



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELCA 10 OF 2019**

**BENSON KAMAU MUTURA.....APPELLANT /APPLICANT**

**VS**

**JAMES MURIMI KAHINGA.....RESPONDENT**

**RULING**

1. This Motion filed on the 21/1/2020 is brought under S. 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6(1), Order 51 rule 1 and 4 of the Civil Procedure Rules. The Applicant sought the following orders;

a. That this Court be pleased to grant stay of execution by maintaining the status quo pending the hearing and determination of the Appeal to the Court of Appeal against the judgement and decree of Hon J G Kemei on the 19/12/19.

b. That costs be awarded to the Applicant.

2. The grounds which anchored the application are ; That judgement delivered on the 19/12/19 decreed the Appellant to pay the sum of Kshs 200,000/- awarded in the lower Court; that the Respondent has commenced execution proceedings to recover costs and the sum awarded; that the Appellant intends to file an Appeal to the Court of Appeal against the whole judgement and the decree and if the Respondent is allowed to execute the intended Appeal shall be rendered nugatory; that if the stay of execution proceedings is not granted irreparable damage shall be visited upon the Appellant as the Respondent is a man of straw; that he has filed the application without delay; the orders sought are just and proper and no prejudice will be occasioned to the Respondent; finally that the Applicant is ready and willing to provide such security for costs as may be ordered for the due performance of such decree as may be ultimately be binding on him.

3. In his Supporting Affidavit dated the 20/1/2020 the Applicant deposed that his intended Appeal stands high chances of success and in furtherance of that intention he has applied for certified copies of the proceedings and paid the necessary deposit towards the Court fees for which a receipt has been annexed and marked BKM. That if the stay is declined his Appeal will be rendered nugatory. That the Respondent has filed a bill of costs exposing him to imminent execution to recover the decretal amount together with costs. That justice will be best served if he allowed to prosecute his Appeal to conclusion. That he is ready and willing to provide the necessary security as directed by the Court for the due performance of the decree.

4. Except for a blurred copy provided by the Respondent marked JNK-2, the Applicant did not annex the copy of the notice of Appeal to the Court of Appeal.

5. The application has been opposed by the Respondent through grounds of opposition set out as thus;

a. The application as filed is frivolous vexatious and an abuse of the process of Court

b. The Applicant has not demonstrated in his application the substantial loss he will undergo if the application to stay granted as per Order 42 Rule 6(2) of the Civil Procedure Rules.

c. The intended Appeal being an Appeal against a money decree cannot be rendered nugatory if execution proceeds against the Applicant.

6. Further in a Replying Affidavit sworn by J N Kirubi, learned Counsel for the Respondent dated the 5/3/2020, he deposed on behalf of the Respondent and reiterated the grounds of opposition set out in para 5 above. That the Respondent has commenced execution for the recovery for the decretal amount as per the decree and the certificate of costs dated the 14/5/15 in the sum of Kshs 184,400/-. That the Appeal being for a money decree cannot be rendered nugatory and in any event the Respondent has not been demonstrated to be a man of straw who cannot refund the amounts should the intended Appeal succeed. That all in all the Applicant has not demonstrated the substantial loss he will or likely to suffer if the application is not granted. Further that the Applicant has not annexed the notice of Appeal as required under Rule 75 of the Court of Appeal Rules to show that he is intending to lodge an Appeal to the Court of Appeal. That the Notice of Appeal annexed by

the deponent does not comply with sub rule 2 as it was filed outside the 14 days mandatory period stipulated in law. The judgement having been delivered on the 19/12/19 the Notice of Appeal should have been filed within 14 days and not the 17/12/19 which in his opinion was out of time.

7. The Motion was heard orally in Court on the 16/3/2020 when the Applicant relied and adopted the contents of his Supporting Affidavit dated the 20/1/2020 together with the grounds thereto. In addition, he added that the application has been brought without any delay.

8. The Respondent in opposing the application argued that the application for stay is against money decree and therefore granting will not render the Appeal nugatory as the money can always be refunded. That the Respondent is a business man in Murang'a and no evidence has been led to demonstrate that he is a man of straw. In any event it is the Respondent who paid the Applicant the purchase price that is being recovered through the decretal amount. In addition, that substantial loss has not been demonstrated by the Applicant as required under order 42 Rule 6(2) (a) of the Civil Procedure Rules. That the Applicant has not demonstrated that he has filed a notice of Appeal and if he did it was filed outside the mandatory 14 days from the date of judgement. That the allegation that an Appeal has been filed is a tactic to delay the execution of the decree to prevent the Respondent from enjoying the fruit of his judgement.

9. The Respondent placed reliance on case law which I have read and considered; **Masisi Mwita Vs Damaris Wanjiku Njeri (2016) EKLR** and **CFC Stanbic Bank Limited V s John Kungu Kiarie & Dye & Blair & Anor (2016) EKLR**.

10. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the motion.

11. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except Appeal case of 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 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.

(3) Notwithstanding anything contained in subrule (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 subrule (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.”

10. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

a. The application was brought without delay;

b. Substantial loss may result to the Applicant unless the stay is granted; and

c. Security for the due performance of the order or decree has been provided.

11. Going by the record the judgment complained of was delivered on the 25/4/19. This application was filed on the 31/5/19, a period of 35 days. The Court finds and holds that there is no delay in bringing this application.

12. Courts have held that substantial loss is the cornerstone of the jurisdiction of the Court under Order 42 which must be proved by evidence by the Applicant in an application for stay of execution. The Applicant must show that execution if allowed will create an irreparable loss to the Applicant and render the Appeal nugatory. See the case of **James Wangalwa & Anor Vs Agnes Naliaka Cheseto (2012) EKLR**.

13. The only way the Applicant can demonstrate substantial loss in a money decree is if he can show that if the decretal sum is paid to the Respondent in form of execution and in the event the Appeal succeeds, the Respondent will not be able to reimburse. The Applicant has

failed to show through evidence that the Respondent is a man of straw who will be unable to repay the decretal amount should he be called upon to reimburse, in the event of a successful Appeal.

14. It is the finding of the Court that the Applicant has not dislodged this requirement and demonstrated that he stands to suffer substantial loss.

15. The Court notes that the Applicant is willing to abide by such security as the Court shall have ordered for the due performance of the decree.

16. In the end the application is unmeritorious and is hereby dismissed with costs in favour of the Respondent.

16. **It is so ordered.**

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 14<sup>TH</sup> DAY OF MAY 2020**

**J G KEMEI**

**JUDGE**