



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E094 OF 2021

CHARLESKIREMA IKIAO.....APPELLANT

VERSUS

HASSAN MWAMBIA IMWAINE.....RESPONDENT

RULING

1. The applicant seeks stay of execution of the judgment delivered on **14.7.2021** in **Maua CMCC No. 156 of 2015** pending hearing and determination of this appeal on the basis his appeal has high chances of success, is likely to suffer substantial loss and damage should he pay the money decreed to the respondent.
2. The application is supported by his sworn affidavit in which he says the lower court ordered him to refund Kshs. 550,000/= plus interest at court rates for breach of contract to sale **Parcel No. 1033 Athiru/Ruujiine/Ndoleli Adjudication** in 2013.
3. The application is opposed through a replying affidavit sworn on 7.10.2021 on the basis that no substantial loss has been demonstrated. Secondly the respondent states he had taken a loan to pay for the land and as a primary school teacher with meagre salary his family has been suffering without basic necessities as he services the loan. Thirdly he says since 2015; the applicant had sold him non-existent land and hence the application and the appeal are all delaying tactics aimed at denying him enjoyment of the fruits of his own judgment.
4. For an applicant to be granted stay of execution, **Order 42 rule 6** requires demonstration of substantial loss, that the application is filed without inordinate delay and thirdly demonstration of willingness to offer security for due performance of the decree.
5. The judgment was read on 16.7.2021 and the application was made on 3.8.2021. I find there was no inordinate delay.
6. In ***James Wangalwa & another –vs- Agnes Naliaka Cheseto [2013] eKLR***, the court held the mere facts that the amount is substantial and there is imminent danger of execution is not good enough since execution is a legal process. Consequently in ***Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] KLR 410***, the court held a party must demonstrate through cogent evidence the substantial loss he is likely to suffer.
7. In the instant case there is no dispute that the applicant took Kshs. 550,000/= in 2013 from the respondent on account of sale of land. Since 2013, the applicant has not given vacant possession and or transferred any land to the respondent. The appellant is both holding onto the money as well as the land. The supporting affidavit has not indicated in whichever manner he is likely to suffer if he refunds the money to the respondent. It is not that the applicant is being ordered to hand over vacant possession in which he would be saying once the respondent takes vacant possession, the substratum of the appeal shall change.
8. In a money claim, the courts have held the only danger is where there is fear that once the monies are handed over to respondent whose financial capacity is in doubt, and unlikely to refund in the event the appeal were to succeed. See ***Stanley Karanja Wainaina & Another – vs- Ridon Anyangu Mutubwa [2016] eKLR***.
9. In the instant case the appellant has not stated anywhere in his application that the respondent is a man of straw and unlikely to refund the monies if and when his appeal succeeds. See ***Kenya Hotel Properties Limited v. Willesden Investments Ltd. (2007) eKLR***.
10. The respondent has stated he is a primary school teacher duly employed and hence in salaried employment. He has also stated he is capable of accessing loan facilities the same way he was able to mobilize Kshs. 550,000/= to pay the appellant. His financial capacity is therefore not in question even if the monies were handed over to him and in the unlikely event the appeal succeeds and he was told to refund it.

11. On the other hand, the appellant says the appeal has high chances of success. The lower court found as a matter of fact the parties had not agreed on the exact land. The appellant is not offering any alternative land to the satisfaction of the respondent as security. In my humble view the appellant has not demonstrated he has an arguable appeal with a probability of success.

12. Lastly in *Vishram Ravji Halai vs. Thornton & Turpin [1990] KLR 365* it was held over and above **Order 42 rule 6**, the court must also take into consideration the overriding objectives under **Section 1A, 1B and Article 156** of the **Constitution** on substantive justice and expeditious disposal of cases in timely cost effective and proportionate manner. See *Kenya Airports Authority –vs- Mitu-Bell Welfare Society Ltd [2014] eKLR*, *John Gachanja Mundia –vs- Francis Muriira alias Francis Muthika & Another & Another [2016] eKLR*.

13. Even by considering the wider justice, I am of the considered view that the appellant has not offered any security for the due performance of the decree if his appeal were to be unsuccessful on account of the decreed sum.

14. In the premises, the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

No appearance for parties

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE