



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC SUIT NO. 277 OF 2017

CHRISTINE WAMBUI MWAURA.....PLAINTIFF/ RESPONDENT

VERSUS

MARY NJAMBI L. K GITHEGI.....DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 6th September 2019 by the defendant/Applicant seeking for the following orders:

- a) Spent
- b) This honourable court be pleased to order stay of execution of judgment and decree of this Honourable court delivered on 31/7/2019 pending the hearing and determination of this application inter parties.
- c) This Honourable be pleased to order stay of execution of judgment and decree of this Honourable court delivered on 31/7/2019 pending the hearing and determination of the appeal being Eldoret Court of Appeal No. 56 of 2019 already lodged in respect of the said judgment.
- d) Costs for this application be provided for.

Counsel agreed to canvass the application by way of written submissions which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel submitted that Judgment was entered against the applicant on 31st July 2019 and the applicant preferred an appeal by filing a notice of appeal and preparing a record of appeal immediately. That if the stay of execution is not granted, the respondent may execute the judgment to the detriment of the appellant.

Counsel submitted that the general principle in granting or refusing stay is if there is no other overwhelming hindrance a stay may be granted so that the appeal may not be rendered nugatory should the Court of Appeal reverse the Judge's decision. The court in granting stay should consider the special circumstances of the case and the unique requirements.

Counsel submitted that in this case the special circumstances are that the appellant contends that no consideration was shown to have been given to the appellant by the respondents and that the land alleged to have been used for part exchange was government land thus incapable of forming the consideration.

It was Counsel's submission that the application was filed without unreasonable delay and that the appellant has filed an appeal with speed and the same is pending trial.

Counsel further submitted that the respondent has shown no peculiar circumstances to warrant deposit of titles in court as the trial was conducted while the appellant had the titles in her possession. That there is a caveat registered against the title and the same is in place till determination of the appeal and that is sufficient security this being a land matter.

Counsel cited the case of **Butt vs Rent restriction tribunal 1982 KLR 417**, where the court held that the discretion ought to be exercised in a manner that would not prevent an appeal. That the Court of Appeal has severally held that the power of the court to grant or refuse an application for stay of execution is a discretionary power and that the discretion should be exercised in such away as not to prevent an appeal.

Counsel further relied on the cases of **Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei (2018) EKLR** and **Pauline Yebei & Another v Estate of Kiprotich Arap Letting represented by Andrew Kiprotich Kiprono (2017) EKLR** and urged the court to grant the orders as prayed.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel for the respondent submitted that the respondent is not opposed to the grant of stay of execution but on the following terms which are set out in the replying affidavit.

- a) THAT pending the hearing and determination of the Appeal, a temporary order of injunction do issue restraining all the Parties whether by themselves or their representatives, servants, agents, and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with suit property.
- b) THAT the applicant be and is hereby ordered to deposit all the title documents in regard to the suit property with the Deputy Registrar of the Honourable Court Within Fourteen (14) days failure to which the stay orders and the injunction in (a) above shall automatically lapse.
- c) THAT the matter be mentioned in Fourteen days of such an order to confirm compliance.

Counsel further cited the provisions of Order 42 rule 6 of the Civil Procedure Rules and submitted that it empowers this court to issue stay of execution. Sub-section 2 makes provisions as to the conditions that this court must consider before making such orders. That the court is not under any duty to consider special circumstances as submitted by the applicant as the same would amount to sitting on an appeal of its own decision.

Counsel also submitted that the applicant has not raised any objection to the prayer for an injunction precluding all parties from dealing with the suit properties. That the record before the court indicates that the applicant sub divided the suit property after the filing of the suit by the respondent. The applicant had on or about 18th August 2004, in total disregard of the court order stopping any dealing in the suit property caused the suit land to be subdivided into 99 portions all registered in her name.

It was Counsel's submission that it would be in the interest of justice that the applicant be ordered to deposit the title documents with the Deputy of Registrar of the Court. The condition for the grant of orders sought by the plaintiff is anchored in law which is in line with the requirement of deposit of security for due performance of the decree. That is couched in mandatory terms.

Counsel relied on the case of **G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam MaalimBishar& another [20181 eKLR** Kamau J. held thus;

"Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously.

Counsel therefore submitted that the applicant has not demonstrated any willingness to issue security and as such ought to render the application incompetent, though the court is however empowered to make such orders as to the deposit of security for the due performance of the decree.

Further that the averment by the applicant that the caution registered against the title is sufficient to act as security is underwhelming as the statute requires a positive action by the applicant in fulfilling that obligation. Counsel stated that the unwillingness of the applicant to furnish security renders the application fatal and undeserving of the orders sought. The past conduct if the applicant is sufficient to demonstrate the need to have the said titles deposited in court or else the respondent may never enjoy the fruits of her success.

Counsel cited the case of **Siegfried Busch vs MCSK [20131eKLR**, where the court held that:

"A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment..."

Counsel therefore urged the court to only grant the orders sought on conditions set out by the respondent.

ANALYSIS AND DETERMINATION

The issues for determination in an application for stay of execution are as set out under Order 42 Rule 6 of the Civil Procedure Rules. substantive provisions for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 provides in part as follows: -

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such

order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (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.

(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court if a notice of appeal has been given.

It is trite law that a successful party is entitled to the fruits of their judgment and the court cannot disregard this fact and continue dallying with the unsuccessful party. In the case of **Machira T/A Machira & Company Advocates vs. East African Standard (No 2) [2002] KLR 63** the court stated as follows:

“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”.

The grant of stay of execution is discretion and upon the applicant meeting the threshold for grant of such orders. The respondent is not opposed to grant of the orders but upon satisfying the condition that the applicant deposit the title documents with the Deputy Registrar of the Court and an orders that the parties do not interfere with the substratum of the case.

This is the time that a party knows that someone’s past in respect of adherence to court orders counts when such a party seeks the courts discretion to tilt in his or her favour. Has the party complied with previous court orders? The record shows that the applicant had not complied with an order stopping her from interfering the substratum of the case whereby she subdivided the suit land and obtained titles in her name. This is an important factor to be considered in these circumstances.

Further the applicant contended that the caveat on the suit property is sufficient security for the application of stay to be granted. I find that in the circumstances an order for stay of execution would be appropriate with conditions that the applicant do deposit the title deeds to the suit land with the next 14 days in court with the Deputy Registrar and that the parties do not interfere with the substratum of the case pending the hearing and determination of the Appeal. Applicant to pay costs of the application.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE