



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CASE NO. 91 OF 2019**

**MAKICHER GENERAL CONSTRUCTION LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**COMMUNICATION GRAPHICS LIMITED.....DEFENDANT/APPLICANT**

**RULING**

**INTRODUCTION**

1. Vide the Notice of Motion Application dated the 1<sup>st</sup> of November 2021, the Defendant/Applicant herein has sought for the following Reliefs;

- i. ....(Spent)
- ii. *Pending the inter -parties hearing of this Application, this honourable court be pleased to grant a Temporary stay of execution of the judgment and Decree in Nairobi Environment and Land Court Case No. 91 of 2019, made by Honourable Justice Oguttu Mboya, Judge delivered on 14<sup>th</sup> October, 2021.*
- iii. *Pending the hearing of the Applicant's Intended Appeal, this honourable court be pleased to grant a Temporary stay of execution of the judgment and decree in Nairobi Environment and Land Court Case No. 91 of 2019, made by Honourable Justice Oguttu Mboya, Judge delivered on 14<sup>th</sup> October, 2021.*
- iv. *Pending the hearing and determination of the Applicant's Intended Appeal, this honourable court be pleased to grant a stay of further proceedings in Nairobi Environment and Land Court Case No. 91 of 2019.*
- v. *Cost of this Application be provided for.*

2. The subject Application is premised and/or anchored on the grounds enumerated at the foot thereof and same is further supported by the Affidavit sworn by one, Fredrick Waweru Karanja, who states that he is a Director of the Defendant/Applicant. For clarity, the supporting affidavit is Sworn on the 1<sup>st</sup> November 2021.

3. Upon being served with the subject Application, the Plaintiff/Respondent responded thereto by a Replying Affidavit sworn by Dr. Linus Cheruyot, on the 18<sup>th</sup> November 2021, to which the deponent has attached one annexure.

**Depositions by the parties**

4. Vide the supporting affidavit sworn on the 1<sup>st</sup> November 2021, one Mr. Fredrick Waweru Karanja, has averred that this honourable court issued and delivered a judgment on the 14<sup>th</sup> October 2021, and that upon the delivery of the said judgment, the Defendant/Applicant felt aggrieved and/or dissatisfied.

5. It is further averred that upon the delivery of the subject judgment, the Defendant/Applicant proceeded to and filed a Notice of Appeal, showing her intention to appeal against the decision to the honourable Court of Appeal.

6. On the other hand, it is further averred that the Applicant herein has similarly written to the Deputy Registrar of this honourable Court to arrange for the typing and provision of the typed copies of the proceedings and judgment of the court, for purposes of compilation of the

requisite Record of appeal to the court of appeal.

7. It is further averred that the intended appeal to the Court of Appeal raises arguable legal issues and in this regard the appeal therefore has overwhelming chances of success.

8. Be that as it may, the Deponent has further averred that despite the filing and lodgment of the Notice of Appeal, the Plaintiff/Respondent herein has since started and/or commenced the process of extracting the decree of the court for purposes of commencing execution thereof.

9. Owing to the foregoing, it is averred that the execution of the decree and the consequential transfer of the suit property in favor of the Plaintiff/Respondent, shall divest the Defendant/Applicant of ownership rights, over and in respect of the suit property and in this regard, the Applicant shall therefore be unable to recover the title of the suit property, in the event that the Appeal succeeds.

10. Finally, the deponent has averred that the kind of loss that would arise and/or accrue, shall be Substantial in nature and hence the Appeal shall be rendered nugatory and/ or otherwise Academic.

11. In the premises, the Defendant/Applicant has therefore implored the honourable to decree an order of stay of Execution pending the hearing and determination of the intended appeal to the Court of Appeal.

### **Response by the Plaintiff/Respondent**

12. Vide Replying affidavit sworn on the 18<sup>th</sup> November 2021, one Dr. Linus Cheruyot has averred that by virtue of the judgment and decree of this honourable court, same was pronounced and/or declared to be the lawful owner and/or proprietor of the suit property.

13. It is the deponent's further averment that having been declared as being the owner and/ or Proprietor of the suit property, such ownership rights, should therefore be allowed to vest and/or accrue, without any hindrance.

14. In any event, the deponent has further averred that the order of stay sought by the Defendant/Applicant, is merely meant to delay and/or otherwise defeat the realization of the fruits of the judgment and decree that was issued by this court, and which essentially vests the ownership of the suit property in favor of the Plaintiff/Respondent.

15. Besides, the deponent has further averred that other than the decree declaring that the suit property belongs to and/or vests in the Plaintiff/Respondent, the honourable court also awarded costs, both of the suit and counterclaim to and in favor of the Plaintiff/Respondent. Consequently, it is the deponent's averments that the Applicant herein ought to provide security on account of the costs, which have since accrued and/or otherwise been incurred.

