



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 71 OF 2017

SIMBA HILLS FARM LTD.....PLAINTIFF

VERSUS

SULTAN HASHAM LALJ.....1ST DEFENDANT

ABDULAZIZ KANJI.....2ND DEFENDANT

MADATALLY SIDI.....3RD DEFENDANT

JAMES KIMOSBEI TUWEI.....4TH DEFENDANT

ISAAC CHEPSIROR.....5TH DEFENDANT

SYLVESTER BIWOTT.....6TH DEFENDANT

RULING

This ruling is in respect of an application dated 30th March 2020 by the 1st defendant for stay pending appeal. The application is supported by the grounds on the face of the Application and the Supporting Affidavit of Sultan Hasham Lalji.

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

1ST DEFENDANT APPLICANT'S SUBMISSIONS

Counsel faulted the replying affidavit sworn Daniel Kispondin Kutto, who alleges to be the director of the Plaintiff/1st Respondent's company on the grounds it is incurably defective and invalid for want of authority and capacity, noting that the issue of the true directors of the Plaintiff's/1st Respondent was not determined by this Honourable Court.

Counsel further submitted that there is no indication or exhibition of the company seal authorizing the deponent to depose, or any accompanying resolution by the board of directors allowing him to swear the affidavit for the Plaintiff/1st Respondent. Counsel therefore urged the court to strike out the replying affidavit for failing to comply with Section 5 of the Oaths and Statutory Declarations Act Cap 15 which states that every jurat or attestation clause shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

It was counsel's submission that the 1st Defendant/Applicant's appeal will be rendered nugatory and will suffer irreparable damage and substantial loss as the Plaintiff/1st Respondent may proceed to execute the decree and transfer the suit property to third parties, charge, or in any other way dispose of the suit property which is already subdivided and resurveyed by the Plaintiff/1st Respondent.

Counsel further submitted that the Plaintiff/1st Respondent un-procedurally obtained a decree on 17th March, 2020 without submitting the draft decree for approval to the Advocates for the 1st Defendant and the 4th-6th Defendants contrary to the provisions of Order 21 Rule 8 of the Civil Procedure Rules, 2010. Lastly, counsel submitted that the said decree fails to ascertain the exact amount of money that the Plaintiff/1st Respondent is supposed to pay the 1st Defendant/Applicant.

Mr. Njigina counsel for the applicant submitted that the principles for grant of stay of execution pending appeal and relied on **Order 42, Rule 6 (2) of the Civil Procedure Rules, 2010** which provides as follows:

(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”

On the 1st issue as to whether the 1st Defendant/Applicant will suffer substantial loss if the stay is not granted, counsel submitted that the 1st Defendant/Applicant is the owner of all that parcel of land known as Land Reference 8304 Eldoret North – Moiben Division. That if the decree is executed, and the suit property is transferred to the Plaintiff, it will be difficult for the 1st Defendant/Applicant to recover the same from the un-known shareholders/owners. And directors.

Mr. Njigina Counsel for the 1st defendant further submitted that if the decree is executed then there is a likelihood that the 1st Defendant/Applicant will be unable to recover the same from the unknown third Parties/shareholders/owners, which action will amount to substantial loss and render the appeal nugatory and of no legal consequences.

Counsel cited the case of the case of **David Kipkoskei Kimeli v Titus Barmasai [2019] eKLR Eldoret** where you held that,

“The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough.”

Counsel therefore submitted that the applicant risks irreparable loss and relied on the case of Rebecca **Chepkoech Lagat v William Kibor Lagat [2020] eKLR** this Honourable Court held that,

“How does a person prove substantial loss? It is not enough for a party to claim that he or she will suffer substantial loss without going a step further to demonstrate this loss.”

Mr. Njigina also submitted that although, the respondent Daniel Kispondin Kutto, avers in his undated Replying Affidavit at paragraph 3 and 38, that the Plaintiff will not charge or sell the suit property, he has not adduced any written confirmation from the 187 members assuring this Honourable Court that the suit property will not be transferred to third parties, or dealt with in any other way as to make it unavailable after the conclusion of the 1st Defendant/Applicant’s appeal.

