



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 215 OF 2017

FORMERLY MERU ELC. 08 OF 2015

FORMERLY EMBU ELC. 266 OF 2015

MUTEGI MUGWETWA.....PLAINTIFF

VERSUS

COUNTY MINISTRY OF LANDS, PHYSICAL PLANNING ENERGY & ICT COUNTY GOVERNMENT OF THARAKA NITHI.....1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI2ND DEFENDANT

THE DIRECTOR GENERAL (KENYA URBAN RURAL AUTHORITY).....3RD DEFENDANT

KENYA URBAN ROADS AUTHORITY.....4TH DEFENDANT

THE REGIONAL MANAGER-UPPER EASTERN (KENYA URBAN ROADS AUTHORITY)....5TH DEFENDANT

TERRITORIAL WORKS (K) LTD.....6TH DEFENDANT

AND

CHUKA IGAMBANG'OMBE DEVELOPMENT ASSOCIATION.....INTERESTED PARTY

RULING

1. This application which is dated **31.12.2019** states that the applicant has brought it to court under Order 42, Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the Civil Procedure Act and all other enabling provisions of the law. The application seeks the following orders:

1. **THAT** this Application be certified as urgent and service of the same be dispensed with in the first instance.
2. **THAT** pending *inter-partes* hearing of this Application, the Honourable Court be pleased to grant an interim order for stay of execution of the Judgement dated 4th December, 2019 and the resultant decree.
3. **THAT** the Honourable Court be pleased to grant an order for stay of execution of the judgement dated 4th December, 2019 and the resultant decree pending the hearing and determination of the appeal.
4. **THAT** the court be minded to make an order that status quo be maintained pending hearing and determination of the appeal.
5. **THAT** costs be in the cause.

2. The application has the following grounds:

a. **THAT** the Applicant has filed a Notice of Appeal against the entire award of the Honourable issued on 4th December, 2019.

b. **THAT** the Applicant has a high chance of success with his intended appeal and the same will be rendered nugatory if the 2nd Respondents proceed to execute the Judgement of the Court delivered on 4th December, 2019 by cutting off a three(3) storey building which is structurally impractical and if implemented by the 2nd Respondent, the same is irreversible.

c. The award of costs in the judgment delivered on 4th December, 2019 who enjoined themselves in their own volition is detrimental to the Applicants which costs may be taxed off any time now.

d. There is imminent risk of the 2nd Defendant demolishing the whole three storey building in the process of removing the alleged encroaching portions for the failure of the judgement delivered on 4th December, 2019 to give specific metres the Applicant's building its alleged to have encroached.

e. **THAT** the Applicant is willing to offer sufficient security in the sum of Kshs.300,000 as a condition for a stay order.

f. **THAT** it is in the interest of justice and fairness that this Application be allowed as prayed.

3. The application was supported by the affidavit of the applicant which states as follows:

I, **MUTEGI MUGWETWA** a resident of Tharaka Nithi County and of P.O. Box 802 Chuka – 60400 hereby make oath and states as follows:-

1. **THAT** I am the Applicant in this matter and thus competent to swear this Affidavit.

2. **THAT** the Honourable Court delivered its judgement on 4th December, 2019 in favour of the Respondents and against the Applicant directing him to structurally cut off part of the a three storey building (suit property) that is allegedly encroaching on the road.

3. **THAT** I have since filed a Notice of Appeal against the entire judgement of the Honourable Court. A copy of the Notice of Appeal is annexed hereto and marked MM-1

4. **THAT** my advocates on record Mr. Murango and Martin are in the process of filing the Memorandum of Appeal and Record of Appeal in the Court of Appeal at Nyeri.

5. **THAT** I contend that my intended appeal has high chances of success and therefore the Honourable Court should grant the orders sought herein to avoid the appeal being rendered nugatory.

6. **THAT** I stand to suffer damage and substantial loss if this Honourable Court declines to grant an order for stay of execution pending hearing of this Application and pending hearing and determination of the intended appeal.

7. That if the Respondents proceed to execute the Decree of this court by taxing the bill of costs it will be detrimental to me before the intended Appeal is heard and determined.

8. The process of implementation of the decree by cutting off the portion and /or the whole storey building is irreversible because the judgement is mute on the metres alleged to have been encroached.

9. I am financially before of the protracted cases between with 2nd Respondents and am ready and willing abide by court by giving Kshs.300,000 as security for cost as condition for grant of the orders sought in the Motion.

10. I verily believe that the case has been made for the grant of the orders sought in this Application, which I urge this Honourable Court to grant.

11. **THAT** the foregoing depositions are true and within my own knowledge save as to matters deponed on information and belief, sources and grounds whereof I have stated.

4. The application was canvassed by way of written submissions.

5. The applicant's submissions are reproduced herebelow in full without any erasure whatsoever or any correction of any spelling or other mistakes:

PLAINTIFF'S /APPLICANT WRITTEN SUBMISSIONS ON THE NOTICE OF MOTION

DATED 30TH DECEMBER ,2019

1. The only prayers that remain for the determination by the court in the Notice of Motion dated 30th December 2019 is the request

by the Applicant, Mutege Mugwetwa for a stay of execution of the judgement delivered on 4th December 2019, pending the hearing of the Applicant's appeal and the status quo to be maintained pending the hearing and determination of the Appeal.

3. The Motion is opposed through Grounds of opposition dated 13th January, 2020 filed by the 1st and 2nd defendant.

3. The Motion is not opposed by the 3rd to 5th Respondents and interested party as well despite service and an affidavit of service on the court record.

4. The application is premised on the grounds that the Applicant being aggrieved with the judgement delivered by the Honourable Court 4th December, 2019 has filed a Notice of Appeal annexed in the supporting Affidavit as **exhibit MM-1**.

5. It is the Applicant's position that the appeal, if successful, will be rendered nugatory and substantial loss will be suffered if the execution is not stayed pending the appeal and status quo be maintained on the subject suit properties.

6. The Applicant avers that he is willing to deposit security for due performance of the decree and the Respondent shall not suffer any prejudice if the application is allowed. Further, that it is in the interest of justice that the application be allowed.

7. The application is supported by the affidavit of Mutege Mugwetwa sworn of even date, the plaintiff/Applicant avers that the Notice of appeal was filed on 6th December 2019, within the time frames of the Court of Appeals Rules and served upon all the parties herein.

8. It is the Applicant's averment that implementation of the decree by cutting off the portion and or the whole three storey building is irreversible and this demonstrates a substantial loss he stands to suffer.

9. The 1st and 2nd Respondent in opposition to the application, avers that the Applicant's suit was dismissed and the court cannot grant a stay of a negative order; that the Applicant has not demonstrated what substantial loss he stands to suffer; that the Motion be dismissed with costs.

10. We urge the court to exercise its discretion in its favour of the Applicant as per the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** where the Court held that discretion ought to be exercised in a manner that would not prevent an appeal. The Applicant has submitted that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay. According to the Applicant, substantial loss would occur if his appeal succeeds and it is irreversible to put or maintain the storey building to its original state upon execution of the decree after 90 days from the date of the Judgement.

11. It is our submission that the judgement of the court issued on 4th December 2019 being appealed from is capable of being executed over and above the order for costs. This has been demonstrated by the 1st and 2nd Respondents filing bill of costs. It is not a negative order as so alleged by the 1st and 2nd Respondents. A stay of execution pending appeal may be granted so as to alleviate any undue hardship the applicant would suffer if stay is refused.

12. The Applicant has indicated that he is willing to furnish security for due performance of the decree. Further, he has met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010.

13. It is our humble submission that the Motion before this court invokes the discretionary powers of the court which should be exercised judiciously. Being brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) 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

14. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. 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 that appeal court reverse the judge's discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

15. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

16. It is our submissions that the Applicant has established that he will suffer substantial loss if the intended execution is not stayed. It also follows that if the Respondent executes the judgement and the Applicant’s appeal succeeds, then not only will the Applicant suffer substantial loss but the appeal will also be rendered nugatory. The application was filed without unreasonable delay.

17. We pray that the Motion dated 30th December 2019 be allowed as prayed

18. That all.

DATED at NAIROBI this 31st day of January, 2020.

MURIMI MURANGO ESQ.

