



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 49 OF 2016

EVERLINE NANGILA WEKESA....PLAINTIFF

VERSUS

MARTIN BUKAMU.....1ST DEFENDANT

EDWARD BARASA.....2ND DEFENDANT

RULING

(On stay pending Appeal)

The Application

1. The Defendants/Applicants herein moved this Honourable Court by way of a Motion on Notice dated **27/9/2021** and filed on the even date. The Application was brought under Certificate of Urgency. It was premised on **Sections 1A & 1B, 3 & 3A** of the **Civil Procedure Act** and **Order 42, Rule 6** of the **Civil Procedure Rules**. The Applicants sought an order for stay of execution of the Judgment of this Honourable Court dated **9/9/2021**. They also prayed for costs of the Application.

2. The grounds upon which the Application is based were set out on the face of it. They are that the Applicants have filed a Notice of appeal; they are likely to be evicted from their parcels of land in issue; they will suffer substantial loss and damages unless the orders sought are granted and that it is in the interest of justice that the orders should be granted.

3. The Second Applicant, one **Edward Barasa**, is the one who swore the Supporting Affidavit on the **27/9/2021** to support the Application. He did it on his own behalf and on behalf of his co-defendant/applicant. In the affidavit, he depones that both Applicants were dissatisfied with the judgment of this honourable court as a result of which they filed a Notice of Appeal in this Court; he then annexed the Notice, dated **20/09/2021**. He also annexed to the Affidavit a letter dated **17/09/2021** requesting for proceedings and the judgment; it was filed on **21/09/2021**; that the proceedings are yet to be typed to enable them prepare the record of appeal; that the deponent's land is number **193** whereas the 1st defendants land is number **186** and that they settled on the parcels of land in the year **1989** and **1987** respectively; that they have both established their homes on the parcels of land where they reside; that the court's judgment has ordered that they be evicted from the land thus there is imminent danger of the Plaintiff/Respondent executing the court's judgment before their intended appeal is heard; that if the orders sought are not granted, that unless application is allowed their appeal shall be rendered nugatory and shall suffer substantial loss and damage and that they are ready to abide by any conditions set by the court and deposit security.

The Response

4. In opposing the application, the respondent filed a replying affidavit dated **4/10/2021** and filed on **5/10/2021**. Her response is that the Application lacks merit as the applicants have not demonstrated that their appeal has high chances of success; that an appeal is not automatic stay of execution; that the applicants are out to delay the matter further and deny her from enjoying the fruits of judgment and that the applicants have not met the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules 2010** thus the application dated **27/9/2021** is an abuse of the courts process and ought to be dismissed with costs.

Submissions

5. This Honourable court directed that the application be heard by way of written submissions. On record are the submissions dated **12/10/2021** filed on behalf of the applicants on the same date. However, the title of the submissions is "**...Defendant/Respondents' Submissions on Notice of Motion dated 27th September, 2021...**". They are signed by learned counsel for the Applicants. The wording and arguments contained therein depicts to be referring to the submissions for the applicants; I will, in this ruling, treat them as such. There are

none filed on behalf of the Plaintiff/Respondent.

Determination

6. I have carefully considered the Application, the affidavits in support and in opposition, the submissions filed and the case law relied. I find that the only issue for determination is:

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules to warrant grant of the orders sought

7. The principles that guide the grant of a stay of execution pending appeal are now well settled. They are provided under **Order 42 rule 6(2)** of the **Civil Procedure Rules**. The Rule provide as hereunder:-

“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”.

8. An elaboration of the principles had been made by the Court of Appeal in the case of *Halal & Another -vs- Thornton & Turpin [1963] Ltd [1990] eKLR* the Court of Appeal (*Gicheru JA, Chesoni & Cockar Ag. JA*). It held that:

“...thus the superior court’s discretion 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.”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo -vs- Straman EA Ltd (2013)* as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

9. Further, in *Antoine Ndiaye vs. African Virtual University [2015] eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006*, the learned judge. held inter alia that:

“.....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.”

10. In the instant application, the applicants are under a duty to prove that if the application is disallowed, then they will suffer substantial loss. What amounts to substantial loss was explained in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, where the court held:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. The applicants submit that they purchased their parcels of land and settled thereon in the year **1987** and **1989** respectively. Their case is that having taken possession thereof then, they have remained on their respective parcels of land to date. They submit further that they have established homes on the properties and that they are likely to be evicted if the Plaintiff proceeds to execute the decree of this honourable court by causing them to be evicted from the land parcels. In addition, the applicants submit that their houses are in danger of being demolished and the plaintiff is likely to dispose of the parcels to third parties rendering them landless.

12. For the foregoing explanation, this court finds since the Defendants have built on the parcels of land and settled thereon, they have demonstrated that they are likely to suffer substantial loss in case the eviction order is carried out. This is sufficient cause that makes the Court to agree with them regarding stay of execution in terms of **Order 42 Rule 6** of the **Civil Procedure Rules**.

13. On the condition as to whether the application has been brought without unreasonable delay, this court notes that judgment was delivered

on 9/9/2021. It which was reviewed on the 15/9/2021. The instant application was filed on 27/9/2021. This period translates 12 days after the judgment was reviewed. There was no unreasonable delay in bring the Application.

14. The third condition to be satisfied is that of security. The Applicants submit that they are ready to abide by any conditions set out by the court. It is this court's considered view that the Applicants have demonstrated readiness of providing security as would be directed by the court. The only issue left is that they did not propose any security they are willing to deposit.

15. From the foregoing, this court finds that the application is merited. In other words, the Applicants have satisfied the threshold of granting the application. The application is therefore allowed under the following conditions:

a. The Applicants shall deposit the sum of Kshs. 500,000/= in joined interest earning account to be opened by the parties' advocates within a period of forty-five (45) days of this Order.

b. The applicants shall file and serve the record of appeal within sixty (60) days from the date of this ruling failure to meet any or both of the above-mentioned conditions the stay orders shall lapse automatically. This extension does not in any way mean that the Applicant has been excluded from observing of following the Court of Appeal Rules regarding computation of time in relation to when he applied for and obtained proceedings and decree of this Court.

c. The sixty days shall not include the days of exclude the days between 21st December, 2021 and 6th January, 2022 both days inclusive.

d. This matter be mentioned in court virtually on 25th January, 2022 for further orders.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 11TH DAY OF NOVEMBER, 2021

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.