



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO.67 OF 2011

JOSEPH MUTUKU MWANTHI.....1ST PLAINTIFF

JAMES MWANTHI MUTUKU.....2ND PLAINTIFF

JOSEPH MUIINDE MUTUKU.....3RD PLAINTIFF

ELIZABETH MUTUKU.....4TH PLAINTIFF

DAVID KIOKO MUTUKU.....5TH PLAINTIFF

NZIOKA MUTUKU.....6TH PLAINTIFF

ESTHER MUKULU MUTUKU.....7TH PLAINTIFF

VERSUS

AIMI MA KILUNGU COMPANY LIMITED.....DEFENDANT

RULING

1. On 4th February, 2021, this Court delivered a judgement herein in which, while declining to award the general damages sought, however set aside the decision made by the Defendant Company via its resolution on 6th January, 2011 nullifying the membership of the 2nd to the 7th in the Defendant Company as well as their respective ballots and consequently repossessing their shares or plots unlawful and proceeded to set aside the said decision.

2. Aggrieved by the said decision, the Defendant/Applicant intends to appeal to the Court of Appeal against the said decision. In the meantime, it has moved this Court vide its Notice of Motion dated 29th April, 2021 seeking that there be a stay of execution of the said judgement pending the hearing and determination of the appeal.

3. According to the Applicant, they have filed a Notice of Appeal against the said judgement and unless restrained, the 2nd to the 7th Plaintiffs may move to execute the judgement by demanding 80 acres of land from the Defendant thereby making the said appeal superfluous. It was averred that the Defendant stands to be greatly prejudiced and will suffer substantial loss and damage if execution were to issue in respect of the said judgement. On the other hand, it was averred, no prejudice will be suffered by the Respondents if the orders sought herein are granted.

4. It was the Applicant's view that the appeal is arguable with high chances of success and that the application was brought without any undue delay as they have requested for certified copies of the proceedings, judgement and decree to fast track the processing of the record of appeal.

5. The applicants undertook to abide by such orders as shall be made on costs.

6. By a further affidavit sworn by **David Muthoka Mutangili** who erroneously described himself as the applicant, it was averred that the citation of the wrong provisions of law under the application does not make the same fatally incurable and defective since the court is conferred powers by section 100 of the **Civil Procedure Act** to amend any error or defect in any proceedings.

7. According to the Applicants, the delay in the lodging of the appeal was inadvertent on the part of the deponent who was unwell and unable

to get to his advocate's chambers to give instructions hence his advocates could not proceed to file the appeal without instructions. According to his information from the advocates, there was need to wait for the typing of proceedings before the lodging of the appeal. It was therefore his view that the delay is neither inordinate nor unreasonable.

8. He explained that the letter requesting for typed proceedings was electronically sent to the registry hence the same is lacking the receipt stamp but was duly received. According to him, they have since been informed that the typed proceedings are ready and they are obtaining the certificate of delay in order to lodge the appeal which the Applicants are interested in pursuing to its logical conclusion.

9. It was the Applicant's case that the respondents are capable of being compensated by an award of costs as the court indicated save their unsatisfactory nature of pleadings. He however stated that he stands to suffer substantial loss if this application is not allowed as the respondents has already started execution and if not allowed, the substratum of the appeal will not be preserved and in the event of success of the appeal, he will only be left with a paper judgment. The deponent averred that there is no proof of the allegations by the Respondents that parts of the land have been sold and are occupied by 3rd parties. He was apprehensive that in the event that this massive suit land remaining in the hands of the respondents before the appeal is heard and determined as their zeal to retain, own and exercise proprietary rights is quite clear. In his view, it was in the interest of justice that this application be allowed.

10. In the submissions filed on behalf of the Applicant reliance was placed on **Absalom Dova vs. Tarbo Transporters (2013) eKLR** and **Masisi Mwita vs. Damaris Wanjiku Njeri (2016) eKLR** and contended that the essence of this application is to preserve the matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. It was submitted that since the suit property herein is 80 acres of land, massive and of high monetary value, it is best if the same is not allowed into the hands of the respondents for any transactions. It was noted that the respondents have not asserted that they are able to refund the sums received or land in the event the appeals succeeds. They, according to the applicants, have neither stated that they are men of means nor is there evidence tendered before court in its support this position. It was therefore submitted that there is no evidence that the Respondents have any resources and whether they are capable of returning the applicant to the original position in the event this application is disallowed and appeal succeeds. In support of this submission, the Applicant relied on the case of **ABN Bank, N.V vs. Le Monde Foods Limited** as was quoted in **Kenya Orient Insurance Co vs. Paul Mathenge Gichuki & Anor (2014) eKLR** and submitted that the applicant is likely to suffer misfortune in the event that he is the successful party in the appeal in that the respondents have not demonstrated their ability to refund the costs.

11. As regards security for costs, the Applicant relied on the case of **Jayesh Hasmukh Shah vs. Narin Haira & Another (2015) eKLR**. As regards delay, it was submitted that the Applicant has explained the delay explicitly in his further affidavit which was inordinate and with good course. In this regard, reliance was placed on the case of **Charles Nyamwega vs. Asa Njeri Kimata & Another (2017) eKLR** and **Mohsen Ali & Another V Priscillah Boit & Another E&L No. 200 of 2012 [2014] eKLR**.

12. While urging the Court to allow the application, it was submitted that the right to a fair hearing enshrined in Article 50(1) of the Constitution is a fundamental human right and a cornerstone to the rule of law together with Article 48 of the Constitution. The duty of this court is therefore to accord and/or ensure every person who has submitted themselves to its jurisdiction an opportunity to ventilate their grievances.

13. The application was however opposed by the Respondents. In the replying affidavit sworn by the 4th Plaintiff, it was averred that the Application is a none starter and should be struck out from the record for the following reasons:

(a) That the Application is brought under the wrong provisions of the law and should not be entertained by this Court. Section 79G of the **Civil Procedure Act** ("the CPA") provides for time for filing appeals from subordinate courts while Section 95 of the CPA provides for enlargement of time for appeals. None of these provisions are relevant to this Application;

(b) This Court delivered its Judgment on 24th February 2021 and the Defendant has not advanced any reason whatsoever why it has had to wait for approximately six (6) months to seek stay of execution of the Judgment through the Application;

(c) It is trite law that an application for stay of execution of a Judgment must be registered without inordinate delay and with good cause advanced as to why the stay of execution should be granted. The Applicant has not demonstrated any reason for the protracted delay. In fact, the Application is dated 29th April 2021 and was only served upon our Advocates on record on 7th July 2021. The Defendant's Application was prompted by the letter from our Advocates on record dated 24th June 2021 where our Advocates forwarded the Order of the Court to the Defendant's Advocates for them to advise the Defendant and avert execution.

(d) Substantial loss will be caused to the Plaintiffs if the Court stays the execution of the Judgment because they are legitimate and legal owners of 80 acres of the Defendant's land and the Defendant allegedly extinguished their claim over the land on 6th January 2011 when it expelled them. The Plaintiffs have fought for their rights over the 80 acres of land and with 8 commercial plots that they own and incurred irrecoverable costs over the last 10 years when this matter has been pending in Court;

(e) The Plaintiffs continue to suffer irreparable loss because the Defendant's leadership have sold some of their properties to 3rd parties where they have established homes. The Plaintiffs will have to go back to the proper Court to assert their ownership of their respective commercial and agricultural plots as allocated to them by the Defendant, this Court having set aside the impugned decision made on 6th January 2011;

(f) The Defendant has not offered any security for the performance of the decree which is already binding upon it;

(g) The Defendant has not registered the Memorandum of Appeal of the intended appeal to show that it is interested in pursuing an appeal against the Judgment delivered by the Court;

(h) A Notice of Appeal is not an appeal and cannot be sufficient ground upon which this Court may be persuaded to stay the execution of the Judgment delivered more than six (6) months ago;

(i) The Notice of Appeal annexed to the Supporting Affidavit was lodged in this Court for endorsement by the Deputy Registrar on 22nd March 2021 and the Defendant has never bothered to follow up to have it endorsed by the Deputy Registrar to date and was never served upon my Advocates on record despite having been drawn in March 2021.

(j) While the Notice of Appeal is dated 8th March 2021, the Defendant's Advocates had to wait for two weeks (14 days) to lodge it at the Registry for endorsement by the Deputy Registrar;

(k) The letter dated 7th April 2021 allegedly requesting the Deputy Registrar to supply the Defendant's Advocates with certified copies of the proceedings and Judgment was never received by the High Court for their action.

(l) The actions of the Defendant and especially those described in paragraphs (i), (j) and (k) above show a very indolent litigant who cannot call this Court to its help to aid in blocking the Plaintiffs from enjoying the fruits of the Judgment; and

(m) This case has been in Court for the last ten (10) years and a stay of execution would prolong the matter exposing the Plaintiffs to irreparable prejudice.

