



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL CASE NO. 35 OF 2017

JOHN MWANGI JOSEPH.....APPLICANT

VERSUS

MICHAEL NJOROGE 'B' & OTHERS.....RESPONDENTS

CONSOLIDATED WITH

MISC.CIVIL CASE NO 202 2017

1. MICHAEL NJOROGE 'B'

2. JOSEPH WATHIGARI.....APPLICANTS

VERSUS

1. VINCENT KIMANI.....1ST RESPONDENT

2. COUNTY LAND REGISTRAR, KIAMBU.....2ND RESPONDENT

RULING

1. Before me is the application filed on 31/7/18 seeking stay pending appeal, in respect of **Ngugi J's** ruling delivered herein on 4th June 2018, and decree issued on 20th July 1993 in **Gatundu succession Cause No. 5 of 1979**.

2. The grounds on the face of the motion are *inter alia* that the Applicants are aggrieved with the ruling delivered on 4th June 2018, and intend to file an appeal which will be rendered nugatory if stay is not granted; that the decree dated 20th July 1993 is a nullity and that the Respondent will not suffer prejudice if the application is granted. The application is supported by the affidavit of the Applicants **Michael Njoroge "B"** and **Joseph Wathigari** which expand upon the grounds on the face of the motion. They have annexed a copy of the notice of appeal filed on 13th June 2018 in respect of the ruling of 4th June 2018 as annexure **MG 2(a)**.

3. With regard to substantial loss, the deponents contend that they risk being evicted from their permanent homes which could also be demolished; that the Respondents might dispose of the suit property; in addition to the possibility of anarchy that may ensue the implementation of the decree of 20th July 1993.

4. **Vincent Kimani**, the 1st Respondent filed a replying affidavit on 18th October 2018 in opposition to the motion. The affidavit is primarily taken up with the history and contentious matters in respect of the dispute. The deponent defends the ruling delivered on 4th June 2018 for finally resolving the vexed question of the correct decree as the one dated 20th July 1993. The deponent disputes the Applicants' claims that they will suffer substantial loss if the decree of 20th July 1993 is implemented. In addition, the Respondents filed grounds in opposition to the motion asserting that the motion is fatally defective and incompetent has been overtaken by events as the estate has already been distributed in accordance with the orders given on 4th June, 2018 and that this litigation which is 40 years old ought to come to an end.

5. The Applicants' further affidavit filed on 25th November 2018 repeats the history of the dispute. It is deposed that the Respondents sought consent of the Land Control Board subsequent to the filing of the instant motion, in order to defeat the motion.

6. The application was argued on 20th November 2018. Restating briefly the key events in this litigation, counsel for the Applicants **Mr. Kahuthu** stated that the Respondents had rushed to execute the decree confirmed in the ruling of 4th June 2018, and procured what counsel contended to be irregular titles in respect of the suit property. Counsel contended that the Applicants have solid grounds of appeal.

7. For the Respondents, **Mr. Musoga** pointed out that this dispute started in 1979 and that what the Applicants seek to stay is the decree issued in 1993 which has already been executed. In his view, the application has been overtaken by events as titles have issued and execution completed in accordance with the directions given by the court on 4.6.18. Asserting that litigation must come to an end, **Mr. Musoga** urged the court to dismiss the motion. In a brief rejoinder, Mr.Kahuthu submitted that the Respondents' intention in executing the 1993 decree is to defeat the instant motion and that notwithstanding the said execution, this court can still grant stay.

8. The court has considered the history of this dispute, and the matters canvassed on this application through the parties' respective affidavits and submissions. The long and chequered history of this dispute was comprehensively captured in the ruling of **Ngugi J** delivered on 4th June 2018, and no useful purpose will be achieved by restating it here. The parties have canvassed contentious issues on the merits of their respective cases, which similarly have no place here, this being an application brought primarily under Order 42 Rule 6 of the Civil Procedure Rules.

9. In order to succeed, an applicant invoking the provisions of Order 42 and 6(1) and (2) of the Civil Procedure Rules is required to satisfy three conditions. He must:-

- i) approach the court without unreasonable delay.
- ii) satisfy the court that substantial loss may result unless the order sought is granted.
- iii) furnish security for the due performance of the decree appealed from.

10. There was no question that the application was filed timeously, relative to the date of the delivery of the ruling by **Ngugi J**.

Have the applicants demonstrated likelihood of suffering substantial if stay is denied? One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] e KLR 410**.

Holdings 2,3 and 4 therein are particularly relevant. These are that:

“1.

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5.”

11. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...”

12. The learned Judge continued to observe that:-

“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 cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
(emphasis added)

13. Earlier on, **Hancox JA** in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,... render the appeal nugatory.

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory.”

As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

14. The key plank upon which the present application is premised is found in paragraph 13 of the supporting affidavit. To the effect that, the appeal, if successful, would be rendered nugatory because the Applicants would have been evicted from the permanent homes they have developed and the said homes demolished, without any prospect of recovering damages, which in any event would not be adequate compensation for such loss. The Applicants did not annex any evidence of the existence of the alleged permanent homes, or other proof of developments alleged to be at risk of demolition. Not even photographs of the one house allegedly demolished after the ruling of 4th June, 2018 was attached to the supporting affidavit. Indeed, the Applicants did not attempt to demonstrate that the alleged developments are on land parcels other than those they are entitled to receive under the 1993 decree, hence necessitating their eviction.

15. The parties confirmed at the hearing of the application that the 1993 decree has been fully executed and respective title deeds issued in the names of the parties. In the circumstances, this court is not persuaded that the Applicants have demonstrated the likelihood that they stand to suffer substantial loss. Besides, courts do not issue orders in vain. Prayer 4 sought in part to stay execution of the 1993 decree, which admittedly has been completed. Of what efficacy would an order for stay execution be? None, in my considered view.

16. Similarly the orders flowing from the court’s ruling of 4th June, 2018 allowing the Respondents application dated 16th March 2017, have been fully executed, culminating in the issuance of the land titles to respective parties on 6th November, 2018. Hence the assertion by the Applicants’ counsel that this court could still grant stay orders in these circumstances is difficult to comprehend. Moreover, the history of this case militates against such a proposition. This dispute began in 1979 and has coursed its way from the subordinate court to the highest court in the land at the time, and back. Litigation must come to an end, but if the Applicants are desirous of pursuing their appeal, they are at liberty to do so. However, the successful party cannot be denied the fruits of his judgment save for just cause.

17. Notwithstanding the subsistence of the appeal filed and how strong the grounds of appeal might be, the Applicants have not satisfied the key requirement for the grant of an order to stay execution under Order 42 rule 6 of the Civil Procedure Rules, namely, the likelihood of substantial loss being occasioned to them if the orders sought are denied. The court having found no merit in the motion filed on 31st July 2018 accordingly dismisses it with costs to the Respondents.

DELIVERED AND SIGNED AT KIAMBU THIS 18TH DAY OF JULY 2019

.....

C. MEOLI

JUDGE

In the presence of:

Mr. Kahuthu for the Applicant

Miss Karungari holding brief for Mr. Ondieki for Respondent

Court Assistant - Nancy