



REPUBLIC OF KENYA

IN THE ELC COURT

AT MOMBASA

ELC. CIVIL APPEAL NO. 11 OF 2021

MADIHA ALWY KHALIFA.....APPELLANT/APPLICANT

VERSUS

SALIM YUSUF MWACHUNDU.....RESPONDENT

RULING

1. Before the Hon. Court is the notice of motion application dated 6th April 2021 filed on 8th April, 2021 by the Appellant/Applicant. On 14th November, 2019 the Applicant filed a Memorandum of appeal before this ELC being aggrieved by the judgment of the Sub – ordinate court – RMCC No. 710 Of 2017 delivered on 15th October 2019. From the said decision, the Defendant/Respondent was awarded a sum of Kenya Shillings Nine Million One Hundred and eighty one two hundred thousand (Kshs. 9, 181, 200.00) plus interest of the suit. From the records, on 2nd November, 2019, the trial court issued the warrant of attachment and sale of both movable and immovable property found lying at her place of residence being Tudor, the County of Mombasa the same addressed to the auctioneers trading in the names and style of Makuri Auctioneers for execution. On 17th February, 2021 the Appellant made an application for stay of execution and on 22nd February, 2021 the court granted an ex - parte order of stay of execution on condition that the appellant deposits a sum of Kenya Shillings Three Million (Kshs. 3, 000, 000.00) in a joint accounts of the Advocates in the suit and that is basically the matter before this court hereof.

2. The said application is brought under the provisions of Order 45 (1) & (2) of C.P.R, Article 159 (1) & (2) of the Constitution, Sections 1, 1A & 3A of C.P.A. The Appellant/Applicant sought for the following orders:-

(a) Spend

(b) That pending the hearing and determination of this application “inter partes” an order of stay of execution of the judgment issued herein in favour of the Plaintiff/Respondent on 15th October, 2019

(c) That the time fixed by the order of this court made on 22nd February 2021 for the deposit of Kshs. 3,000,000/= be extended by a further period of thirty (30) days or such other period as the court deems just.

(d) That the costs of this application.

3. The said Notice of Motion application is supported by the grounds in the scheduled annexures and the 8 paragraphed supporting affidavit of one MADIHA ALWY KHALIFA the Appellant/Applicant herein sworn and dated 6th April 2021 (Hereinafter referred to as the Supporting Affidavit).

4. By the deposition of the said supporting affidavit, the Appellant/Applicant has held that on 22nd February, 2021 this court granted an ex-parte order of stay execution on condition that the Appellant deposits a sum of Kenya Shillings Three Million (Kshs. 3,000,000/=) in a interest earning joint account in the names of the advocates for the parties within 30 days from 22nd March 2021.

5. Pursuant to that, she made arrangements to dispose off her property known as C.R.S. 57540 situated at Lamu in order to comply with the said order. Unfortunately the transaction could not be concluded within the 30 days period granted as the prospective purchaser resides in the United Kingdom. Arising from the travel restrictions put in place due to the Covid-19 pandemic she was unable to travel within a reasonable time to enable the Appellant/Applicant comply with the orders. She annexed a copy of the sale agreement.

6. The Appellant/Applicant held that eventually the purchaser arrived in Nairobi on 29th March, 2021 and that she would be required at least 14 days to undertake the necessary due diligence before the deposit of the purchase price would be made. It is for this reason that the Appellant/Applicant moved court for the period grant by it was extended by at least 30 days to enable her comply.

She was apprehensive that if the order were not granted the Respondent would commence execution against her making her suffer substantial detriment.

II THE RESPONDENTS CASE

7. The application was opposed by the Defendant/Respondent. On 19th May, 2021 the Respondent filed a 15 paragraphed Replying Affidavit dated 18th May, 2021. The Respondent held that the Appellant/Applicant sworn supporting affidavit was shallow and failed to raise proper grounds for granting the orders sought from the said application.

