



**REPUBLIC OF KENYA**

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

**ELC NO.198 OF 2017**

**PATRICK NGANGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GERISHON NGURE MANGARA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JOHN MUCHIRI GACHIHI.....THIRD PARTY**

**RULING**

1. Gerishom Ngure Mangara, the Applicant herein, moved the Court by way of a Notice of Motion dated the 4/11/2019 and filed on even date seeking orders as follows;

a. Spent

b. That the Court be pleased to issue orders of stay of execution of the Court's judgement delivered on the 3/10/19 and the resultant decree issued on the 15/10/19 pending the hearing and determination of this application interparties.

c. That the Court be pleased to issue orders of stay of execution of the Court's judgement delivered on the 3/10/19 and the resultant decree issued on the 15/10/19 pending the hearing and determination of the intended Appeal to the Court of Appeal as per the Notice of Appeal filed on the 22/10/19.

d. That costs be provided for.

2. The motion is anchored on the grounds adduced thereon and the Supporting Affidavit of the Applicant sworn on the 4/11/19 and filed on even date. That the judgement of the Court delivered on the 3/10/19 has aggrieved the Applicant who has proffered an Appeal and filed a Notice of Appeal in this Court on the 22/10/19. In furtherance of his Appeal that he has applied for the certified copies of the proceedings and judgement vide letter dated the 7/10/19. That Rule 82 of the Court of Appeal Rules entitles him to lodge his Appeal within 60 days of the certified copies of proceedings and the judgement are supplied to him by the trial Court.

3. That the Respondent has started in earnest the process of execution of the judgement so much so that he has extracted the decree, issued notice to the Applicant to vacate the suit land within 14 days w.e.f 8/11/19, threatened to demolish the building and demanded for the cheque for the decretal amount in the sum of Kshs 500,000/-. That the threat to execute is real and proximate.

4. In seeking stay of execution, the Applicant deposes that he will suffer irreparable loss and damage if the threatened execution ensues. Further that his plea has been supplicated timeously and without delay before the Court and that he is ready and willing to provide such security as the Court may order for the due performance of the decree.

5. Reminding the Court of its wide and unfettered discretion to issue the stay orders, the Applicant urged the Court to so issue to meet the ends of justice.

6. The Applicant has exhibited a copy of the Notice of Appeal filed on the 18/10/19.

7. In contesting the application Mr Kaka, the learned Counsel for the Respondent in a Replying Affidavit dated the 27/11/19 and filed on 28/11/19 deponed on behalf and with the authority of the Respondent and from his own knowledge that the application before the Court is frivolous, bereft of merit and is otherwise an abuse of the Court process.

8. He argued that the Applicant has not complied with the provisions of Order 42 of Civil Procedure Rules by filing a competent Appeal before the Appellate Court; nothing on record to suggest that the Applicant has an arguable Appeal; whether the Appeal is on the whole or a part of the judgement; that the notional Appeal is just but a delaying gimmick on the part of the Applicant; no valid ground for orders of stay

of execution has been established; contrary to Order 42, no security has been offered, at the very least the Applicant should have proposed the sum of awarded as general damages in the sum of Kshs 500,000/- as security; substantial loss has not been demonstrated;

9. That it is in the interest of justice that the Respondent is not denied the fruits of his judgment which he is so legally entitled. The Applicant is bent on obstructing or delaying justice and the Court should not assist him in his misadventure. He urged the Court to dismiss the application.

10. In respect to timelines in bringing the application, the Applicant submitted that it filed the Notice of Appeal within 14 days as stipulated by the Court of Appeal rules Rule 75(2). That it is entitled to lodge the Appeal within 60 days from the date of the certified copies of the proceedings in the superior Court. See Rule 82 of the Court of Appeal Rules, 2010.

11. In respect to whether or not the Applicant will suffer substantial loss and what the loss is, the Applicant submitted that the Applicant has erected permanent buildings on the suit land as confirmed in the valuation report adduced at the trial to wit; two shops, one double room and two single rooms, all valued at Kshs. 2.8 Million. That the Respondent has called upon the Applicant to vacate the premises, demolish the structures at his own expense and hand over possession of the suit land. That it is this development and investment in the suit land and the building that forms the substantial loss which has to be prevented by preserving the status quo because such loss has the potential of rendering the Appeal nugatory. See the case of **James Wangalwa & Anor Vs Agnes Naliaka Chesete (2012) eKLR and Silvertein Vs Chesoni (2002) KLR.**

12. Further that the Applicant would be worse off if the Respondent is allowed to evict him and demolish his permanent building.

13. In respect to unreasonable delay, the Applicant submitted that the judgement was delivered on the 3/10/19 and the application was filed on the 4/11/19 a period of 30 days from the date of delivery and thus the application was brought timeously.

14. In respect to the provision of security for the due performance of the decree the Applicant submitted that it is the Court that orders the furnishing of the appropriate security that may ultimately bind him. Whilst faulting the Respondent for proposing that the Applicant should pay a figure Kshs 500,000 as security, the Applicant intimated his readiness and willingness to abide with such orders of the Court when made.

15. I have read and considered the cases placed before me by the Applicant.

16. The Respondent submitted that the Court of Appeal in often times is guided by the following principles when considering an application for stay of execution;

“a). the power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an Appeal.

b). The general principle in granting or refusing a stay is; if there is no other over whitening hindrance; stay must be granted so that an Appeal may not be rendered nugatory should the Appeal Court reverse the judge’s discretion.

c). The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

17. Admitting that though the execution of the judgment has commenced, it cannot be taken as in itself to amount to substantial loss. See the case of **Global Tours Travel WC No 43 of 2000 (UR)** where the Court observed as follows;

“ . . . whether or not to grant a stay of proceedings or further proceedings on a decree or order Appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save by virtue of its character as a judicial discretion. It should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings; and if it is so, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended Appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

18. He opined that the Applicant has not demonstrated whether the Appeal is on part or the whole of the judgment; whether it has an arguable Appeal as it is not enough for the Applicant to state that it will suffer irreparable damage. That the amount of irreparable loss is the amount adjudged to be due to him from the third party. That the Applicant has not offered any security for the due performance of the decree and at the very least has not deposited the sum of Kshs 500,000/- which in his opinion is adequate security.

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

20. 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.”

21. 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 within 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.

22. Going by the record the judgment complained of was delivered on the 3/10/19. This application was filed on the 4/11/19, a period of 30 days. The Court finds and holds that there is no delay in bringing this application.

23. The Respondent has faulted the Applicant for not filing an Appeal that would show a strong arguable case. My understanding of the procedural law as set out under Order 42 Rule 4 above is that 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. Subrule 5 even allows an application of stay *exparte* and informally immediately after delivery of the judgement.

24. This rule is encapsulated under Rule 75 of the Court of Appeal rules which states that an Applicant has to show that he has filed a Notice of Appeal within 14 days from the date of the judgment. It is only fair that an intended Appellant who has filed a Notice of Appeal should be able to apply for stay of execution to the Court either from which the Appeal is from or the Court to which the Appeal is proffered and not have to wait until he has lodged the Appeal. I say so owing to the long delay in obtaining the proceedings of the superior Court which means that it may take many months before he could lodge the Appeal within which time the judgement creditor will have executed the decree in his favour. His right to Appeal would be laid bare and I do not think the framers of the law contemplated such a scenario. The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in the dispute so that the right of the Applicant to Appeal is safeguarded and the Appeal if it turns out to be successful is not rendered nugatory and reduced to a scholarly exercise. Of course, of most importance and running parallel to this right is equally the right of the successful litigant in the contest not to be deprived of the fruits of his judgment in his favour without a just course. Once a decree holder’s right has been determined by a competent Court it should not be taken away lightly and that is why the procedural law set the parameters that the Court must satisfy itself before granting the orders of stay of execution.

25. The merit or none of the Appeal of the Applicant is neither here or there. In any event it is not expected, actually not in the province of this Court, having rendered itself in the judgement, to comment on the intended Appeal.

26. In respect to the 2<sup>nd</sup> requirement of proof of substantial loss, the Applicant has averred that the Respondent has commenced the process of execution and if he is evicted and his building demolished, he stands to suffer substantial loss. He adduced the demand letter from the Respondent requiring him to interalia vacate within 14 days.

27. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

28. In this case and going by the decision in **Machira** above the Applicant has proved the loss that he stands to suffer if the Court does not

grant stay of execution orders.

29. The Court is alive to its duty to balance the two competing rights as noted by Gacheru J. in **John Gacunja Njoroge –Vs – Joseph Njoroge (supra)**. Also see **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR** Ombwayo J **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** Mabeya, J and **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** where the Court set out thus;

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of Appeal should be safeguarded from his Appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal.

30. In respect to the requirement of security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of the security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered.

31. In this case the Applicants have stated that they are willing to abide by the conditions of this Court in respect to security of costs. The Applicants have however not indicated nor disclosed the quantum.

32. I find and hold that the sum of Kshs. 400,000/- is sufficient security for the due performance of the decree.

33. Balancing the rights of the parties and doing the best I can, the motion dated the 4/11/19 is allowed subject to the following terms;

- a) The stay of execution is granted provided that the Appeal is filed within 90 days from the date of this ruling or such other time that the Registry will have officially opened its operations, given the ongoing COVID -19 Pandemic.
- b) The Applicant to provide security for the due performance of the decree in the sum of Kshs. 400,000/- (Four Hundred Thousand only) within 90 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both advocates of the parties or a bank guarantee of a similar amount.
- c) If the Applicant fails to comply with Order b). above the stay shall lapse.
- d) Costs of the application shall be met by the Applicant.

34. **It is so ordered.**

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

**J G KEMEI**

**JUDGE**