16. On the other hand, the deponent has averred that because the Defendant/Applicant has not offered to provide and/or avail security, then the court should not consider to and or grant of an order of stay of Stay of Execution of the Judgment and Decree, pending the Hearing and determination of the Intended Appeal.

17. Finally, the deponent has further averred that if the court is inclined to grant the orders of stay of execution, in the manner sought by the Defendant/Applicant, then the court should direct that the Defendant/Applicant should provide security in terms of party and party costs, which should thereafter be deposited in an Escrow Account, in the names of the advocates for respective of the parties.

### **Submissions**

18. The subject Application came up for hearing on the 24<sup>th</sup> November 2021, whereupon the court ordered and/or directed that the Application be canvassed by way of oral submissions on even date.

19. Pursuant to and in line with the directions of the court and despite the reluctance by counsel for the Defendant/Applicant to ventilate the application by way of oral submissions, the advocates for the parties tendered their respective submissions and same form part and parcel of the record.

20. It is imperative to state that the submissions by the parties highlighted the issues raised in the respective affidavits and on the part of the Defendant/Applicant, it was elaborated that the execution of the decree, shall culminate into the transfer and registration of the suit property in the name of the Plaintiff/Respondent and that such registration, would divest the Defendant/Applicant of ownership rights thereto.

21. It was similarly submitted that the transfer and registration of the suit property in execution of the Decree of this honourable court, would occasion substantial loss to the Defendant/Applicant, to the extent that the Suit Property would be put beyond the reach of the Defendant/Applicant.

22. With the foregoing in mind, the deponent therefore pleaded with the court to grant an order of stay of execution, pending the hearing and determination of the Intended appeal at the Court of Appeal.

23. As pertains to the provision of security, the Defendant/Applicant averred that same would not be averse to the registration of an Inhibition, against the title in respect of the suit property, pending the hearing and determination of the intended appeal.

24. On her part, the Plaintiff/Applicant has reiterated and/or repeated the contents of the Replying affidavit and restated that no Evidence has been laid before the court, to show that the Defendant/Applicant shall suffer any Substantial loss, prejudice or at all.

25. On the other hand, the Plaintiff's/Respondent's counsel has also submitted that there being no averment, in the supporting affidavit, where the Defendant/Applicant has offered to provide security, then the Applicant herein, has not satisfied and/or established the grounds for the grant of an order of stay of execution.

### **Issues for determination**

26. Being an Application for stay of execution pending the hearing and determination of the intended appeal to the Court of appeal, the Defendant/Applicant herein is enjoined to establish and satisfy certain statutory requirements, as captured and/or provided for under the provisions of **Order 46 Rule 6(2) of the Civil Procedure Rules 2010**.

27. The foregoing aside, I have reviewed the Notice of Motion Application dated the 1<sup>st</sup> November 2021, the affidavit in support thereof, as well as the oral submissions, which were made by Ms. Anne Njoroge and I have also considered the Replying affidavit sworn on the 18<sup>th</sup> November 2021, as well as the oral submissions made by learned counsel Mr. Rapando, on behalf of the Plaintiff/Respondent and in this regard, the following issues are thus germane for determination;

- I. *Whether the Defendant/Applicant has established a sufficient cause.*
- II. *Whether the Defendant/Applicant is disposed to Suffer substantial loss, if the orders sought are not granted.*
- III. *Whether the Defendant/Applicant has offered to provide security or better still, what kind of security ought to be provided by , the Defendant/Applicant*

### **Analysis and determination**

#### **Issue number 1**

28. The stepping stone to accessing the discretion of this honourable court as pertains to the grant of an order of stay of execution pending the hearing and determination of an appeal or better still an intended appeal, is proof and/or exhibition of the existence of Sufficient cause.

29. Sufficient cause in this regard connotes and/or refers to an appeal having being filed and/or lodged or necessary steps, having been taken towards the lodgment of the requisite appeal. For clarity, if the appeal is to be lodged to the Court of Appeal, then evidence must be availed that the requisite Notice of Appeal has been filed and/or served in line with the provisions of Rule 75 of the Court of Appeal Rules 2010.

30. In respect of the subject matter, it is common ground that a Notice of Appeal was duly filed and/or lodged on the 19<sup>th</sup> October 2021, same being five days after the pronouncement and/or delivery of the judgment now sought to be appealed against. Consequently, the filing of the Notice of Appeal does constitute an Appeal to the Court of Appeal, for all intents and purposes.

31. On the other hand, the service of the Notice of Appeal has not been contested by the counsel for the Plaintiff/Respondent. In this regard, it is thus implied that the Notice of Appeal was timeously and/or duly served in accordance with the rules.

