



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CIVIL CASE NO. 129 OF 2013

JOSEPH RAJULA LUNANI.....PLAINTIFF/APPLICANT

= VERSUS =

DONALD OYATSI.....DEFENDANT/RESPONDENT

R U L I N G

1. The Applicant brought this application dated 30/3/2021 and under provision of section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 42 Rule 6, Order 51 of the Civil Procedure Rules, 2010, Article 159 of the Constitution and under the High Court Vacation Rules section 3 (2) seeking to be granted orders THAT:

a) Spent

b) This Honourable Court do hereby order for stay of execution and enforcement of the decree herein pending hearing and determination of the Court of Appeal Civil Appeal No. 12 of 2021 at Kisumu Court of Appeal;

c) The Honourable Court do hereby order stay of execution of taxed bill of costs in the ruling delivered on the 3rd March, 2021 by this Honourable Court pending the hearing and determination of the Court of Appeal Civil Appeal No. 12 of 2021 at Kisumu Court;

d) The costs of this application be provided for.

2. The Application was supported by the affidavit of JOSEPH RAJULA LUNANI dated 30th March, 2021 and on the following grounds;

a) That, the judgement herein was delivered on the 17th of March, 2020;

b) That, the plaintiff/applicant has filed an appeal against the entire decision of this Honourable Court;

c) That, the applicant has already filed record of appeal and are waiting directions from the Court of Appeal;

d) That, the respondent/decree holder have taxed the bill of costs and ruling was delivered on 3rd March, 2021 and are in the process of execution;

e) That, the Applicant shall suffer substantial loss unless stay is granted;

f) That, the Applicant has filed this application without unreasonable delay;

g) That, the applicant's appeal is merited;

h) That, the Respondent is not bound to suffer any prejudice if the orders are granted;

i) That, it is in the interest of justice that the prayers sought in the application are granted.

3. The Respondent filed his replying affidavit on the 15th of April, 2021 where he stated that neither he nor his advocates had been served with any Notice of Appeal or the Memorandum of Appeal. That the judgement and decree delivered by the trial court had no positive order

requiring him to do something or refraining him from doing something. He stated further that the application did not disclose the loss that the Applicant was bound to suffer unless the stay was granted. He urged the Court to dismiss the application with costs.

4. The Applicant filed a Further Affidavit on the 31st May, 2021 where he stated that his advocates filed and served the Notice of Appeal upon Manwari & Co. Advocates who previously received correspondences on behalf of the Respondent's advocate. He stated further that the record of appeal was electronically filed and served to the Respondent's advocates.

5. The Respondent replied to the Applicant's further affidavit on the 11th June, 2021 admitting that although the Notice of Appeal and the Memorandum or Appeal were served upon them, the service was done on the 14th of December.

6. The parties agreed to canvass the application by way of written submissions. The Applicant's submissions were filed on the 31st of May, 2021 stating that the judgement in the trial Court was electronically delivered on the 17th of September, 2020 and a notice of appeal was filed on the 28th of September, 2020. That service was properly effected upon the Respondent. He stated further that he is in possession of the suit land and he not only lives on it but is also farming it and that without the stay of execution he shall be rendered homeless and the farming already applied shall go to waste. He relied on the following cases: **Victory Construction vs. BM (a minor suing through the next friend one PMM) 2019 eKLR, Mayfair Insurance Company Limited vs Globe Developments Limited (2021) eKLR, John Gachanje Mundia vs. Francis Muriira alias Francis Muthika & Another (2016) eKLR and Century Trading Company Limited vs. Kenya Shell Limited Nairobi HCMCA No. 15611 of 2007 (unreported).**

7. The Respondent through his submissions filed on the 16th of June, 2021 submitted that the Applicant has not complied with the provisions of Rule 77 requiring service of the Notice of Appeal within 7 days from the date of filing the Notice. That failure to serve the Notice and the Memorandum of Appeal on time renders the Appeal incompetent and subject to dismissal. That failure to serve the Notice of Appeal of is not a mere technical lapse that can be cured by the fact of filing the appeal. The Respondent submitted further that a dismissal order cannot be stayed as the Applicant's suit was dismissed with costs in the trial court. Ultimately the Respondent urged this Court to dismiss the Application as the Applicant has not described in his affidavits what loss he is bound to suffer if the stay is not granted. The Respondent relied on the cited cases inter alia: **Republic vs Retirement Benefits Appeals Tribunal ex-parte Heritage A.I.I Insurance Company Limited Retirements Benefits Scheme (2017) eKLR.** In that case, G. V. Odunga, J., replying various Court of Appeal decisions as detailed in his judgments held *inter-alia* that:

1. A dismissal order being a negative order is not capable of execution and consequently cannot be stayed.

2. An applicant for stay of execution should demonstrate the damages he would suffer if an order of stay is not granted, since refusal to grant the order simply means that the applicant stays in the position he was in before coming to Court and therefore the issue of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise.

