court to pick each one, analyse it and find its relevance. Had the method proposed above been applied, counsel should have noticed that most of the provisions he cited were either irrelevant or unhelpful and could have left them out.

9. Be that as it may, the grounds for the grant of an order for stay of execution pending appeal are to be found in **Order 42 Rule 6(2)**. The provision states 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.

10. This provision gives three requirements to be satisfied by an Applicant in order to be granted an Order for stay of execution. They are that the Applicant ought to show that he:-

(i) is likely to suffer substantial loss

(ii) has moved the court without undue delay

(iii) is ready to furnish security.

11. However, under **Rule 6(1)** the Court may for sufficient cause order a stay of execution of a decree or order appealed from. **Sufficient cause** has been explained to mean bona fide and more than inaction on the part of a party. In **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others** the Court of Appeal in Tanzania expressed itself to the effect that there is difficulty in bringing out the clear meaning of the phrase "sufficient cause". However, in **Parimal v. Veena, (2011) 3 SCC 545**, the Supreme Court of India observed that:-

"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".

This imports the idea of good faith, honesty, blamelessness and diligence in action.

12. In the case of **Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR** the Court of Appeal has held 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.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:

“In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

13. The Court has the discretion to order for stay of execution; however, the same has to be exercised judiciously.

14. This court is alive to the intention and purpose of stay of execution pending appeal being to preserve the subject matter. I agree with the decision of the court in **RWW vs EKW (2019) eKLR** which held that:-

“.....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.”

15. The court is also clear, in its mind, of its role to balance the interests of both the successful party in litigation so as not to unnecessarily bar the party from enjoying the fruits of judgment and that of the appellant whose appeal may succeed and be rendered nugatory if stay of execution pending appeal is not granted.

16. I note that the appellant has lodged in this court a Notice of Appeal dated **8/7/2021** on **23/7/2021**. It is annexed to the Application. That notwithstanding, this court is called upon to determine whether the applicant has satisfied the conditions to be satisfied as set out by **Order 42 Rule 6** of the **Civil Procedure Rules**. This is because the provision is clear in **6(1)** that no *“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...”* In order for the Court to make an order of stay of execution, it has then to consider whether or not the Applicants have met the requirements for the grant of such an Order.

17. Although the application has been filed timeously, given that the Application was filed only after **three weeks** of the determination sought to be appealed from, the applicants have not explained the nature of substantial loss they will suffer in the event that stay of execution pending appeal is not granted. He who alleges must prove. The applicants have not proved the substantial loss they will suffer at all. This court cannot work on assumptions.

18. Further, the applicants have not demonstrated that they are ready to furnish any security as the other saving requirement to be satisfied under **Order 42 Rule 6**.

19. The upshot is that the application dated **19/7/2021** is devoid of merit and is hereby dismissed with costs to the Respondent.

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.