32. Suffice it to say, that it would have been necessary for the Defendant/Applicant to attach and/or exhibit a copy of the memorandum of appeal to the court of appeal, to signify the nature of the grounds to be canvassed, but however, no such memorandum of appeal has been annexed.

33. Be that as it may, the provisions of Order 42 Rule 6(4) of the Civil Procedure Rules, 2010 denotes that the filing of the Notice of appeal shall be deemed as an Appeal. In this regard, I therefore find and hold that an Appeal has since been lodged before the Court of Appeal.

34. Owing to the foregoing, I find and hold that to the extent that the Defendant/Applicant has filed and/or lodged the requisite Notice of appeal, coupled with a letter bespeaking proceedings, the latter under the provisions of Rule 82 of the Court of Appeal Rules, sufficient cause has therefore been established, exhibited and/or showed.

#### **Issue number 2**

35. As pertains to the second issue herein, it is worthy to note that Substantial loss is the cornerstone to an Application for stay of execution, pending the hearing and determination of an appeal.

36. For clarity, Substantial loss connotes and/or means such a loss that would irreparably affect the status of the suit premises and/or issue, which is the subject of appeal and thus one which must be prevented from accruing and/or occurring. However, such substantial loss must be pleaded and/or alluded to by the Appellant and must thereafter be established by credible evidence contained in the supporting affidavit of the Applicant.

37. Concerning the place and importance of the concept of Substantial loss, it is imperative to take cognizance of the decision in the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & Another (1986) eKLR**, where the honourable court of appeal stated as hereunder;

***'It is usually a good rule to see if order XLI 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 corner stone of both jurisdictions for granting a stay. That is what has to be prevented.***

***Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money'.***

38. As pertains to the subject matter, it is the Defendant's/Applicant's position that the execution of the judgment and the resultant decree, shall culminate into the registration of the suit property in the names of the Plaintiff/Respondent, who shall thus become the registered owner thereof.

39. It is further contended that in the event of transfer and registration of the suit property in favor of the Plaintiff/Respondent, the Plaintiff/Respondent shall therefore be conferred and/or otherwise be vested with absolute and exclusive rights thereto and hence be at liberty to alienate, sell, transfer and/or dispose of the suit property.

40. It is further submitted that in the event of such kind of actions and/or alienation taking place, the title to and/or in respect of the suit property will be placed beyond recovery and/or redemption by the Defendant/Applicant, that is, in the event that the appeal succeeds.

41. In view of the foregoing, it is the Defendant's/Applicant's plea that it is necessary and/or appropriate that an order of stay be granted, so as to preserve and/or conserve the substratum of the Appeal during the pendency thereof.

42. During the hearing of the Application, counsel for the Plaintiff/Respondent conceded that if the suit property was transferred to and/or registered in the name of the Plaintiff/Respondent, the Plaintiff/Respondent shall be at liberty to deal with same as his own.

43. Be that as it may, counsel conceded that the circumstances of the subject matter, are such that the execution of the decree, shall therefore expose the Defendant/Applicant to substantial loss. Simply put, the Plaintiff/respondent conceded the aspect of substantial loss.

44. Suffice it to say, that substantial loss is what must be prevented. Consequently, substantial loss having been conceded, the honourable is therefore enjoined to ensure that no such loss accrues and/or arises during the pendency of the appeal.

45. In support of the foregoing position, I am obliged to rely on and/or adopt the position of the law as captured in the case of **R. W. W v E. K W (2019) eKLR**, where the honourable Court of Appeal observed as hereunder;

***'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'.***

### **Issue number 3**

46. Even though the Appellant herein, has established a sufficient cause and also proved that substantial loss shall arise, it is still imperative to note that the Respondent herein has a Judgment and/ or Decree, in his favor and to this extent, the Respondent should be afforded the avenue to realize and thereby benefit from the fruits of the litigation thus far.

47. On the other hand, the Appellant herein is also exercising undoubted Right of appeal, and in this regard, unless there is any hindrance on appeal, the honourable court is called upon to ensure that the exercise of the undoubted right of Appeal, is realized and/or actualized. **See Article 48 of the constitution 2010.**

48. Owing to the foregoing, the court is thus called upon to exercise a delicate balance between the Appellant's rights to pursue the appeal, versus the Respondent's rights to partake of the fruits of the subject litigation.

49. In the premises, the court is thus called upon to strike a balance and to protect the interest of both parties, without flirting with the Appellant's right of appeal, to the detriment of the successful litigants' rights to benefit from and/or actualize the fruits of the litigation.

50. In view of the foregoing, it is Imperative to consider and speak to the issue of security, for the due performance of the decree that may ultimately be binding on the Appellant.