8. Before determining whether or not to grant stay, this Court has to determine whether the order issued in the High Court is a negative order incapable of being stayed. The Applicant's suit in the trial court was dismissed but the Respondent's counterclaim was allowed in terms of prayers (a), (b), (c), (e), (f) and (g) of the Counterclaim.

9. In **Milcah Jeruto T/A Milcah Faith Enterprises v Fina Bank Limited & Another (2013) eKLR** the court relying on the decision of **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No. NAI 79 Of 2007 (unreported)** cited in the **Civil Application No NAI 219 of 2007 (134/2007 UR) Sonalux Limited & Another vs Barclays Bank of Kenya Limited & others (unreported)** where the Court of Appeal had this to say: -

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

The court further observed as follows:

“To further emphasize the point in the Re Sonalux case, the Court of Appeal stated that in the matter that was before it, Kasango J in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money.”

10. For an order to be negative, none of the parties should have any orders to do or abstain from doing anything. In this case however the counterclaim was allowed and the following orders issued:

a) Possession of the property known as Marachi/Elukhari/2611.

b) A declaration that the title deed or certificate if title issued to the Defendant in the Counterclaim for the ownership of property known as Marachi/Elukhari/2611 is null and void;

c) A mandatory injunction commanding or compelling the Land Registrar to cancel the registration of the Defendant in the counterclaim as the owner of the property known as Marachi/Elukhari/2611 in the land register of the Property;

d) A mandatory injunction to compel the Defendant in the Counterclaim to forthwith handover vacant possession of the property known as Marachi/Elukhari/2611 to the Plaintiff; and

e) An injunction to restrain the Defendant in the Counterclaim by himself his servants or agents howsoever from remaining on or continuing in occupation or entering the said property known as Marachi/Elukhari/2611.

11. The aforementioned orders make the orders issued by the Court positive orders capable of execution unless stay orders are issued.

12. The other issue raised by the Respondent is that the failure to serve the Notice of Appeal and Memorandum of Appeal within the duration specified in the law hence rendering the appeal nugatory. The jurisdiction to strike out a Notice of Appeal, Memorandum of Appeal and a Record of Appeal lie with the Court where the appeal has been preferred and in this case, the Court of Appeal. The argument for incompetence of the appeal on the basis of non-service or late service can be fronted before the Court of Appeal. This court lacks jurisdiction to refuse the stay orders based on this ground.

13. With regard to whether stay of execution should be granted or not, the Civil Procedure Rules 2010 at Order 42 Rule 6 (2) provides the guidelines for Courts to i.e. follow:

- a) **That substantial loss may result unless the order is made;**
- b) **That the application has been made without unreasonable delay;**
- c) **Willing to provide such security as the court may order for the due performance of such decree.**

14. The Applicant has stated that if stay of execution is not granted, he will lose his home and he will incur losses for his farming. Losing a home besides having sentimental value attendant to it also attracts economic loss comprised in the value of the structures and farm produce if any. Secondly, the Trial Court ordered the cancellation of the transfer of Title in respect of the Suit Property to the Applicant and have the same registered in the Respondent's name. In the event that the Applicant's appeal succeeds it will be another process to have the title transferred back to the Applicant. These are facts gleaned from the record and need not be repeated through an affidavit.

15. In the case of **Peter Maina Maingi vs Lucy Kagure Wanjohi [2011] eKLR** the court held that alteration of a title that had moved to a third party would be cumbersome so as to amount to substantial loss and proceeded to grant an order for a stay. Also in on the account of cancellation of title ordered, I find that the Applicant has proved that there is substantial loss to be suffered in the event that the execution proceeds.

16. Security is a fundamental tenet to the grant of stay of execution. The Respondent's bill of cost was taxed at Kshs.253, 235/-. The Applicant has not sworn in his affidavit or mentioned in his statement the security is will be providing for the stay of execution. There was no formal security offered by the Applicant. However, there is evidence that party and party costs have been taxed. This court in exercising its discretionary powers on the issue of security hereby makes an order that the taxed costs shall be deposit as security for the due performance of the partial decree. I rely on the provisions of order 42 and on the decision of **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.”

17. In conclusion, I hold that the Applicant has fulfilled the conditions for stay and as such the application is allowed on terms that:

- a) **Stay of execution of the decree pending appeal is granted;**
- b) **The Applicant shall deposit the amount of taxed costs of Kshs.253,235/- into an account opened in the joint names of the advocates on record or into Court within 90 days from the date of this ruling to be held pending hearing and determination of the said appeal;**
- c) **In default of (b) above, the execution on costs shall proceed and amounts realized deposited into the Court account; and**
- d) **The costs of this application to abide the winner in the appeal.**

DATED, SIGNED & DELIVERED AT BUSIA THIS 13TH DAY OF OCTOBER, 2021.

A. OMOLLO

JUDGE