It was counsel’s submission that the decree being one of specific performance once it is enforced the suit property might change hands which will result in substantial loss. Counsel relied on the case of **Moses Ndungu Mbogo & another v Moses Ng’ang’a Kimani [2019] eKLR** where the Court held that:

“In this case, if stay of execution is not granted the natural consequence will be that specific performance of the agreement for sale will be enforced and the suit property will most likely change hands. Such an outcome will certainly amount to substantial loss...”

On the second issue as to whether the application has been made without undue delay, counsel submitted that on 15th March, 2020 the Honourable Chief Justice issued directives to the effect that the Court operations should be scaled down in view of the peril caused by the spread of the novel Corona virus (COVID -19) and further issued practice directions for the protection of judicial officers and other court users from the global corona virus pandemic on 20th March, 2020. That this Honourable Court delivered the Judgment herein on 4th March, 2020 and this Application was filed on 9th April, 2020.

Counsel urged the court to find that the application was filed without undue delay and relied on the case of **Rebecca Chepkoech Lagat v William Kibor Lagat (supra)** where the court held that a period of two (2) months was not unreasonable delay.

On the issue as to whether the applicant is willing to deposit such security as may be ordered, counsel stated that the 1st Defendant/Applicant is ready, willing and able to furnish such reasonable security as this Court may deem fit to Order. That the 1st Defendant/Applicant is willing to offer security in the form of a blank land transfer, signed by the Plaintiff to be held by the advocates of the 1st Defendant/Applicant, which shall be executed by the 1st Defendant/Applicant after the appeal depending on the outcome of the appeal.

Counsel further submitted that a stay of execution order will not in any way interfere or interrupt the peace that the deponent avers to be enjoying. Counsel finally submitted that the applicant has demonstrated a sufficient cause to warrant this Court to issue a stay of execution pending the hearing and determination of the intended appeal and urged the court to allow the application as prayed.

PLAINTIFF/RESPONDENT’S SUBMISSIONS

The respondent vide a replying affidavit by Daniel Kipsondin Arap Kutto opposed the application. Counsel submitted that the 2nd to 6th defendats did not file an appeal

Mr. Magare counsel for the plaintiff/respondent submitted that the court delivered judgment on the following terms:

a) *That a permanent injunction is hereby restraining the Defendants, their servants, agents from interfering with trespassing onto, surveying, sub-dividing, alienating, selling transferring or in any other way doing anything over and in respect of all that parcel of*

land namely LR No. 8304 situated in Eldoret North, Moiben Division in Uasin Gishu District measuring 1680 acres.

- b) That an order is hereby issued compelling the 1st, 2nd and 3rd Defendants to transfer to the Plaintiff title deed of the suit property.
- c) That the 1st Defendant's counterclaim is dismissed with costs.
- d) That the Plaintiff to pay the 1st Defendant Kshs. 1,000,000/= being the balance of the purchase price with interest from the date of filing this suit.
- e) That Defendants to pay costs of this suit and interest.

That in compliance with clause (d) of the said Judgment and decree, the Plaintiff/1st Respondent has deposited in court, the amount which is entitled to execute the decree a sum of **Kshs. 2, 698,740/=** being the principal amount ordered plus interest from **22/2/2006** to **21/4/2020** and fully executed their part of the Judgment. Counsel further submitted that in that respect, part of the decree against the Plaintiff has been fully executed in terms of Order 22 Rule 1 (a) of the Civil Procedure Rules and there is nothing remaining to be executed. The only remaining issue is that the 1st Defendant/Applicant to pick his monies from court at his own pleasure.

Mr. Magare counsel for the respondent submitted that 1st Defendant/Applicant has to execute the transfer to the Plaintiff and surrender original title which he has not done since the year 1981, a period of 40 years. The Plaintiff/1st Respondent has been in possession of the suit land since the year 1969 to date, a period of 51 years (half a century) and that the 1st Defendant/Applicant has not in the last 51 years been in possession or ever attempted being in possession.