51. It is also worthy to note, that the determination of the nature, kind and quantum of security to be provided for, falls at the discretion and within the preserve of the court. Consequently, it is thus irrelevant, whether the Applicant has offered to provide security or otherwise. However, where an applicant offers to provide security, such an offer is an indicator of good faith on the part of the Applicant.

52. In support of the foregoing observation, I beg to adopt and subscribe to the decision in the case of **Focin Motorcycle Company Ltd v Anne Wambui Wangui & Another (2018) eKLR**, where the court observed *inter-alia*;

***'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'.***

53. In respect of the subject matter, it is important to note that the court has already entered judgment to and in favor of the Plaintiff/Respondent. In this regard, the Plaintiff/Respondent is thus entitled to partake of and benefit from the success accruing from the judgment of this court.

54. On the other hand, the Defendant/Applicant, is aggrieved by the judgment and decree of the court and same has since filed a Notice of appeal and thereby evincing her intention to exercise a undoubtable right of appeal. For sure, the court ought to afford the Defendant/Applicant the requisite facility and/or latitude to pursue the intended appeal.

55. Owing to the foregoing, it is therefore apparent that there is a conflict between the rights possessed by the Plaintiff/Respondent on one hand, and the Defendant/Applicant on the other hand. Consequently, the court is therefore called upon to strike a balance between the two competing rights and to ensure that no party suffers a prejudice, during the pendency of the appeal.

56. In the premises, the court is therefore called upon to deal with the aspect of the provision security by the Appellant and to ensure that the security, which is decreed and/or given, is able to satisfy the decree that may ultimately be binding on the Appellant.

57. Suffice it to say, that the security to be provided or given is not just any other security. For clarity, the law circumscribes and/or defines what constitutes security and underscores the necessity that the security must be sufficient to meet and/or satisfy the decree that may ultimately ensue upon the determination of the appeal and which decree will be binding on the Appellant.

58. To underscore the nature and importance of the security, I subscribed to the decision in the case of **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR**, where the honourable court observed as hereunder;

‘ 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.’

59. Notwithstanding the foregoing, there was the argument by the Plaintiff/Respondent that because the Defendant/Applicant had not offered to provide such security, that such a failure, negates the discretion and/or jurisdiction of the court to decree the provision of security.

59. In my humble view, that submission by and/ or on behalf of the Plaintiff/Respondent is far from the true position of the law. For clarity, the obtaining position of the law is such that whether or not an offer to provide security is made by the Applicant, the court is enjoined to deal with and pronounce itself on the issue of security.

60. Further, it is also my finding and holding, that the determination of the nature, kind and quantum of security to be provided and/or availed, falls within the discretion of the court and in this regard, the court does not require the persuasion and/or invite by the disputants. For sure, the court must exercise its mandate and/or discretion in accordance with the letter and the values of the law.

61. Having come to the conclusion that issues of security falls within the mandate and discretion of the court, and the court is not under the direction and/or persuasion of either of the parties, it is therefore upon this court to determine the nature and kind, as well as the quantum of security, that would suffice in respect of the subject matter.

62. In exercise of this mandate and/or discretion, it is appropriate that the orders that are made to safeguard the suit property during the pendency of the appeal, are such that same are able to preserve and/or conserve the suit property and to ensure that same, [read the suit property], will be available to the ultimate winner of the appeal.

### **Final disposition**

63. In conclusion, the orders that commend themselves unto me are as hereunder;

I. *The Notice of Motion Application dated the 1<sup>st</sup> November 2021, be and is hereby allowed in terms of prayer 3 and 4 thereof.*

II. *An order of Inhibition be and is hereby directed to be registered against the title in respect of L.R No. 209/7008-Nairobi, pending the hearing and determination of the intended appeal to the Court of appeal.*

III. *The Defendant/Applicant is hereby ordered and/or directed to deposit and/or Surrender the certificate of title in respect of L.R No. 209/7008-Nairobi, with the Deputy Registrar of this court and the original title to be verified by an affidavit confirming that same is the original title and/or certificate title held by the Defendant/Applicant over L.R No. 209/7008-Nairobi.*

IV. *The Defendant/Applicant herein to deposit kes.500, 000/= only, in an Escrow Account in the names of the advocates for the respective parties and same to be opened and maintained with a Reputable Banking Institution.*

V. *The deposit of the original title/certificate of title and the opening of the escrow account, to be undertaken and/or be carried out within 30 days from the date of this Ruling.*

VI. *In default of compliance with limb iii, iv and v hereof, the order of stay herein shall lapse and/or stand discharged without any further reference to the court and the Application for stay of Execution shall similarly stand Dismissed.*

VII. *Costs of the Application shall abide the Intended Appeal*

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT

MS ANNE NJOROGI FOR THE DEFENDANT/ APPLICANT.

MR. RAPANDO FOR THE PLAINTIFF/ RESPONDENT.