



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. E071 OF 2021

BETWEEN

ILULWE DEVELOPMENT LIMITED.....APPLICANT/APPELLANT

-VERSUS-

JUDITH ACHIENG OMONDI.....RESPONDENT

RULING

1. The application that I am tasked with determining is a Motion, dated 14/09/2021. It seeks stay of execution of the judgement passed in the Principal Magistrate's Court Civil Suit No. 2159 of 2019, pending hearing and determination of the instant appeal.
2. The appellant swore an affidavit on 14/09/2021, where they state that they were aggrieved by the said judgement and any decree arising therefrom on several grounds. One, that no suit could be brought upon a contract for disposition of an interest in land, unless the contract on which the suit was founded was in writing and was signed by all the parties thereto. Secondly, that the decision made not only entertained a non-starter suit but proceeded to grant reliefs in a manner contrary to the express provisions of the law, thus precipitating a gross miscarriage of justice. Thirdly decision was an error in law and fact by failing to find that the original bargain between parties was rendered obsolete, overtaken by events, impossible to complete and/or frustrated at law. Fourthly that the court erred in law and fact by failing to find that upon the Appellant's refund of the deposit paid by the Respondent any claim the Respondent might have had against the Appellant thereby stood extinguished and the parties discharged from the respective obligations. Fifthly that the preceding error of law was further compounded when the court relied on a valuation report that was of no probative value, given that it was a valuation report in respect of a different development, located in a different location, and of a different value, and was totally inappropriate for purposes of assessing the purported claim for loss of bargain.
3. The sixth ground was that the court erred by finding that the Respondent was entitled to valuation fees – as the said valuation report was not fit for purpose and had no probative value. Lastly that the court misapprehended both the facts and the applicable law in the matter, disregarded submissions and relevant authorities and as a result arrived at a decision that was contrary to both the evidence and the law.
4. The respondent swore an affidavit, on 6/10/2021, in reply. She asserts that the application of the appellant should be dismissed for the following reasons; one that the application is meant to prevent the Respondent, the judgement creditor from reaping the fruits of justice awarded by the Honorable Court. Two, that the application contravenes the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Thirdly that the application does not demonstrate sufficient cause as required under Order 42 Rule 6 of the Civil Procedure Rules, 2010. Fourthly, that the Applicant has failed to demonstrate what irredeemable damage and loss they stand to suffer. She avers that she has come a long way in pursuing her claim since 2016 to 2021. She contends that she is a person of means and she is capable of refunding the decretal sum should the appeal succeed. She avers further that she stands to suffer gravely if she is not allowed to enjoy the fruits of her judgment immediately as filing of the Appeal offends the provision of Order 42 Rule 6(2). She further states that in the interest of justice the application dated 14/09/2021 should be dismissed.
5. Directions were taken on the 7/10/2021 when the Appellant made an oral application for grant of interim orders for prayer 2. The Appellant stated that they are willing to provide security since they believe when money is paid out to the Respondent it will be difficult for the Appellant to recover it.
6. The Respondent on her part opposed the application and the granting of interim Orders especially prayer 2. The Respondent stated that she is a person of means and the decretal sum is money that can be repaid incase the Appeal succeeded. Further the Respondent asked the Court not to be concerned with the merit of Appeal. She stated that having perused the Appellant's application it does not disclose any substantial loss that may arise.
7. In my opinion there is really only one issue for determination, and that is whether the order of stay of execution should be granted.
8. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which

states as follows:

“(1) 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 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.

9. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in:

Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye vs. African Virtual University [2015] eKLR*.

10. In *Butt vs. Rent Restriction Tribunal [1979]*, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge’s discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

11. As to what substantial loss is, it was observed in *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.”

12. In the instant case it is the appellant’s case that it is in the greater interest of justice that the said judgement be stayed noting that the Honorable Magistrate or the Court made a finding on the basis of legal and factual errors. Further that if the orders sought are not granted, the Applicant herein stands to suffer irreparable damage and loss as the plaintiff might proceed and execute. The Applicant also states that it is important to stay execution pending the hearing and determination of the said Appeal so as to ensure that the said Appeal is not rendered nugatory and also to prevent the Applicant incurring substantial loss. The Respondent on her part states that she stands to suffer gravely if she is not allowed to enjoy the fruits of her judgment immediately. At the same time the Respondent confirmed that they are ready execute the order as awarded by the court with immediate effect.

13. The court, in *RWW vs. EKW [2019] eKLR*, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.

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.”

14. The court is called upon to look at the interests of both parties. Despite stating that she will suffer gravely, the respondent has not shown this in any of the documents filed. The appellant, on their part, state that the execution of the decree will make the appeal to be rendered nugatory and they are willing and able to provide such security as would be fair and just.

15. With regard to security for costs, the court in *Absalom Dova vs. Tarbo Transporters [2013] eKLR*, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

16. In *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] KLR, it was said:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

17. While in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, it was 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 for stay.”

18. In *RWW vs. EKW (supra)*, the court said.

“The other condition for granting stay orders is on the security to be offered. The law is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. I am however of the considered view that in the circumstances of this cause and it being a matrimonial cause, the court can grant stay of execution of its orders without demanding that the Applicant furnish the Court with security for the due performance of the orders. As to whether the application was made without, unreasonable delay, I find in the affirmative.”

19. From the cases referred to above , it is clear that the issue of security is discretionary and it is upon the court to determine the same. To direct in all cases of money-decrees that the decree amount should be deposited in Court before stay, pending appeal, is ordered, is to defeat the very purpose for which Order 42, Rule 6 is intended, though in suitable cases nothing comes in the way of laying down such a condition.

20. The circumstances in which an application for stay of execution has been prayed for has been referred to already and I think sufficient cause has been shown for ordering execution to be stayed pending disposal of the appeal.

21. On security being furnished, the appellant has to deposit *the principal amount as ordered in the judgement and decree dated 29/09/2021 in an interest earning account in a financial institution of repute to be held in the joint names of counsel for both parties within 60 days from the date of this ruling.*

22. In the upshot, I find that the application, dated 14/09/2021, is meritorious, and I hereby allow prayer 2 of the application with no orders as to costs. Let the Deputy Registrar call for the original trial record from the lower court, to pave way for directions on the disposal of the appeal.

DELIVERED, DATED AND SIGNED THROUGH VIRTUAL COURT AT MILIMANI, NAIROBI THIS 13TH DAY OF OCTOBER 2021

.....

MOGENI J.

JUDGE

In the presence of

.....Applicant/Plaintiff

.....Respondent

Vincent Owuor CA