



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 20 OF 2019

GLADYS KEMUNTO AUNGA.....APPELLANT/APPLICANT

VERSUS

AGNES KEMUNTO MOSE.....RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 23rd July 2019 the Appellant filed an application for stay of execution of the judgment and decree dated 24th April 2019 issued by the Rent Restriction Tribunal in RRT Case no. 11 of 2018 pending appeal. The application is based on the grounds stated on the face of the Notice of Motion and the Appellant's supporting affidavit sworn on the 23rd July 2019 as well as the further affidavit sworn on the 3rd October 2019.

2. The main ground advanced by the applicant is that during the hearing of the case at the Rent Tribunal, she was not given a chance to present her defence. She also claims the judgment was delivered in her absence without any notice to her. It is her contention that she has occupied the suit premises for a period of 15 years and paid her rent upto the year 2020 and if she is evicted, she will suffer irreparable loss. She maintains that her appeal has high chances of success.

3. The application is opposed by the Respondent through his Replying Affidavit sworn on the 23rd September 2019. In essence the respondent contends that the applicant was accorded an opportunity to be heard by the Tribunal and even though she cross-examined the Respondent after he gave his evidence, she declined to testify in support of her case and opted to rely on her pleadings and submissions. He contends that the applicant's appeal has no chances of success as she was found to be in arrears of rent. He argues that the applicant filed her appeal out of time without leave of the court and therefore there is no appeal before this court. He further denies that the applicant would suffer irreparable loss if the order for stay is not granted as she was given sufficient notice to move out of the suit premises.

ISSUES FOR DETERMINATION

4. Having considered the Notice of Motion, affidavits and rival submissions, the following issues arise for determination:

- i. Whether the applicant obtained leave to appeal out of time
- ii. Whether the applicant has met the prerequisites for grant of a stay pending appeal.

ANALYSIS AND DETERMINATION.

5. It is the Respondent's contention that the appeal filed by the applicant is contrary to the provisions of section 79G of the Civil Procedure Act which prescribes a period of 30 days within which to file an appeal. Counsel for the Respondent has submitted that judgment was delivered on 24th April 2019 whereas the appeal was lodged on 24th July 2019. Even though the applicant alleges to have obtained leave to file her appeal out of time from the Rent Restriction Tribunal, the order annexed to her affidavit and marked as annexure GKA3 is for stay of execution and does not expressly grant the applicant leave to appeal out of time. That being the position, I agree with counsel for the respondent that there is no valid appeal before this court.

6. In the event that leave to appeal out of time was granted, I will consider whether the applicant has met the conditions for stay of execution. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

- 1. That: Substantial loss may result to the applicant unless the order was made;**

2. That: The application was made without unreasonable delay; and

3. That: 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.

7. The principles that guide the court in the exercise of its discretion to grant an application for stay pending appeal were enunciated in the case of **Elena D. Korir vs Kenyatta University (2014) eKLR** where Justice Nziokiwa Makau stated as follows;

*“the application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & another vs Thornton & Turpin Ltd** where the Court of Appeal (Gicheru JA, Chesoni JA & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must 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 **Hassan Guyo Wakalo vs Straman EA Ltd[11](2013)** where the court observed 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 have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

8. Whether the Applicant has demonstrated that he will suffer substantial loss if the order for stay is not granted.

The applicant has expressed the fear that she will be evicted from the suit premises which she has been occupying since 2005. The court has however held that the process of execution does not amount to substantial loss. This was so held in the case of **James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR** where Gikonyo J observed as follows:

“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, that does not amount to substantial loss under order 42 Rule 6 of the Civil Procedure Rules. This is 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”.

9. In **Machira T/A Machira & Co Advocates V East African Standard (2002) 2 KLR 63** Kuloba J (as he then was) stated that:

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay”.

10. Beyond her desire to continue staying in the suit premises, the Applicant has not demonstrated what tangible loss she stands to suffer if the order for stay is not granted. It is therefore my finding that the Applicant has failed to satisfy this condition.

11. Whether the applicant has been made without undue delay.

The application was filed three months after judgment was delivered. It was therefore not made without undue delay.

12. Whether the Applicant has furnished security for costs.

In the case of **Exclusive Mines Limited & Another v Ministry of Mining & 2 others [2015] eKLR**, the court stated as follows:

“...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred.

13. With regard to security for costs, the applicant has not demonstrated by way of affidavit that she is willing to furnish security for costs which is one of the prerequisites for the grant of an order of stay pending appeal. The applicant has only stated that she has paid rent up to the year 2020.

14. The courts have held that the above conditions set out in Order 42 Rule 6 of the Civil Procedure Rules cannot be severed and must be met in full. See **M.O.M Amin Transporters Limited & another v Alexander Ndung’u Mbugua & 2 others [2017] eKLR** and **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR**.

15. Whether or not to grant stay of execution pending appeal is a matter of judicial discretion and the court must balance the interests of both parties. It is trite law that a successful party is entitled to the fruits of his or her judgment and the court cannot disregard this fact.

16. In the instant case the Applicant has not satisfied all the conditions laid down under Order 42 Rule 6 of the Civil Procedure Rules. It is therefore my finding that the application lacks merit and it is hereby dismissed with costs to the respondent.

Dated signed and delivered at Kisii this 28th day of February, 2020.

J.M ONYANGO

JUDGE