



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO 398 OF 2011

ELLEN WANGARI MBURU.....PLAINTIFF/RESPONDENT

VERSUS

PATRICK KINUTHIA KIIGA.....DEFENDANT/APPLICANT

RULING

1. Before this Court for determination is the Defendant's/Applicant's Notice of Motion Application dated 25th of October 2019 seeking for the following orders:

a) **That the Honourable Court be pleased to order stay of execution of the Judgment of the Hon. Justice E.O Obaga pending the lodgment, hearing and determination of the Appeal.**

b) **That costs of this Application be provided for.**

2. The Application is based on the grounds on the face of the Motion and supported by the affidavit of the Defendant/Applicant herein sworn on 25th of October 2019.

3. It is the Defendant's/Applicant's deposition that the Plaintiff/ Respondent instituted this suit against him seeking *inter alia* permanent injunctive orders, a declaration that the Defendant holds L.R No Ndarugu/Gakoe/344 in trust for the Plaintiff and the Defendant in equal shares and an order that the Plaintiff is entitled to be registered as owner of half of the suit property.

4. According to the Defendant/Applicant, vide a Judgment delivered on 27th August 2019, this court (Obaga J) found that the Plaintiff was an equitable owner in common of the suit property and ordered that she be registered as an owner of the suit property.

5. The Defendant/Applicant deponed that the aforesaid Judgment was erroneous; that he has lodged a Notice of Appeal and duly applied for typed proceedings; that the Plaintiff/Respondent is likely to enforce the Judgment as there is no order of stay of execution to protect his interests; that any enforcement of the Judgment will cause him irreparable loss and damage which he may not recover if the Appeal is successful and further that the enforcement of the Judgment will render the appeal nugatory as any compensation may not be an adequate remedy.

6. In response to the Application, the Plaintiff/Respondent filed two Replying Affidavits. The first being undated and filed on 5th March 2020 and the second one sworn on 17th June 2021.

7. Vide the undated Replying Affidavit, the Respondent deponed that there is no evidence of the request for proceedings and Judgment alluded to in the Application; that the Applicant has no arguable appeal and finally that the grounds in support of the Motion and those in the draft Memorandum of Appeal are not borne out of the proceedings of the court.

8. Vide the Replying Affidavit of 17th June 2021, the Plaintiff/Respondent deponed that the Defendant/Applicant has since died; that the impugned Judgment is valid and meritorious and that she is entitled to enjoy the fruits of her Judgment.

9. According to the Respondent, both the Applicant and herself reside on the suit property; that she is entitled to get the title deed to the portion of the property that she occupies; that the Applicant has not demonstrated the prejudice he will suffer if the title deed to the portion she now occupies is given to her; that the Applicant's Appeal is not arguable and has no chance of success and finally that the Applicant has not bothered to give security as required by law.

10. The Application was canvassed by way of written submissions. The Applicant, through their counsel, filed submissions on 22nd October, 2021. The Defendant's/Applicant's counsel submitted that the Applicant has for the past five decades been in occupation of 3 ¼ acres portion

of the suit property and not the entire 5 ½ acres claimed; that the Applicant is in danger of being dispossessed from the portion of land measuring 2 ¼ if stay is not granted and that the Respondent will likely evict the Applicant from the aforesaid portion of 2 ¼ acres of the suit property.

11. According to the Defendant's/Applicant's counsel, the Applicant has been in possession of and has been cultivating that portion of the suit property; that if the same is alienated to third parties, the Applicant and his family will be rendered destitute and that the provision of security is unnecessary in this case as the judgment/decreed is non-monetary. Counsel placed reliance on the case of Sarah Nandancha Mayeku v Aden Noor Aden [2020] eKLR where the court held as follows:

“In the case of Butt v Rent Restriction Tribunal [1982] KLR 417 the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. 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 that appeal court reverse the judge's discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.’

12. Counsel further cited the following excerpt from the Sarah Nandancha case (supra);

“since it is the Appellant who has been on the suit land for a while, with the Respondent having admitted in his evidence that he had never taken possession of the same and being that the Appeal revolves around dispute over title to the said land, I opine that she is indeed the disadvantaged party herein. Based on the standards set in the above cited case and in applying them to the circumstances at hand, I find that the Appellant has met the threshold for stay of execution and will grant her the same.”

13. Counsel submitted that at the very least, the Applicant is entitled to orders preserving status quo whereby the Respondent continues to be in possession of a portion of the suit property measuring 3 ¼ acres while the Applicant continues occupying the remaining portion of the property.

14. The Plaintiff's /Respondent's counsel submitted that the Application for stay of execution is guided by **Order 42 Rule 6(2)** of the **Civil Procedure Rules** which sets out the two conditions that the Applicant must satisfy before the orders for stay of execution can be granted. Counsel cited the case of ANM v VN [2021] eKLR.

