



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCC No. 130 OF 2016

PETER WASWA CHIMOSOPLAINTIFF

VERSUS

LAWRENCE DAUDI CHIMOSO.....DEFENDANT

RULING

1. Judgment was delivered in this matter on 27th June 2018. The court found that the plaintiff had failed to prove his case and accordingly dismissed it with costs.
2. The plaintiff later filed Notice of Motion dated 30th November 2018 seeking review of the judgment on ground of mistake or error apparent on the face of the record. The application was heard on its merits and dismissed through ruling delivered on 14th May 2019.
3. Undeterred, the plaintiff filed another application, Notice of Motion dated 4th February 2021, seeking stay of execution of “*all orders made in this case pending the hearing and determination of [his] intended appeal to the Court of Appeal*”.
4. This ruling is in respect of the said Notice of Motion dated 4th February 2021. The application is supported by an affidavit sworn by the plaintiff. He deposed that he filed Notice of Appeal and that he is awaiting proceedings so as to file record of appeal. That auctioneers had proclaimed his property and that the property was at risk of being sold any time. He annexed a Notice of Appeal lodged on 27th May 2019 against the ruling delivered on 14th May 2019.
5. The defendant opposed the application through a replying affidavit in which he deposed that the applicant had not shown that he had lodged any appeal against the judgment or that he would suffer any substantial loss. That the present application was activated when he initiated execution proceedings against the plaintiff.
6. The application was canvassed through written submissions which both parties filed. I have considered the application, the affidavits and the submissions.
7. This court’s jurisdiction to grant stay of execution pending appeal is guided by **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provides as follows:

6.(1) 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 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.

8. An applicant seeking stay of execution pending appeal under **Order 42 rule 6 (1)** is required to demonstrate that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. The applicant is further required to

give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**.

9. From the material placed before the court by the applicant, there is nothing to show that he filed any appeal against the judgment delivered on 27th June 2018. The Notice of Appeal which he lodged on 27th May 2019 was against the ruling delivered on 14th May 2019. There being no appeal against the judgment herein, I see no basis upon which to order stay of execution pending a non-existent appeal.

10. It is also apparent that having opted to seek review of the judgment, the applicant has abandoned any possibility of ever appealing against the judgment. I also note that the present application is worded loosely as seeking stay of *all orders made in this case*. It is not clear if what is sought to be stayed is the judgment of 27th June 2018 or the orders of 14th May 2019. The application was filed on 4th February 2021, over two and a half years after the judgment was delivered. There certainly has been unreasonable delay. If on the other hand what is sought to be stayed is the order of 14th May 2019, as already pointed out, there is no basis upon which to grant stay in the absence of an appeal against the judgment. That being the case, the applicant has not persuaded me that any substantial loss will result to him if stay is not granted.

11. In view of the foregoing, I find no merit in Notice of Motion dated 4th February 2021. I dismiss the application with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

Ms Shimoli for the Defendant

Court Assistant: E. Juma