



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**E & L. NO. 290 OF 2013**

**PATRICK KIMUTAI KIPRONO.....PLAINTIFF**

**-VERSUS-**

**ERICK KIPKURGAT KIPRONO.....DEFENDANT**

**RULING**

This ruling is in respect of an application brought by way of Notice of Motion by the defendant/Applicant dated 11<sup>th</sup> June 2019 seeking for stay of execution of decree of the court pending the hearing and determination of an intended appeal.

Counsel canvassed the application vide written submissions which were duly filed.

**DEFENDANT'S SUBMISSIONS**

Counsel for the defendant submitted that the defendant was sued by the plaintiff who claimed 5 acres out of the suit land Pioneer Ngeria Block I (EATEC) 1426. Counsel further submitted that the honourable court ordered that the defendant subdivides the parcel of land and transfer 5 acres thereof the plaintiff of which the defendant was aggrieved by the decision hence filed a notice of appeal.

It was Counsel's submission that for an application for stay pending appeal to succeed the applicant has to demonstrate that:-

- a. He has filed an appeal or a notice of appeal
- b. The application has been filed without unreasonable delay
- c. He stands to suffer substantial loss in the event stay of execution is not granted
- d. He is ready to provide security for the due performance of the decree

On the issue of filing an appeal or notice of appeal, Counsel submitted that there is no dispute that the defendant has not only intimated his intention to appeal by filing the notice of appeal but has also sought proceedings and therefore satisfies the first limb.

On the second issue of unreasonable delay, Counsel submitted that the judgment was delivered on 31<sup>st</sup> May 2019 and that the defendant filed a notice of appeal on the same day and filed the instant application on 12<sup>th</sup> June 2019. That the application was therefore filed expeditiously.

On the issue of substantial loss, it was Counsel's submission that the defendant and his family have been exclusively using the suit parcel of land since 2000 and further that he has carried out substantial developments thereon.

Mr. Momanyi submitted that in the event that he is evicted to avail 5 acres, then the structures and developments will be destroyed which will render the appeal an academic exercise.

On the issue of provision of security, Counsel submitted that the suit parcel of land will still be available as the hearing of the appeal proceeds and that the execution of the decree in the event of the appeal succeeding or otherwise will not therefore be compromised. He therefore urged the court to grant the orders as prayed.

**PLAINTIFF RESPONDENT'S SUBMISSIONS**

In opposition to the application Counsel cited Section 63(e) of the Civil Procedure Act which states as follows: -

**"In order to protect the ends of justice from being defeated the court may, if it is so prescribed...**

**(e) make such other interlocutory orders as 111(1)' appear to court to be just and convenient. " (Our emphasis.)**

Counsel further relied on the provisions of Order 42 on the conditions set for grant of stay of execution orders.

Mr. Wafula Counsel for the respondent submitted that a successful litigant should not be deprived of the fruits of his judgment as was stated in the case of **KENYA SHELL LIMITED V BENJAMIN KARUGA KIBIRU & ANOTHER [1986] eKLR**

It was Counsel's submission that a person cannot wrongfully and illegally bring about a state of affairs and then apply to court to preserve that state of affairs (of preventing the plaintiff from continuing with his developments on the said land) as was held in the case of **THOMPSON V. PARK (1944) 2 ALL ER 477** and which was adopted later by the Court of Appeal in its unanimous judgment in the case of **M/S GUSII M WALIMU INVESTMENT CO. LTD & 2 others v M/S MWALIMU HOTEL KISII LTD 119961 eKLR.**

Mr. Wafula further submitted that by granting the stay of execution to the defendant, the plaintiff will continue to suffer irreparable harm. Counsel relied on the conditions set out on grant of stay of execution under Order 42 and that the court has to be satisfied that the applicant has met the conditions before granting the orders.

Counsel submitted that even though the application was brought without unreasonable delay, the applicant has failed to demonstrate the substantial loss that he is likely to suffer if the orders are not granted.

Counsel relied on the case of Kenya Shell (supra) to elaborate on the issue of suffering loss Plat J.A., had this to say:-

"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 b) some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions in granting stay. That is what is to be prevented. Therefore without this evidence, it is difficult to see why the respondent should be kept out of their money"

Counsel submitted that the applicant having claimed that he has developments on the suit land should have demonstrated photographs to show such developments. The entire parcel of land by measurement is ten (10) acres and the defendant is not in occupation of the whole of it.

It was Counsel further submission that the applicant has not met the threshold for grant of the orders of stay and therefor the application be dismissed with costs or in the alternative if the court is inclined to grant the orders the then the applicant should be ordered to furnish reasonable security.

### **ANALYSIS AND DETERMINATION**

The issues for determination in an application for stay of execution are as laid down under Order 42 Rule 6 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.**

The above must be met by the applicant before the court can exercise its discretion to grant the order of stay. The exercise of judicial discretion must be done judiciously.

The Court also held in the case of **Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, that:-

**"For the court to order a stay of execution there must be:-**

**i. Sufficient cause**

**ii. Substantial loss**

**iii. No unreasonable delay**

**iv. Security and the grant of stay is discretionary".**

The court finds that the applicant filed the application timeously and therefore has met one limb of the requirements. On the issue of substantial loss which is key in an application for stay of execution, the applicant has not demonstrated to the court what loss he is likely to suffer if the order is not granted. Mere allegation that there will be substantial loss to be suffered without demonstration is not enough to tilt the scale to the applicant's favour.

In the case of **Machira & Machira & Co Advocates vs East Africa Standard** (No.2) [2002]2 KLR 63 Kuloba J. had the following to say:-

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage – this is the trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution pending appeal.

The learned Judge then continued:-

“A court will not order a stay of execution upon a mere vague speculation. There must be the clearest ground of necessity disclosed on evidence. Commonly the applicant may obtain a stay of further proceedings or execution if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before appeal is concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed ...”

It is also important to note that substantial loss is a relative term as was stated by Musinga J in the case of **Daniel Chebutul Rotich & 2 others vs Emirates Airlines, Civil Suit No.368 of 2001** :-

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

The court must balance between the rights of a successful litigant and that of an applicant who would like to appeal against the judgment. This balancing act must also be done judiciously so as not to occasion injustice. 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.”

For a party to state that they are in occupation which might be illegal or be the subject of the impugned occupation, is not a ticket to continue with the occupation.

I find that the applicant will not suffer any loss if the stay is not granted. The best that the applicant can do is to fast track the hearing of the intended appeal. I find that the applicant has not met the conditions for grant of stay of execution and therefore is dismissed with costs.

**DATED and DELIVERED at ELDORET this 4<sup>TH</sup> DAY OF FEBRUARY, 2020**

**M. A. ODENY**

**JUDGE**

**RULING** read in open court in the presence for Miss.Gati holding brief for R.M. Wafula for Plaintiff/Respondent and Miss.Kimeli holding brief for Momanyi for Defendant/Applicant.

Mr.Yator – Court Assistant