15. It was submitted on behalf of the Respondent that the Applicant has not sufficiently demonstrated the substantial loss he will suffer if the application for stay is not granted nor has he offered security of any kind for performance as required and that the Application has not complied with the express provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

16. Counsel submitted that the cases of Sarah Nandancha Mayeku vs Adan Noor Aden (supra) and Butt vs Rent Restriction Tribunal(1982)eKLR relied on by the Applicant support the principle that substantial loss must be demonstrated; that the Applicant has failed to demonstrate the substantial loss he will suffer nor offered any security and that the case of Sarah Nandancha (supra) relied on by the Applicant is distinguishable from the present case because the Respondent in this case is in possession of the suit property whereas the Appellant in that case was not.

17. According to the Plaintiff's/Respondent's counsel, the Applicant's submission that the Respondent keeps 3 ¼ of the suit property is untenable in law and tantamount to altering the decree and reducing the size of the portion occupied by the Respondent and that the court having already determined the matter, it is *functus officio* with respect to what size of land is due to the parties.

Analysis & Determination

18. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is whether the Defendant/Applicant has satisfactorily discharged the conditions warranting the grant of orders of stay of execution of decree pending Appeal.

19. As correctly cited by the parties, the law governing the grant of stay of execution pending appeal is **Order 42 Rule 6 (1) and (2)** of the **Civil Procedure Rules** 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 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.

20. In the case of Halqi & Another v Thornton & Turpin (1963) Ltd [1990] eKLR the Court of Appeal held, inter-alia, as follows:

“The Superior Court’s discretion to order a stay of execution of its order or decree 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.

21. It is evident from the above provisions and the cited authorities that the grant of orders of stay of execution is subject to the court’s discretion, the court being guided in this regard by the provisions of Order 42 rule 6 of the Civil Procedure Rules. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 where it was stated as follows:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. 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 that appeal court reverse the judge’s discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

22. This court is alive to the fact that while exercising its discretion hereunder, it should always opt for the lower rather than the higher risk of injustice. This was persuasively stated by Warsame, J (as he then was) in Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR where he expressed himself as follows:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court...”

23. By way of a brief background, the Motion herein relates to the Judgment delivered by this court (Obaga J) on 27th August 2019. In it, the Court found in favour of the Plaintiff in the following terms:

i. An order of permanent injunction restraining the Defendant from evicting and/or interfering with the Plaintiff’s quiet possession of her portion of the suit property.

ii. An order that the Defendant holds the suit property in trust for himself and the Plaintiff.

iii. An order that the Plaintiff is an equitable owner in common of L.R No Ndarugu/Gakoe/344.

iv. An order that the Plaintiff is entitled to be registered as owner of half of L.R No Ndarugu/Gakoe/344.

v. Costs and interests

24. The aspect of what constitutes sufficient cause in an application for an order of stay of execution was discussed in the case of **Antoine Ndiaye vs. African Virtual University [2015]eKLR**, where Gikonyo J. opined as follows;

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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”.

25. Counsel for the Applicant contends that the Defendant/Applicant will suffer substantial loss if stay is not granted. The basis of this contention is that the Respondent has been in occupation of 3 ¼ acres portion of the suit property and not the entire 5 ½ acres claimed and that the Applicant is likely to be evicted from the portion of land measuring 2 ¼ if stay is not granted.

26. In considering whether the Applicant will suffer substantial loss unless an order of stay of execution is granted, the court is guided by the decision of the Court of Appeal in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** in which the court stated as follows:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

27. It is undisputed that the parties to this suit reside on the suit property. The substantial loss alluded to by the Defendant/Applicant is with respect to a portion of the suit property measuring 2¼ acres. Considering that the court decreed that the Plaintiff/Respondent is an equitable owner in common of L.R No Ndarugu/Gakoe/344 and that the Plaintiff is entitled to be registered as owner of half of L.R No Ndarugu/Gakoe/344, the Defendant is likely to be evicted from the portion of land he has been occupation.

28. The likelihood that the portion of land that the Defendant is occupying will be taken out of his reach in the event the Judgment of this court is not stayed pending the hearing of the appeal is high. This, coupled with the likelihood of the Defendant being rendered homeless will occasion the Defendant substantial loss. In the circumstances, it is my finding that the Defendant will suffer substantial loss unless an order of stay is issued.

29. Considering that the subject matter is land, the issue of the Defendant/Applicant providing security for the due performance of the decree does not arise. Land, being a fixed asset, will always be there for purposes of enforcing the decree.

30. For those reasons, I allow the Application dated 25th October, 2019 as follows:

a) An order be and is hereby issued staying execution of the Judgment of the Hon. Justice E.O Obaga pending the lodgment, hearing and determination of the Appeal.

b) Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Mogikonyo for the Plaintiff

Mr. Kimani for Musyoka for the Defendant

Court Assistant: John Okumu