8. It was the Respondent's deposition that the Appellant/Applicant had a legal option of reviewing the orders of court made on 22nd February, 2021 or preferring an appeal against the said orders but did not do so. According to the Respondent the action taken by the Appellant/Applicant would only be prolonging litigation causing parties to incur more costs which the Appellant/Applicant did not intend to pay.

9. The Respondent held, besides the orders for the deposit of part of the judgment sum expired on 21st March, 2021 and therefore the orders could not be extended or varied as they did not exist anymore. They submitted that the prayers No. 2 and 3 of the Notice of Motion application dated 6th April, 2021 were frivolous and devoid of good faith as they had been brought late in the day after failure to comply with the orders of 22.2.2021.

10. The Respondent deposed that the certificate of title No. CR 57540 used by the Appellant as security to secure her release at Shanzu Court in Criminal Case No. 750 of 2017 where the Appellant/Applicant had been charged with 3 counts of forgery of the judicial documents and was released on security bond of Kshs. 3,000,000/=. The respondent annexed a copy of the Judgment of the said case.

11. Furthermore, the Respondent deposed that the said plot known as CR 57540 situated in Lamu was agricultural land whose value could not exceed Kshs. 500,000/= which could not be used as Security against a sum of Kshs. 15,530,726/= - Additionally he held that ne valuation report to the said plot had been filed. The court had already issued orders at securing the interest of both parties to the suit which orders the Appellant/Applicant ignored. The application was only intended to vex and annoy the Respondent and frustrate her for enjoying the fruits of the judgment delivered to her favour.

The Respondents Costs aspersion and doubts on the authenticity of the documents annexed and marked as "MAK -1" and "MAK - 2" by the Appellant/Applicant. The Respondent urged court to dismiss the application.

III THE SUBMISSIONS

A. THE APPELLANT/APPLICANTS SUBMISSIONS

12. On 19th July, 2021, the Advocates the law firm of Messers Gikandi and Company Advocates filed their written submissions accompanied with several authorities thereof dated the same date to support their case. They submitted that by reiterating in details all the facts of the case as stated above. In light of the foregoing, the Appellant/Applicant's Advocates submitted that if the court failed to grant the order of stay of execution as prayed, the Respondent would proceed to execute the Judgment delivered on 15th October, 2019 against the Appellant occasioning substantial loss and render the appeal nugatory. On this point they relied on the case of ***'Century Oil Trading Company Limited - Versus - Kenya Shell Limited (Nbi - Milimani) HCMCA No. 1561 of 2007'***

13. The Advocates submitted that if the court could not agree on granting the order of stay of execution, at least it should extend the time fixed by the order on 22nd February, 2021 to deposit the sum of Kenya Shillings Three Million (Kshs. 3, 000,000.00) within 30 days for a further fourteen (14) days or such other period the court could deem fit and suitable to do. They relied on the provisions of Order 50 rule 5 of the CPR on the enlargement of time on giving security for costs when not to be reckoned. They pleaded that this was due to circumstances beyond the Appellant's control. They held that the Appellant was working closely with the purchaser of the afore stated land and soon would completing the said sale transaction. To buttress their point of extension of time they relied on the case of ***"Elijah Muriithi & Ano - Versus - Peter Christopher Kahoro Mbogo (2020) eKLR.***

B. THE RESPONDENT'S SUBMISSIONS

14. On 29th January, 2021 the Advocate for the Respondent filed their written submissions. The Respondent's Advocates briefly recounted all the averments in summary made out in the Replying Affidavit the Advocates held that the Respondent Opposed the instant application by the Appellant/Applicant which he held was unnecessary and only intended to further consume limited resources - time, money and man power for the court making the matter to be convoluted and prolonged. The Advocates further stressed that it was an attempt at delaying the determination of this matter.