14. Based on legal advice, it was deposed that the Plaintiffs have already begun the process of execution of the Judgment by extracting the Order and Decree; serving the Order upon the Defendant's Advocates on 24th June 2021 before the Defendants served theirs; and the Decree and Order had been released to the Court process server to effect service upon the Defendant at the time the Application was served.

15. On behalf of the Respondents, it was submitted based on **Congress Rental South Africa vs. Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee) [2019] eKLR** and **Global Tours & Travel Limited vs. Five Continents Travel Limited [2015] eKLR** that the Court is called upon to weigh the pros and cons of granting the order sought for stay of execution vis-a-vis the need for expeditious disposal of the case and whether the intended appeal has any chances of success. According to the Respondents, in granting the order for stay of execution, the Court will only be prolonging the disposal of this suit whose matters were sufficiently and successfully determined in the Judgment delivered on 24th February 2021. Needless to say, the Defendant has waited for over six months to bring this Application and it disqualifies it on the ground that this Application should have been brought timeously. Based on **Elena Doudoladova Korir v Kenyatta University [2014] eKLR** it was submitted that the Defendant has breached all the preconditions and it was noted that in this matter, the Defendant has not offered any security for grant of stay of execution. And that the Defendant has conceded that the Plaintiffs are the owners of 80 Acres of agricultural and commercial land whose value cannot be understated. To the Respondents, the Application is a delay tactic being employed by the Defendant to prevent the Plaintiffs from enjoying the fruits of the Judgment and in particular being registered as the absolute owners of their respective parcels of land. They submitted that there is no substantial loss likely to be suffered by the Defendant if the stay is not granted. The onus of proof of substantial loss lies with the Defendant and there is not evidence that any loss will be sustained by the Defendant.

16. It was the Respondents' position that the terms of the Judgment as prayed in the Plaint are not capable of being stayed because the Judgment did not issue a positive order for performance by the Defendant. This submission was based on **Ndungu Kinyanjui v Kibicho Kugeria Services & Another [2007] eKLR** referring to its earlier decision in **David Thiong'o t/s Welcome General Stores v Market Fancy Emporium [2007] eKLR**. It was submitted that an order for stay of execution must serve a purpose as was explained in the case of in **Co-operative Bank Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR** and **Sonalux Limited & Another vs. Barclays Bank of Kenya Limited & 2 Others [2008] eKLR**, and the Court was urged to dismiss the application with costs.

Determination

17. 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 provides as follows:

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.

18. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 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. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(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" while under section 1B some of the aims of the said objective are; the just

determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

19. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

20. Therefore, this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

“It is an affront to the rule of law to... render nugatory an order of Court whether real or anticipatory. Furthermore... parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity.”

21. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.”

22. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

“In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement.”

23. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is

to do justice in accordance with the law and to prevent abuse of the process of the court.”

24. In this case, as stated at the beginning of this ruling, the decision sought to be stayed is the one setting aside the decision made by the Applicant nullifying the membership of the 2nd to the 7th in the Defendant Company as well as their respective ballots and consequently repossessing their shares or plots unlawful and proceeded to set aside the said decision. In other words, the execution of the judgement is likely to lead to repossession of the subject plots by the Respondents. The effect of that decision is that the said Respondents were reinstated as members of the Appellant Company, together with their respective ballots as well as shares and plots. In **Nyals (K) Ltd. vs. United Housing Estate Ltd. Civil Application No. 129 of 1995**, the Court of Appeal held that where the subject matter is simply a right to possess, it is difficult to see how this can be preserved unless the status quo is maintained pending the determination of the appeal.

25. Apart from repossession, the possibility that the Respondents may dispose of the suit properties cannot be ruled out. The Respondents however contend that some of the said plots are now in the hands of third parties and that they will have to seek the intervention of the ELC to repossess them. If that be the position, then the grant of stay will not adversely affect their interests. Taking into consideration the fact that the Court should always opt for the lower rather than the higher risk of injustice, it is my view that a stay ought to be granted. The effect of the said stay would be to maintain the status quo.

26. In the premises, the order that commends itself to me and which I hereby grant is that the status quo be maintained. In other words, there will be a stay of execution pending the hearing and determination of the said appeal on condition that the Applicant does not alienate or in any other manner howsoever interfere with the titles of the subject properties.

27. The costs of this application are awarded to the Plaintiffs/Respondents.

28. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 6TH DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Kamene for Mr Mulei for the Defendant/Applicant

Ms Matu for the Plaintiffs/Respondents

CA Susan