



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL CASE NO. 22 OF 2021

SAMUEL NJOROGE KIARIE.....APPELLANT/APPLICANT

VERSUS

GEORGE IRUNGU MUYA.....RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect of the Appellant/Applicants Notice of Motion Application dated 27th September 2021. It is expressed to be brought under Article 40(1), 159(2)(d) of the Constitution of Kenya 2010, Section 4(4) and 7 of the Limitation of Actions Act, Section 65 of the Civil Procedure Act, Order 22 Rule 18 (2), Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules.

2. The said application is brought under Certificate of Urgency and seeks the following orders:

i. Spent.

ii. Spent.

iii. THAT this honourable court be pleased to order a stay of execution of the Judgement and order made in Naivasha Magistrate's Court Case No.82 of 2018 on 22nd September 2021 by Honourable Kennedy Bidali pending the hearing and determination of the Applicant's Appeal.

3. The application has no grounds on its face but is supported by an affidavit sworn on 27th September, 2021 by the Appellant/Applicant, Samuel Njoroige Kiarie.

4. There are certain grounds appearing on the face of the Certificate of Urgency and are set out as below:

a. THAT I do certify that the Notice of Motion filed herewith is most urgent Application requiring to be placed before the Honourable Vacation Judge at the earliest possible moment for the reason that the Applicant bears a risk of losing is suit property in plot 347 in Gilgil through fraudulent misrepresentation by the Respondent.

b. THAT judgment was passed on 22nd September, 2021 by HON KENEDY BIDALI allowing the Respondent's application dated 25th January, 2017.

c. THAT the nature and content of the Judgment delivered by the Learned Magistrate are completely strenuous ad forcible upon the Appellant as the same is grounded on the subject suit plot no. 347 Ngomongo Gilgil where the Appellant has been living with his family for the last 14 years.

d. THAT in order to preserve the substratum of the entire suit and the Notice of Motion, it is only fair that the status quo be maintained and the same can only be achieved by grant of orders of stay of terms of the judgement.

e. THAT this application has been brought forward in good time and without any delay on the part of the Applicant.

f. THAT there is sufficient cause and reason to hear and determine this application ex parte in the first instance, and the

Appellant shall be completely prejudiced if the same is not allowed.

g. THAT accordingly it is only fair, just and equitable that the said application be heard on priority basis and the same be allowed.

5. On the cause title of the Notice of Motion Application, the Appellant/Applicant has indicated that this is an **“Application for stay of the Judgment and orders made by the Chief Magistrates’ Court (By Honourable Kennedy Bidali) on 22nd September, 2021”**.

6. It is important to point out from the outset that the Appellant/Applicant appeared in person while the Respondent was represented by counsel.

7. The application came up for hearing on 16th November, 2021 and proceeded by way of Oral Submissions.

APPLICANT’S CONTENTION.

8. The Appellant/Applicant made elaborate Oral Submissions and the court had to, on many instances, remind him that the hearing was in respect of the application for stay pending Appeal and not the actual Appeal.

9. The relevant parts of his submissions, pertaining to his application, are that judgement was entered against him in Naivasha ELC No. 82 of 2018.

10. The Appellant/Applicant stated that his life will be difficult if the orders of stay pending Appeal are not granted and that there is every danger that the Respondent will sell the property which he states is his matrimonial home.

11. The Appellant/Applicant stated that he is opposed to the averments in the replying affidavit sworn by the Respondent that he deposits the amount awarded in court. He instead prayed that orders of status quo be issued and further that the suit be heard afresh and fully determined.

RESPONDENT’S RESPONSE.

12. In his Response, the Respondent stated that the Application and the Appeal have no merit.

13. He stated that for grant of orders of stay of execution pending Appeal, three conditions must be fulfilled:

i. The Appeal must be meritorious.

ii. The Applicant must demonstrate that failure to grant the orders of stay will cause him prejudice or damage.

iii. The Applicant must furnish security so that the successful party is not deprived of the fruits of his judgement.

14. On the issue of prejudice and irreparable damage, the Respondent submitted that he is the one who has been suffering. He submitted that he purchased the suit property 5 years ago and has not been able to enjoy it, adding that the Applicant is enjoying both the property and the money paid to him as purchase price for the suit property.