14. To buttress their argument in the opposition to the Appellant/Applicant's Application they relied on the equity legal maximum ***"He who comes to Equity must come with clean hands."***; the decision of ***"Hunker Trading Company Ltd. -VS- ELF Oil Kenya Ltd. (Nbi) Civil Appeal No. 6 of 2021; Arvind Velfi Shah -VS- Zaverchand Sopped Jetha Holdings Ltd. & 5 others (Nbi) Civil Appeal No. 96 of 2009 - (UR 60/09) Gitahi & Another -VS- Wangongo (1988) KLR Civil Application No. 3 of 1988 & Gikandi Ngibuini & Co. Adv. -Vs- Stallion Insurance Co. Ltd." Mbsa HCCC No. 287 of 2000***

The upshot of this, the Respondents Advocate prayed that the Appellant/Applicants application be dismissed with costs.

III. ANALYSIS AND DETERMINATION

15. I have read and put into account all the pleadings –the written submissions and authorities pertaining to the Notice of Motion application dated 6th April, 2021 and considered the appropriate provisions of the law. In order to arrive at a fair, just and informed decision as urged by both the Appellant/Applicant and the Respondent, the court has relied on the following framed issues.

These are:-

(a) Whether the Appellant/Applicant is entitled to be granted the order of stay of execution of the Judgment delivered in favour of the Respondent on 15th October, 2019 as set out under Order 46 Rule 6 (1) (2) & (6) of CPR?

(b) Whether the temporary and/or Conditional stay of execution of the decree granted on 22nd February, 2021 for the deposit of Kshs. 3, 000,000.00 should be reviewed by being extended by a further period of 30 days pursuant to the provisions of Order 45 (1) and Order 50 Rule 5 of the Civil Procedure Rules?

(c) Who will bear the costs of the notice of motion application.

ON ISSUE NO. 1 - Whether the Appellant/Applicant is entitled to be granted the order of stay of execution of the Judgment delivered in favour of the Respondent on 15th October, 2019 as set out under Order 46 Rule 6 (1) (2) & (6) of CPR?

14. From the very onset I have noted that none of the parties herein have bothered to address on the issue nor the principles set out while granting stay of execution of a decree as envisaged under Order 46 Rule 6 (2) and Rule 6 (6) of C.P.R., Instead, the parties have spent more energy on the aspect of the general temporary and/or conditional stay of execution- and its ramifications in Law. I will deal with it at length under sub-heading No. 2 below.

15. The order for stay of execution is discretionary and inherent. It is provided for under the provisions of Order 42 Rule 6 (2) of the CPR as stated *inter alia*:-

The Provisions of Order 42 Rules 6 (1) holds *inter alia*:-

“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 an 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”.

The court is guided by plethora cases from the court of appeal on this legal aspect – *Vishram Ravji Halal Versus Thornton & Turpin*” Civil Application No. 15 of 1990 (1990) eKLR 365 and “*Stephen Wanjohi Versus Central Glass Industries Limited Nbi, HCC. No. 6726 of 1991*” where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised.....for the court to order a stay of execution there MUST be:-

a) Sufficient cause;

b) Substantial loss;

c) No unreasonable delay;

d) Security and the grant of stay is discretionary

16. I believe this honorable court did consider all these four (4) conditions before granting the temporary and conditional stay on 22nd February, 2021 and 9th April, 2021 and therefore I am convinced that the Appellant/Applicant fully complied and satisfied the honorable court by fulfilling the three (3) conditions set out herein. And therefore, I will not want to say more than just this above stated.

ISSUE NO. 2:- Whether the temporary and/or Conditional stay of execution of the decree granted on 22nd February, 2021 for the deposit of Kshs. 3, 000,000.00 should be extended by a further period of 30 days pursuant to the provisions of Order 45 (1) and Order 50 Rule 5 of the Civil Procedure Rules?

17. The Appellant/Applicant application and the prayer sought are under Order 45 (1) & (2) and Order 50 rule 5 of the CPR where they are seeking for review of the orders made by this court and by extending time for giving security for costs when not to be reckoned on. Order 50 Rule 5 holds:-

18. Initially, the application was brought following a judgment delivered against it by this Honorable court on 15th October, 2021. She made an application dated 17th February, 2021 for stay of execution and on 22nd February, 2021 the orders were granted. The conditional stay order granted read:-

“An ex - parte order of stay of execution is granted on condition that the Applicant deposits Kshs. 3,000,000 in joint account earning interest in the names of the Advocates for the parties within 30 days in default the order herein lapses”

19. From the literal reading of this conditional stay orders, they were to have lapsed on 22nd March, 2021 or thereabout. It not clear what might have transpired in between this period as there is nothing from the record to provide that information. In any case, the same was never raised as an issue by the parties. Therefore the court will not belabor on it. It’ s for this reason that the Appellant/Applicant saw it fit to move court through this Application. On 9th April 2021, the Honorable court extended the temporary stay of execution orders.

20. The Appellant/Applicant has urged court to extend the time for the fulfillment of the order, as she is depending on the proceeds to be garnered from a sale of land known as Land Reference No. C.R.S 57540 situated in Lamu. Indeed, a sale agreement between the Appellant as the vendor and the purchaser has been annexed thereof. The purchase price is indicated to be a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) which once it is realized, it would be adequate sum for the ordered deposit of Kenya Shillings Three Million (Kshs. 3,000,000/=) a very plausible and persuasive argument to say the least.

21. Be that as it may, and with great humility, although the sale agreement is not dated, but the Appellant/Applicant had indicated the sale of the land would have taken place by March 2021. It is evident and common knowledge that it is now mid of the month of October, 2021 and still there is no indication of the sale of land having been successful. Surely, the court had expected a firm and cogent proposal of the said deposit by now through the filed submissions by the Appellant/Applicant but all was in vain apart from making mere empty promises as there before. Besides, this court is not necessarily interested on the source of the money intended for security for costs. Nay. Far from it. It is only concern with the compliance and/or obedience of its orders. Hence, honorable court while agreed with the submission by the Respondent. Basically, therefore, this court is not satisfied that the Appellant/Applicant is committed on the fulfillment of the orders made for temporary and/or conditions stay of execution made on 22nd February, 2021.

22. Clearly, this court concurs with the arguments by the Defendant/Respondent to the effect that by this application the Appellant/Applicant is indeed prolonging litigation and making the matter more convoluted. By so doing, the Applicant/Appellant is denying the Respondent from enjoying her fruits of judgment delivered on 15th October, 2020 which is exactly one year now down the line. The pattern depicted by the Appellant/Applicant is not impressive to a point the court feels she is being rather casual with it and its orders to the chagrin of the Respondent.

Nonetheless, all said and done, based on the provisions of the Sections 1, 1A 3 and 3A of the Civil Procedure Rules 2010, Section 3 of the Environment & Land Act, No. 19 of 2012 and Article 159 of the Constitution of Kenya, what are termed as overriding objectives. These provisions of law do donate to court a greater latitude when dealing with land matters to overcome any undue technicalities which would hinder the attainment and application of the said overriding objectives and its principles to ensure and facilitate fast expeditious, proportionate and accessible resolution of dispute before it. It is noted that land is sensitive and a main source of livelihood in this Country and the same has to be handled with ginger care on its merit. Therefore, it is for this reason that I am reluctantly obliged to allow the notice of motion application but with stringent terms and making it the very last offer as their will be no more such pleas to be tolerated in future by further extending the order for temporary conditional stay for strictly a period of 21 days to enable the Appellant/Applicant to fully comply with the orders made on 22nd February, 2021 failure to which the said orders and this directions lapses and execution to issue accordingly.

ISSUE No. 3 Who will bear the costs

23. Pursuant to the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21, the costs follow events. In this case, the Appellant/Applicant will bear the costs of this application.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 13TH DAY OFnOCTOBER, 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

M/s. Murage holding brief for Mr. Gikandi for the Appellant/Applicant.

M/s. Arika for the Respondent