Counsel further submitted that the effect of dismissal of Counterclaim is that the Plaintiff continues being in possession through its members through the sub-division which was approved in the year 1986, a period of 34 years. Once dismissal order has been made, there is nothing to stay in dismissal order. Counsel relied on the case of **Cortec Mining Kenya Ltd –vs- Cabinet Secretary, Attorney General & Others 2015 eKLR**, the Court of Appeal held as doth:-

“The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court.”

Counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules on stay of execution and submitted that the loss that is contemplated must not only be any loss but a loss incapable of being reversed and is *prima facie* unconscionable to let the Applicant absorb. It is not an idle speculative loss, it should be significant and sizable. Counsel relied on the case of **David Kimeli –vs- Titus Barmasai** where the court held that the start of execution process and even completion does not in itself amount to a substantial loss. The court stated that:

“Establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what the substantial loss would entail, a question that was aptly discussed in the case of Silverstein –vs- Chesoni (20023) 1KLR 867 and in the case of Mukuma –vs- Abuoga.... Counsel submitted that 5 (2)(b) of the Court of Appeal Rules respectively emphasized the centrality of the substantial loss thus....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory...”

Counsel therefore submitted that in this case the land is in the possession of the plaintiff and this has been so for over 50 years and as such it not something that the court took away. That the 1st Defendant/Applicant has never been in occupation and there is nothing he can lose. Counsel further submitted that in regard to the title deed, the 1st Defendant/Applicant has not disclosed its whereabouts, its state and his willingness to have it transferred to the Plaintiff/1st Respondent. That there will be no loss completely if the land is transferred to the Plaintiff in accordance with the 1986 subdivisions. The Plaintiff/1st Respondent has no intentions in the foreseeable future of parting with possession other than the normal cause of settlement of members who have waited for eons.

On the issue of security of performance of the decree, counsel submitted that a successful litigant must enjoy the fruits of its Judgment unless there is a very good reason for stay, it is not enough to try your luck in the hierarchy of courts. The applicant has only averred was they are willing to furnish security but have not mentioned the security they are offering, the amount, the nature and the basis. That the Applicant in their submission has purported to offer a security in form of blank transfer to be held by the advocate for the 1st Defendant which shall be executed by the 1st Defendant after the appeal depending on the outcome. Mr. Magare submitted that he above form of security is both contemptuous and unknown in law and that unexecuted blank documents are not documents known in law further that security held by the giver of the security is not security.

Counsel relied on the case of **Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee) [2019] Makau J** held that:-

.In the instant matter, the applicant was required to provide the actual security for consideration by the Court as to its sufficiency. In the case of Equity Bank Ltd –vs- Taiga Adams Company Ltd[2006] eKLR it was held that:-

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others.

“The Applicant has been silent on the issue of security in this matter. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute. I find in this matter the applicant has failed to meet the four mandatory tenets under which this application is brought. The applicant has failed to satisfy any of the four mandatory tenets under which stay of execution can be granted. The Court is of the view that the Applicant has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion in this matter; hence it is of the view that the application is not merited”.

Counsel submitted that the Applicant cannot challenge the Judgment in the application for stay as the merits or otherwise of the Judgment have already been determined and the court is *functus officio*. The claim by the 5th defendants was not allowed and no appeal has been proffered.

In response to the applicant’s submissions counsel stated that the affidavit of Daniel Kipsondin Kutto was properly attested, dated and filed and that under the practice notes issued by the Chief Justice vide gazette Notice No. 3137 of 2020 practice directions, the party is entitled to send a draft for assessment and upon paying the same, stamped and scanned. The Applicant cannot rely on a draft before it has been filed.

