REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 85 OF 2015

BENJAMIN KIMELI TANUI.....PLAINTIFF/RESPONDENT

VERSUS

OMARI SALIM NASIB.....1ST DEFENDANT/APPELLANT

JAMKA SAID alias JAMILA SAID.....2ND DEFENDANT/APPELLANT

R U L I N G

On 30th May 2019, this Court delivered it's Judgment in this dispute and ordered, inter alia, that **BENJAMIN KIMELI TANUI** (the Respondent herein) is the registered proprietor of the land parcel **NO BUNGOMA/TOWNSHIP/515** (the suit property) and that **OMAR SALIM NASIB** and **JAMKA SAID** alias **JAMILA SAID** (the Appellants herein) have no enforceable claim therein and are trespassers. The Court further directed that the Appellants do vacate the suit property within six (6) months from the date of Judgment or be evicted therefrom in accordance with the law.

The record shows that the Appellants first filed an application dated 14th October 2019 seeking orders to stay execution of that Judgment and also review, variation and/or setting aside of the same. That application was however withdrawn on 16th January 2020.

I now have before me two applications as follows: -

1. The Respondent's Notice of Motion dated 9th December 2019 and brought under the provisions of Section 22 (sic) Rule 29, 30, 32 and 83 of the Civil procedure Rules seeking the following orders: -

(a) An eviction order against the Appellants, their agents and/or servants or tenants to remove them from the suit property.

(b) The Officer Commanding Bungoma Police Station do ensure enforcement of the decree and/or provide security during the eviction.

(c) The Appellants do meet costs of the enforcement of the decree.

2. The Appellants' Notice of Motion dated 15th January 2020 brought under the provisions of Articles 159 and 164(3) of the Constitution, Sections 3A and 3B of the Civil Procedure Act, Order 22 Rules 22 and 52, Order 42 Rule 6 and Order 51 of the Civil Procedure Rules seeking the following orders: -

(a) Spent

(b) Spent

(c) That pending the hearing and determination of Civil Appeal No 287 of 2019, a stay of execution of the decree and orders of this Honourable Court be and is hereby granted.

(d) That this Honourable Court be pleased to make such further and/or other orders as it may deem just, fair reasonable and appropriate in the circumstances in order for the ends of justice to be met.

(e) That the costs of and incidental to this application do abide by the out – come of the intended appeal.

By consent of the parties, it was agreed that the two application be canvassed simultaneously by way of written submissions.

Those submissions were subsequently filed by **MR MOMANYI** instructed by the firm of **ANASSI MOMANYI & CO ADVOCATES** for the Respondent and **MS WAKOLI** instructed by the firm of **WAKOLI & WAKOLI ADVOCATES** for the Appellants.

Although the Respondent's application was filed first, I shall start by considering the Appellants' application because if I allow it, then there will be no need to consider the Respondent's application as it will be rendered surplusage.

The Appellant's application dated 15th January 2020 is premised on the grounds set out therein and is also supported by the affidavit of **JAMKA SAID** alias **JAMILA SAID** the 2nd Appellant herein. The gravamen of that application is that following this Court's Judgment delivered on 30th May 2019, the Appellants requested for certified proceedings and Judgment and also filed a Notice of Appeal on 11th June 2019. That the certified proceedings and Judgment were supplied in late October 2019 and a Certificate of Delay was issued on 27th November 2019. That the six (6) months period within which they were required to vacate has lapsed and the Respondent has extracted a decree which he has served upon the tenants in the suit property seeking to evict them. That the Appellants have an arguable appeal with high chances of success grounds of which have been set out in the application in paragraphs 6(a) to 6(k). That the appeal will be rendered nugatory if the orders sought are not granted and if the decree is executed, the Appellants who are elderly and ill and who depend on the rent from the suit property will suffer hardship as the tenancy between them and their tenants will be terminated. That the Respondent will suffer no prejudice since he has never been in occupation of the suit property. Annexed to the application is the Notice of Appeal dated 11th June 2019, the Certificate of Delay dated 27th November 2019 and the Memorandum of Appeal.

The application is resisted and the Respondent by his replying affidavit dated 24th January 2020 has deponed, inter alia, that no appeal has been filed against this Court's Judgment nor a Notice of Appeal or Record of Appeal served upon his counsel. That the application is incompetent as there is inordinate delay in filing it and the Certificate of Delay was incompetently issued. That whether or not the appeal is arguable is not a consideration for such an application by this Court. That by being the registered proprietor of the suit property, the Respondent is entitled to the fruits of his Judgment and will be highly prejudiced if the application is allowed. That the Appellant is mistaken as to the grounds of stay of execution pending an appeal and this application should be dismissed withy costs.

I have considered the application, the rival affidavits and submissions by Counsel.

Order 42 Rule 6 of the Civil Procedure Rules provides as follows: -

> ***6(1) "No appeal or second appeal shall operate as a stay of execution or proceeding 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 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."*** Emphasis added.

Sub rule (6) is not relevant for purposes of this application.

It is clear from the above that a party seeking stay of execution pending appeal must establish the following: -

> **(a) Sufficient cause**
>
> **(b) Substantial loss**
>
> **(c) