



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C APPEAL NO. 25 OF 2019

DAVID OGEKA NGANGI.....1ST APPLICANT/APPELLANT

CHARLES MWENZI NGANGI.....2ND APPLICANT/APPELLANT

VERSUS

ALFRED MATOYA CHWEYA.....RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 1st November 2019, the Appellants/Applicants seek the following orders:

a) Spent

b) That pending the hearing and determination of this application, this Honourable court be pleased to issue an interim order of stay of execution of the judgment delivered on 10th September 2019.

c) That pending the hearing and determination of the instant appeal, this honourable court be pleased to issue an order of stay of execution of the judgment delivered on the 10th September 2019.

2. The application is based on the grounds outlined in the Notice of Motion and the supporting affidavit of David Ogeka Ngangi sworn on the 10th September 2019. In the said affidavit the 1st Applicant deposes that the Respondent has obtained judgment in his favour and extracted decree which he is likely to execute against him. He further deposes that he had lodged an appeal against the said judgment and if a stay of execution is not granted, the appeal may be rendered nugatory. It is his contention that if execution is carried out, the applicant shall suffer substantial loss as the applicants will be disinherited.

3. The Respondent has opposed the application through his Replying Affidavit sworn on the 13th December 2019 as well as Grounds of Opposition filed on even date. In essence the respondent contends that the application lacks any legal basis and is merely aimed at preventing the respondent from enjoying the fruits of his judgment.

4. The parties agreed to prosecute the application by way of written submissions and both parties filed their submissions.

5. In his submissions, learned counsel for the Applicant submitted that the Applicant had satisfied the conditions for stay of execution set out in Order 42 Rule 6 of the Civil Procedure Act. He cited the case of **Butt v Rent Restriction Tribunal (1982) KLR 417** for the proposition that the power to grant a stay of execution is discretionary and should be exercised in such a way as not to prevent an appeal. It was his contention that if the stay of execution was not granted, the appeal would be rendered nugatory.

6. He submitted that the application had been made without undue delay as the application was filed 30 days after the appeal was filed. It was his contention that since the judgment stated that the Applicant was required to vacate the suit property within 45 days failing which he would be evicted, the period of 45 days acted as an informal stay of execution.

7. It was submitted that the Applicant had demonstrated that he would suffer substantial loss if he was evicted from the suit property. Counsel referred to the case of **David Oyiare V Ntungani Ole Naisuaku Orket (2017) eKLR** where the court held that substantial loss would be suffered where a court directs that a party be evicted from the suit property. This is because of the financial implications that may be attributed to the relocation.

8. On the other hand, learned counsel for the Respondent submitted that the application had no legal basis for seeking a stay of execution. He

argued that the Applicant did not have an arguable appeal with high chances of success and that the application was merely intended to block the Respondent from enjoying the fruits of his judgment. In essence he was of the view that the application lacked merit and it ought to be dismissed.

9. It was Respondent's contention that the Applicant had not demonstrated that he would suffer substantial loss. He however conceded that the Applicant had in his affidavit stated that the risk of having their land occupied by the respondent was real as the respondent had obtained a decree and he was likely to commence execution proceeding against them at any time.

10. The Respondent's counsel submitted that the intended appeal was frivolous and that there was delay in filing the application for stay of execution. It was his further submission that the Applicant had not made any offer of security for costs. He relied on the case of **Hallequitorial Ltd V Olympic Food Processors Nairobi HCCC no. 5400 of 1991** for the proposition that for one to succeed in an application for stay of execution he must satisfy all the three conditions set out in Order 42 Rule 6 of the Civil Procedure Rules. This means that he must demonstrate to the satisfaction of the court the substantial loss will ensue if the order is not granted, that the application has been filed without undue delay and that he is willing to give such security as is ordered by the court for the due performance of the decree.

ISSUES FOR DETERMINATION

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

- (a) Whether the Applicant has met the threshold for grant of stay of execution pending Appeal.
- (b) Who should bear the costs of the Application.

ANALYSIS AND DETERMINATION

12. The principles that guide the courts in the exercise of their discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

13. 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 notice of appeal has been given.

14. In the case of **M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others [2017] eKLR** the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

“13. In the cases of Kiplagat Kotut vs Rose Jebo rKipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

15. Furthermore, in the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** Mutungi J stated as follows:

“It is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal”.

16. In the instant case the Applicant has stated that he would suffer substantial loss if the stay was not granted though he has not demonstrated the nature and extent of the loss. The application was filed after a delay of 20 days from the date when the Applicant was to vacate the suit property which though not inordinate, was not explained. However, the Applicant has not demonstrated that he is willing to

furnish security for costs. In the circumstances, the Applicant has failed to meet the all conditions set out in order 42 Rule 6 of the Civil Procedure Rules.

17. In view of the foregoing, I find no merit in the application and I dismiss it with costs to the respondents.

Dated, signed and delivered electronically via zoom this 23rd day of April 2020.

J.M ONYANGO

JUDGE