Counsel further submitted that the court is not determining the directorship of the Plaintiff and that Daniel Kipsondin Arap Kutto testified as a director and evidence was produced by all parties that he was a director. There was no finding that he is not a director as pleaded in the counterclaim. (See section 7 of the Civil Procedure Act provides that:-

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Further that resolutions are not required after the amendment of Section 35 of the Companies Act through the Business Laws Amendment Act No. 1 of 2020 which came into force on 18/3/2020. Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

This is an application for stay of execution pending appeal which is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

(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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

The filing of a notice of appeal or an appeal cannot operate as an automatic stay of execution.

The applicant must satisfy the threshold for grant of stay of execution. In the case of **Stephen Wanjohi...Vs...Central Glass Industries Ltd HCC No.6726 of 1991**, the Court held 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”.

On the first issue on sufficient cause, counsel submitted that the applicant has shown sufficient cause why the stay should be granted due to the fact that if transfer and registration of the suit land is done, there is a likelihood of the land changing hands to third parties which would be detrimental to the applicant which would render the appeal nugatory.

In the case of **Antoine Ndiaye vs. African Virtual University [2015]eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006**. Gikonyo J. held inter alia that *stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.*

On whether the application was brought without undue delay, it is evident that the judgement was

delivered on 4th March 2020 and the application was filed on 9th April 2010. This meets the threshold as subsequently the country was engulfed in the COVID 19 pandemic. Every case should be treated on its own merit and the circumstances surrounding the filing of the application and the explanation for the delay if any.

In the case of **Jaber Mohsen Ali & Another...Vs...Priscillah Boit & Another, ELC No.200 of 2012 (2014) eKLR**, the Court held that:-

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after the Judgement could be unreasonable depending on the Judgement of the court and any order given thereafter...”.

On the issue of substantial loss, as it has been held in many cases that this is the cornerstone of applications for stay of execution. Is there substantial loss to be suffered if the stay is not granted? Has the applicant demonstrated the substantial loss that he/she will suffer if the order sought for stay is not granted, If the same is established then the court will exercise its discretion and grant the order as prayed. In the case of **Andrew Kuria Njuguna Versus Rose Kuria NBI Civil Case No. 2 of 2001** the court held that:

“Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss, money wise or other and thereafter grant the stay”.

It is trite that a successful litigant is entitled to the fruits of his/her judgment and he/she may only be prevented from benefitting as such within the provisions of the law. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“.....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. 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.”

It was submitted that the judgment has brought lasting peace within the community, the balancing act between the successful litigant right to enjoy the fruits of his/her judgment and the applicant who is aggrieved by the outcome ‘s right of appeal comes into play. This act must be balanced in a way that serves both parties without causing hardship and injustice.

The purpose of stay of execution is to preserve the substratum of the case. In the case of **Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

What is the status quo on the suit land. The plaintiffs are in occupation and the 1st defendant is holding the title to the suit land. Would there be any prejudice if the court declines or grants an order of stay to stop the implementation of the decree? What is the nature of the decree to be implemented? The court had granted a permanent injunction restraining the defendants from interfering with the suit land in any way. The other order was that the defendants to transfer to the plaintiff the suit land and an order that the plaintiff pays Kshs.1000,000/(One Million Shillings) being the balance of the purchase price with interest from the date of filing the suit.

Considering the terms of the decree to be implemented, it can be deduced that if the court does not grant the stay, the applicant will not suffer any prejudice. No substantial loss will be suffered if an injunction is in place pending the hearing and determination of the appeal. After all, the injunction had been in place for the last 14 years and the respondent has been in occupation for over 50 years.

On the issue of transfer, the same can be done on condition that the respondent does not part with possession of the suit land pending the hearing and determination of the appeal.

The plaintiff has already deposited in court a sum of **Kshs. 2, 698,740/=** being the principal amount ordered plus interest from **22/2/2006** to **21/4/2020** and fully executed their part of the

Judgment which the 1st defendant can access if it so wishes pending the hearing and determination the appeal. The 1st defendant to pay costs of the suit.

DATED and DELIVERED at ELDORET this 26th DAY OF MAY, 2020

M. A. ODENY

JUDGE