



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC APPEAL NO. E006 OF 2020

SHADRACK OMONDI OKUMU.....1ST APPELLANT

MARY WAYUA NDAMBUKI.....2ND APPELLANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST RESPONDENT

ALBINA NAMONO MUKOPI.....2ND RESPONDENT

STUBER HEINZ.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated 17th May 2021 by the Appellant/applicants seeking for the following orders:

a) Spent

b) That this Honourable court be pleased to order a stay of execution of the Ruling, order and or decree issued on 9th December 2020 by Hon. Kituku SPM in Kilifi CMCC No. 57 of 2019 pending the hearing and determination of this application.

c) That thus Honourable court be pleased to order a stay of execution of the Ruling, Order and or Decree issued on 9th December 2020 by Hon. Kituku SPM in Kilifi CMCC no 57 of 2019 pending the hearing and determination of the appeal filed herein.

d) That this application be heard inter partes on such a date and this time as this Honourable court may be pleased to direct.

e) That the costs of application abide by the outcome of the appeal filed herein.

Counsel agreed to canvas the application vide written submissions which were duly filed

APPELLANT/APPLICANTS' SUBMISSIONS

Counsel relied on the grounds on the face of the application and the supporting affidavit of Shadrack Omondi Okumu who stated that on 9th December 2020, Hon. Kituku SPM delivered a ruling in Kilifi CMCC No. 57 of 2019 whereby the court allowed the 2nd and 3rd respondents' application for a mandatory injunction which would result to yielding vacant possession of the suit property to the 2nd and 3rd respondents.

The applicant further averred that the suit property is his matrimonial home and he is apprehensive that the 2nd and 3rd respondents will proceed with execution and forcefully evict him from the suit property rendering the appeal nugatory.

Counsel submitted that the applicant is aggrieved by the ruling and has requested for the typed proceedings to enable him filed a record of appeal. It was counsel's further submission that the application for stay of execution at the trial court was dismissed and following the dismissal the applicants reached out to 2nd and 3rd respondent with a view to an amicable solution which failed.

Counsel relied on the case of **RHODA MUKOMA –VS- JOHN ABUOGA [1988] eKLR**, where the Court of Appeal cited with approval **BUTT –VS- RENT RESTRICTION TRIBUNAL** where the Court stated:

“that in the case of a party appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.”

Counsel submitted that the Court laid down the questions to be considered in the grant of a stay of execution in the above case as follows:

- a. whether substantial loss may result unless stay is granted.
- b. whether the application is made without delay.

Ms Wambui also cited the case of **SEAMAN BUILDING & CIVIL ENGINEERING LTD –VS- JUSTUS MAKOKHA NASONGO [2020] eKLR** where **Joel Ngugi, J** pronounced himself thus!

“Hence, under our established jurisprudence, to be successful in an application for stay, an applicant has to satisfy a four-part test. He must demonstrate that:

- a. The appeal it has filed is arguable.*
- b. It is likely to suffer substantial loss unless the order is made. Differently put, it must demonstrate that the appeal will be rendered nugatory if the stay is not granted.*
- c. The application was made without unreasonable delay, and*
- d. It has given or is willing to give such security as the court may order for the due performance of the decree.*

Counsel further relied on the case of **RWW –VS- EKW[2019] eKLR**, cited with approval in **HGE –vs- SM [2020] eKLR**, where the Court addressed its mind to the purpose of a stay of execution orders 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.

9. 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.”

Ms Wambui therefore urged the court to allow the application as prayed as the applicants have met the conditions for grant of stay pending appeal.

1ST RESPONDENT’S SUBMISSIONS

Counsel relied on the replying affidavit by the 1st respondent’s legal Manager one Christine Wahome whereby she averred that the 1st respondent offered the 1st appellant a mortgage loan facility of Kshs. 5,236,000 to construct the 1st appellant’s house. The 1st appellant defaulted in repayment of the said loan and after serving the requisite notices, the 1st respondent exercised its statutory power of sale. She also stated that following a public auction on 6th February 2019, the 2nd and 3rd respondent’s emerged as the highest bidders and that the sale had been conducted procedurally.

Counsel further submitted that the Appellant filed a suit in the Lower court being Kilifi CMCC No. 57 of 2019; seeking inter alia interim injunction orders from any Respondent’s agents from trespassing, entering, ejecting, evicting or in any other manner interfering with the Appellants occupation, possession and proprietorship of the suit property known as plot LR No. 5408/III/MN (C.R. 49951), which application was heard and the Court disallowed the same with costs.

It was counsel’s further submission that the appellants filed an appeal against the said order and the High Court disallowed the appeal on 11th October 2019 by Justice R. Nyakundi.

Counsel submitted that Plot No. L.R. No. 5408/III/MN (C.R. 49951) situated in Mtwapa is now legally owned by the 2nd and 3rd Respondents having purchased the same for value at a public Auction, following statutory sale. That the intended appeal herein has no chances of success.

Counsel cited the case of **Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR** wherein it was stated:

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for,

the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR.

Counsel therefore urged the court to dismiss the application with costs to the respondents

2ND AND 3RD RESPONDENTS' SUBMISSIONS

Counsel relied on the replying affidavit dated 12th July 2021 sworn by one Musyimi Stephen Advocate whereby he stated that the 2nd and 3rd respondents are the actual registered owners of the suit property having purchased the same from the 1st respondent vide a public auction conducted on 6th February 2019.

Counsel submitted that when the appellant herein filed an appeal on the lower court ruling in CIVIL SUIT NO. 57 OF 2019 dated 29th May, 2019 the High Court in MALINDI HCCC APPEAL NO. 30 OF 2019 while addressing itself on the same issue found the auction was carried out legally with strict observance of the law.

Counsel therefore urged the court to dismiss the application with costs to the respondents.

ANALYSIS AND DETERMINATION

Applications for stay of execution pending appeal are guided by the provisions under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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.*

I have considered the application, the affidavit both in support of the application and in opposition, the submissions filed as well as the authorities relied upon and I am guided by the above provisions for grant of stay of execution.

The Court's discretion is fettered by the 3 requirements that an applicant must establish before grant of stay of execution. An applicant must satisfy the court that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and 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.

This was held in the case of **EQUITY BANK LTD VS TAIGA ADAMS COMPANY LTD [2006] eKLR** and also in **ELENA D. KORIR VS KENYATTA UNIVERSITY [2012] eKLR**, Justice Nzioki Wa Makau, held that

"The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay. In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd (2013) eKLR and Hassan Guyo Wakalo vs Straman FA Ltd [2013/eKLR in which it was held thus; "In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other"

If the applicant meets the above, then the court would not hesitate to grant an order of stay pending appeal. In the case of **Ishmael Kagunyi Thande vs Housing Finance Company of Kenya limited, Civil Application No. Nai. 157 of 2006 (unreported)** where the court stated that in order to succeed the applicant has to establish not only that his appeal is arguable, but also that it is likely to be rendered nugatory if the orders of stay of execution are not granted.

The court should balance the rights of the successful litigant and the aggrieved litigants who has a right of appeal to try his/her luck in the higher court. The applicant herein is aggrieved by the order of a mandatory injunction granted by the lower court at an interlocutory stage alleging that no special circumstances were established.

I notice that the application was filed timeously though it had a false start where the order being impeached was not attached on two occasions. In the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR where Munyao J** held:

"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."

The applicant has met the threshold for grant of stay of execution and he has established that he will suffer substantial loss if the orders are not granted. Even though the applicant submitted that the suit property is matrimonial home that does not sway the court into granting an order of stay of execution since when entering into the mortgage he knew the consequences of non-compliance.

In the case of **Siegfried Busch vs MCSK [2013] eKLR**, the court held that

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

It is not disputed that the 2nd and 3rd respondents are the current registered owners of the suit land. In order to preserve the substratum of the suit land pending appeal, I order that the applicants who are in possession do deposit Kshs 150, 000/ to a joint interest earning account of counsel on record for the applicant and the 2nd and 3rd respondents within the next 30 days failure to which the order lapses.

The court also orders that the applicant is precluded from interfering with the character of the suit land pending the hearing and determination of the intended appeal. Applicant to file the record of appeal within 30 days. Costs to abide by the outcome of the appeal

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF NOVEMBER, 2021.

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.