15. The Respondent submitted that the circumstances under which the Applicant/Appellant took possession of the suit property were irregular and that a court of competent jurisdiction had ordered that he vacates the property.

16. The Respondent further submitted that he had used money to renovate the suit property and was apprehensive that the Appellant/Applicant was causing his investment to waste away fearing that there was damage to it and that the Respondent might be removing fixtures.

17. The Respondent submitted that the best way to balance the interest of both parties is to have the Appellant vacate the suit land and the court to issue an order that the Respondent doesn’t dispose the suit property until the Appeal is heard and determined.

18. On the question of security, the Respondent proposed that the Appellant/Applicant moves out of the property and have the Decretal Sum deposited in a joint interest earning account or in court.

19. The Respondent ended his submission by praying for the dismissal of the Application. The Respondent added that if the court exercised its discretion and granted stay, the same should be conditioned on three things:

i. That the Appellant/Applicant vacates the suit property.

ii. That the Appellant/Applicant deposits Kshs. 400,000 in court or in a joint interest earning account.

iii. That the Respondent be ordered not to dispose of the property until determination of the Appeal.

APPELLANT/APPLICANT’S RESPONSE TO THE RESPONDENT’S SUBMISSIONS.

20. In his Response to the Respondent's submissions, the Appellant/Applicant stated that the matter be heard afresh adding that he had no capacity to transfer the suit property and would not cause it any damage.

21. He added that he did not receive any money for the suit property and there was no evidence in the Replying Affidavit that he was paid for the suit property.

22. The Appellant/Applicant in his response, stated that he went back to the suit property because he was not paid the purchase price and he needed to safeguard his family otherwise he would have become a squatter.

23. The Appellant/Applicant urged that the court to make orders for status quo. He stated that the statements by the Respondent that he was paid for the suit property are not true.

24. He also stated that he transferred the suit property to the Respondent and that if orders of stay are not issued, he will be evicted and the suit property sold by the Respondent.

25. That marked the close of the Appellant/Applicant's submissions.

ISSUES FOR DETERMINATION

26. The issues for determination are:

a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

b. Who shall bear costs of the Application?

ANALYSIS AND DETERMINATION

27. I have considered the Application, the affidavits in support of the Application and in opposition to the Application, the annexures to the affidavits and the Oral Submissions by both parties.

28. I have agonized over this application mostly for the reason that the Appellant/Applicant who appeared in person might not have fully appreciated the criteria for grant of orders of stay of execution pending Appeal. What is clear, however, is that the Appellant/Applicant is desirous of appealing against the decision in Naivasha CMCC No. 82 of 2018 and he has filed a document which he refers to as a Memorandum of Appeal. This document is an annexure to this application which he describes in his cause title as an application for stay pending Appeal.

29. I have also taken note of the submissions by the Respondent wherein he appreciates that the court has discretion in granting or refusing to grant orders of stay of execution pending Appeal. He prays, however, that the stay should be conditional.

30. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which states as follows:

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.

31. In **Victory Construction Vs BM (a minor suing through next friend one PMM) [2019] eKLR**, the Learned Judge stated that the Court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, should also be taken into consideration. He stated that the court is no longer limited to the Provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions.

32. Section 1A of the **Civil Procedure Act** provides that: -

1. the overriding objective of the Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes governed by this Act

2. “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section 1”

33. Section 1B of the Civil Procedure Act explains some of the aims of the overriding objectives as:

a. the just determination of the proceedings;

b. the efficient disposal of the business of the Court;

c. the efficient use of the available judicial and administrative resources;

d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and

e. the use of suitable technology.

34. In **Vishram Ravji Halai Vs Thornton & Turpin Civil Application No. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending Appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a **sufficient cause, satisfaction of substantial loss and the furnishing of security**. Further the application must be made **without unreasonable delay**.

35. In **Butt Vs Rent Restriction Tribunal [1979]**, the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending Appeal. The court stated thus:

i. The power of the court to grant or refuse an Application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.

ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal court reverse the judge's discretion.

iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

36. On the first criteria as set out in Order 42 Rule 6 (2) i.e. Whether Applicant/Appellant has brought this Application without unreasonable delay, I am satisfied that there was no delay. The judgement was delivered on 22nd September, 2021 and this Application and Memorandum of Appeal were filed on 29th September, 2021.