ADVOCATES FOR THE PLAINTIFF/APPLICANT

6. The 1st and 2nd respondents’/defendants’ submissions are reproduced herebelow in full without any erasure whatsoever or any correction of any spelling or other mistakes.

1ST AND 2ND RESPONDENTS’/DEFENDANTS’ SUBMISSIONS

ON MOTION DATED 30/12/2019

The application is brought under the provisions of Order 42 Rule and Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B, 3A of the Civil Procedure Act. The application makes 4 prayers of which prayers 1 and 2 are spent. The substantial prayer is the one for stay of execution of the judgment dated 4/12/2019 pending determination of appeal. The appeal is yet to be filed though, albeit there is Notice of Appeal filed by the applicant.

The application is predicated on the grounds set out in body of the motion. It is supported by a jumbled affidavit of the applicant.

The grounds in support of the application for stay are now settled. In the case of **HALAL & ANOTHER –VS- TAXNTON & TURRIN (193) KLR** the court clearly set out the criteria to be used in determining an application for stay of execution, pending appeal as follows:-

“The high court’s discretion to order stay of execution of its order or decree is fettered by three conditions

- i. Sufficient cause**
- ii. Substantial loss would ensue from a refusal to grant stay**
- iii. The applicant must furnish security**
- iv. The application must be made without unreasonable delay.”**

The above criteria was hailed as good law in the case of **ELENA DONDOLADOYA KORIR –VS- KENYATTA UNIVERSITY (2012) eKLR**

It is quite clear that an order of stay of execution is discretionary. The discretion is however fettered by the conditions set out in the case of HALAL (supra) and also by the conditions clearly set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. Order 42 (6) (2) sets out the conditions as follows:-

- i. Application must be made without delay**
- ii. Applicant must demonstrate that he will suffer substantial loss unless the order of stay is granted, and**

iii. And the applicant must provide security.

Whereas it may be conceded that the application was filed within reasonable time, it is contended that the applicant has not satisfied conditions set out in Order 42 (6) (2) of the Civil Procedure Rules.

On the question of substantial loss the applicant states that his house could be partly demolished if stay is not granted. The factual burden of proving substantial loss falls upon the applicant. The incidence of both factual and legal burden of proof lies with the applicant. The applicant is required to satisfy the court that the respondents are incapable of making a full restitution in the event the appeal succeeds. Looking at the body of the motion and the entire supporting affidavit nowhere does the applicant state that the respondents are incapable of full restitution in the event of the appeal succeeding. Real and cogent evidence must be tendered by way of an affidavit and not by way of submissions by counsel on record. In the case of **BAKE “N” BITE (NRB) LTD –VS- DANIEL MUTISYA MWEALONZI –HCA NO 411 OF 2014**, when dealing with the question of stay of execution, Justice RE ABURULI stated

‘It is trite law that he who alleges must prove. Real and cogent evidence must be tendered by way of affidavit not by way of submissions by counsel or the applicant that the respondent is not possessed of any sufficient means to refund.’

In this case, the applicant during the hearing of the case filed a valuation report on the property subject of litigation. The valuation report ascertains the value of the subject matter, which he stated to be Kshs 205,000,000/=. The loss he stands to suffer if the decree is executed and the appeal succeeds is therefore ascertained and is known. The 1st, 2nd, 3rd, 4th & 5th Respondents are government and government agencies. The I.P is a huge Association. There is no evidence that the respondents are incapable of restituting the applicant to his current position in the vent of the appeal succeeding. Indeed there is no such allegation, in the affidavit by the applicant in support of the application. We submit that even if the applicant was to succeed in the appeal, the respondents have the capacity to do full restitution of the building. We submit that the applicant has not discharged the burden of proving that the respondents are incapable of restitution. The appeal will in that eventuality not be rendered nugatory. If the applicant is capable of getting full restitution then the issue of substantial loss or the appeal being rendered nugatory would not arise.

We submit that the applicant has failed to place before the court such material and information that would lead the court to conclude there would result substantial loss and failure of restitution. We submit that the applicant has not proved this condition.

