



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MAKUENI

ELC APPEAL NO 2 OF 2021

SYLVESTER NTHENGE.....APPELLANT

VERSUS

JOHSTONE KIAMBA KISWILI.....RESPONDENT

RULING

1. By a Notice of Motion Application dated the 29th of September 2021 brought under Section 1A, 1B, 3, 3A, 63(b), 80, 95, 100 of the Civil Procedure Act cap 21 and Order 42 Rule 6(2), (3), Order 45 and Order 50 Rules 1, 2, 3, 4, 5, 6 and 7, Order 51 Rule 1 of the Civil Procedure Rules, Section 3, 13(7) of the Environment and Land Court Act and all enabling provision of the law, the Appellant sought for the following orders:-

a) (Spent).

b) That the court be pleased to issue interim orders of stay of execution of the judgment delivered on the 12/1/2021 by Hon J. O. Magori (SPM) IN Makindu SPMCC Civil Case No. 162 of 2014 Johnstone Kiamba Kiswili –vs- Sylvester Nthenge and decree and all consequential orders emanating therefrom pending the hearing and determination of this application.

c) That the court be pleased to enlarge time and extend the orders of stay issued by Hon Justice Mbogo on 29/7/2021 pending the hearing and determination of this application.

d) That the court be pleased to enlarge time and extend the orders of stay issued by Hon Justice Mbogo on the 29/7/2021 pending the hearing and determination of the main appeal.

e) That the court be pleased to review, vary and/or extend the order of stay issued by Hon Justice Mbogo, enlarge time and allow the appellant/applicant to deposit the security for costs of Kshs. 81,280 within three days of its orders in court as opposed to deposit in a joint interest earning account agreeable to the respective advocates as the advocates cannot agree on the said joint account.

f) That the cost of the application be in the cause.

2. The application is premised on the grounds on the face of the application. It is further supported by the affidavit of Sethna Atonga Advocate sworn on the 29th of September 2021 who avers that, vide a ruling delivered on the 29/7/2021, the Hon Justice Mbogo granted the Appellant/Applicant orders of stay of execution pending the hearing and determination of the application on condition that the Applicant deposit security of costs in the sum of Kshs 81,280 in a joint interest earning account agreeable by the advocated within 45 days from date of the ruling.

3. She further averred that the Applicant's Advocate obtained the relevant documents from the Kenya Commercial Bank and served them upon the Respondent's lawyers on the 2/9/2021 annexure SIA1. That despite receiving the documents on 7/9/2021 and well before the stay orders could lapse on the 14/9/2021, the Respondent's Advocates failed to execute their part.

4. That the defendant uncooperativeness is demonstrated by their letter dated 9/9/2021 where they indicated that the default clause had kicked in whereas it had not. That although the letter was dated 7//2021, it was served upon them on the 24/9/2021. She argued that the Respondent's having obtained the decree, it was only a matter of time for them to enforced the decree.

5. She argued that the applicant was ready and willing to deposit the entire security for costs within 3 days of the variation of the order in court. She contends that unless the orders of stay are varied the Respondents would proceed with the execution to the detriment of the

Appellant's goods, business and tools of trade and that the Appeal would be rendered nugatory.

6. The court issued directions on the 7th of October 2021 in the presence of Ms Kaloki holding brief for Mr Muia for the Respondent and Mr Hassan holding brief for Ms Atonga for the Applicant. The Respondent was granted leave of 10 days to file and serve its replying affidavit. The parties were further directed to canvass the application by way of written submissions.

7. The Respondent did not file any response or submissions to the Appellant's application. The Appellant filed its submissions on the 10th of Nov 2021. The Applicant reiterated the contents of the replying affidavit and the grounds on the face of the application in its submissions. To buttress on the issue on security of costs, the Appellant relied on the case of **Margret Mwhaki vs Joseph Muiriuri Mugo (2015) eKLR**.

ANALYSIS AND DETERMINATION

8. I have considered the application, the supporting affidavit and the written submission of the Applicant and I find that the issue for determination is whether the Appellant/Applicant is entitled to the orders sought.

9. The Applicant herein is seeking to have the orders of stay issued by Hon Justice Mbogo on the 29th of July 2021 extended and reviewed, or varied. I have carefully perused the court record and I find that the court vide its ruling delivered on the 29th of July 2021 granted the Appellant orders of stay of execution pending the hearing and determination of the Appeal on condition that the Appellant deposits the security for costs in a joint interest earning account within 45 days from the date of the ruling.

10. Section 80 of the Civil Procedure Act provides that:-

Any person who considers himself aggrieved-

a) By a decree or order in which an appeal allowed by this Act, but from which no appeal has

b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. The provisions of Order 45 Rule 1 provides for the review of a decree or order as follows:-

1. (1) Any person considering himself aggrieved: -

a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred or

b) By a decree or order from which no appeal is hereby allowed, and from whom the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

12. There are three limbs which are discernible from part (b) above

a) Discovery of new and important matter or evidence.

b) Mistake or error apparent on the face of the record.

c) Any other sufficient reason.

13. From the above provisions it is clear that while Section 80 of the Civil Procedure Act gives the court the power to make orders for review, Order 45 sets out the conditions to be met in a review.

14. In **Republic –vs- Public Procurement Administrative Review Board & 2 Others** the court held that:-

Section 80 gives the power of review and Order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.

15. In the present application, the Appellant has not demonstrated that there has been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record. Review can also be allowed for any other sufficient reason. The expression sufficient reason means a reason sufficiently analogous to those specified in the rule.

16. In **Shanzu Investments Limited v Commissioner for Lands (Civil Appeal No 100 of 1993)** the Court of Appeal held that:-

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the civil procedure act: and that the other grounds set out in the

rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

17. I have carefully perused the court record and I find that, upon hearing the application dated the 28th of April 2021, the court on the 29th of July 2021, granted orders of stay of execution of the judgment delivered on the 12th of January by Hon. J.O. Magori (SPM) in Makindu SPMCC Civil case NO 162 of 2014 the decree and all the consequential orders emanating therefrom pending the hearing and determination of the Appellant's/Applicant's Appeal on condition that the Appellant deposits Kshs 81,280/= in an interest earning account in the joint names of the Advocates on record for the parties within 45 days from the date of the ruling and in default the Respondent would be at liberty to execute.

18. The Appellant obtained the account opening forms annexure SIA2 from the Kenya Commercial Bank and executed its part without delay. The Respondent despite being served with the forms for purposes of execution, failed to comply with its part. The appellant cannot be faulted for failing to comply within the stipulated period of 45 days. I find that the reasons advanced by the Appellant are sufficient to vary the orders issued herein. The variation sought herein will give effect to the ruling dated the 29/7/2021.

19. The upshot of the foregoing is that the application dated 29th of September 2021 is allowed in terms of prayers number 4 and 5 on condition that the Appellant/Applicant shall deposit Kshs 81, 280 in court within three days from the date hereof, in default the Respondent will be at liberty to execute.

20. The costs of the application shall be in the cause.

RULING DELIVERED DATED AND SIGNED VIRTUALLY THIS 15TH DAY OF DECEMBER 2021.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:

Kemboi – court assistant

Mr. Atonga for the Appellant