37. The second criteria is whether the Applicant/Appellant has demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In **Silverstein Vs Chesoni (2002) 1 KLR 867** it was held that:

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"

38. **Shell Ltd Vs Kibiru & Another [1986] KLR 410** sets out the principles for grant of orders of stay pending Appeal. Holding number 4 of this case is particularly instructive on the question of substantial loss. The principles are that:

"1.

2. In considering an Application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the Appeal nugatory.

3. In Applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed Appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the Appeal nugatory, as the case involved a money decree capable of being repaid." (Emphasis is mine)

39. My deduction from principle No. 4 above is that when a decree is for payment of money, refusal to stay execution would not render the Appeal nugatory because the money can be repaid unless, of course, the Respondent is unable to demonstrate his financial capabilities.

40. The decree herein, however, is for orders of eviction and payment of money. If an order of stay is not granted, then the Appellant/Applicant faces eviction, he has submitted that the suit property is registered in the name of the Respondent and the only thing preventing the Respondent from disposing off the property is the fact of his occupation. The Respondent in an attempt to allay the Appellant/Applicant's fears has proposed that court makes an order prohibiting the Respondent from disposing off the suit property until the determination of the Appeal. It is clear, therefore, that the Appellant/Applicant's fears are not unfounded and that a potential sale hangs over his head. If orders of stay are not granted and a sale of the suit property ensues, it would occasion him substantial loss, rendering his Appeal nugatory. I therefore find that the Appellant/Applicant has sufficiently demonstrated that substantial loss would be occasioned to him if orders of stay pending Appeal are not granted.

41. The third criteria are that the Applicant must furnish security for the due performance of the decree. I am reminded that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks to preserve the status quo pending the hearing of the appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement.

42. The Court of Appeal in *Nduhiu Gitahi and Another Vs Anna Wambui Warugongo [1988] 2 KAR 621*, while citing the decision of *Sir John Donaldson M. R. in Rosengrens Vs Safe Deposit Centers Limited [1984] 3 ALLER 198* stated:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an Application for stay pending Appeal the court is faced with a situation where judgment has been given. It is subject to Appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that Appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the Appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the Appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”

43. In *Absalom Dova Vs Tarbo Transporters [2013] eKLR*, stated:

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

44. In *Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & 4 Others [2015] eKLR*, it was said:

“... 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.”

45. In *Gianfranco Manenthi & another Vs Africa Merchant Assurance Company Ltd [2019] eKLR*, the court observed:

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of Appeal from money decree of the lower court for an order of stay must satisfy this condition on security.

46. *The decision in RWW Vs EKW [2019] eKLR* reminds me of the purpose of a stay of execution order 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.

47. In *Cotton L J in Wilson Vs Church (No 2) (1879) 12ChD 454* at page 458, Hancox JA stated,

“I will state my opinion that when a party is appealing, exercising his undoubted right of Appeal, this court ought to see that the Appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed Appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

48. On the question of costs of the Application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287*.

49. It is not lost on me, therefore, that the power to grant or refuse an Application for stay of execution pending Appeal is discretionary and that while at it, I should balance the competing interests of both the Appellant and the Respondent; focusing on their reconciliation. Keeping this in mind and taking into consideration the submissions of parties, the provisions of section 1A and 1B of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and judicial decisions cited in preceding paragraphs. I now make the following orders:

1. There shall be an order a stay of execution of the Judgement and order made in Naivasha Magistrates Court Case No.82 of 2018 on 22nd September 2021 by Honourable Kennedy Bidali in terms of prayer (a) (b) (c) of the plaint pending the hearing and determination of the Applicant's Appeal.

2. The Appellant shall furnish security of Kshs. 400, 000 for performance of the decree. The said amount shall be deposited in court within 45 days.

3. That in the event of failure to comply with the order in (2) above, the order in (1) shall stand vacated.

4. The cost of this Application shall be in the Appeal.

51. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF DECEMBER, 2021

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kiarie the Appellant/Applicant - (In person)

No appearance for the Respondent.

Court Assistant; Monica