The applicant is also required to provide security for due performance of the decree. In this case, apart from the order that the applicant removes the offending part of the building, he was also ordered to pay costs of the suit. The costs of the suit payable to the respondents would be based on the value of the subject matter, which the applicant has placed at Kshs 205,000,000/=. The instructions fees alone on the suit, taking into account the stated value would be in excess of Kshs 3,000,000/= per respondent. When all the respondents are through with taxation of their bills, we are looking at costs in excess of Kshs 10,000,000/=. The 1st and 2nd respondents have already filed their bill of costs amounting to Kshs 4,763,575/=. It is on record. The applicant merely states that he is willing to offer security of Kshs 300,000/=. Considering the value of the subject matter, the importance of the matter, complexity of the case and the duration of the case has taken, an offer for security in the sum of Kshs 300,000/= is not serious and is no security for due performance of the decree at all. We urge the court to find that the applicant has not offered a security contemplated under Order 42 (6) (2) of the Civil Procedure Rules.

The security proposed to be offered is grossly insufficient to cover the costs that may ultimately be taxed against the applicant and in favour of the respondents. The applicant is not offering anything useful like a bank guarantee or substantial deposit.

In the case of **GITAHU & ANOTHER –VS- WARUGOGO ,C.A. CIVIL APPLICATION NO 3 OF 1998**, the Court of Appeal substantially dealt with the issue of security in matters stay. Quoting with approval the holding in the case of **ROSENGERENS LTD –VS- SAFE DEPOSIT CENTRE LTD 919840M 3ALLER** 198 where judges of Appeal remarked

“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 be given in a way which is the least disadvantageous to the party giving that security. It may take many forms. Bank guarantee and payment into court are but two of them, so long as it is adequate.”

The emphasis herein was on adequacy of the security offered for due performance of the decree. Without adequate protection, the respondents are left exposed and will result in unequal treatment by the court.

We urge the court to find that the applicant has failed to satisfy the court on the cumulative grounds for granting stay under Order 42 (60) (2) and proceed to dismiss the same.

DATED AT MERU THIS.....6THDAY OF.....FEBRUARY,.....2020

FOR: MURANGO MWENDA & CO.

ADVOCATES FOR THE 1ST & 2ND DEFENDANTS

7. I have considered the pleadings, the submissions and the authorities proffered by the parties to buttress their diametrically incongruent assertions. As the authorities proffered by the parties have been fully elaborated upon in their written submissions which have been fully reproduced in the earlier part of this ruling, I do not find it necessary to regurgitate the principles espoused by those authorities.

8. The applicant asserts that he is entitled to orders for stay of execution for the reasons which he has stated. The 1st and 2nd respondents oppose the application and proffer 2 reasons.

a. That the applicant has not demonstrated that he would suffer substantial loss unless the order for stay is granted.

b. That in view of the averment in a valuation report proffered by the applicant during the hearing of this suit which said that the value of the subject property was Kshs.205,000,000/=, the offer of Kshs.300,000/= as security was quodlibetical and rather offered in a veritably cavalier manner.

9. Upon consideration of the apposite issues and circumstances, I will now make my determination. It is pellucid that the applicant filed a Notice of Appeal in good time. Our Judicial system pays obeisance to the Hierarchy of courts. Although I do not wish to delve into matters which await determination by the Court of Appeal, there is no doubt that demolition of the applicant's building would occasion him substantial loss, if eventually the intended appeal succeeds. I also agree with the 1st and 2nd respondents that the sum of Kshs.300,000/= offered as security by the applicant is far too little and for that reason I will order that it be tripled.

10. I opine that the issue of security should not be used to render preservation of the subject matter pending appeal impossible. If the court moves this way, it may end up rendering appeals nugatory. This would not be in tandem with the principle that obeisance of orders made or to be made by higher courts is sacrosanct.

11. Consequently, the following orders are issued:

a. Prayer 3 for stay of execution is granted on condition that the applicant will deposit with court the sum of Kshs.900,000/= as security within the next 14 days FAILING which this order will automatically lapse.

b. Costs shall be in the cause.

Delivered in open Court at Chuka this 24th day of February, 2020 in the presence of:

CA: Ndegwa

Murimi Murango present for the Plaintiff

Murango Mwenda present for the 1st and 2nd defendants

Kiongo present for the 3rd, 4th and 5th defendants

P. M. NJORGE,

JUDGE.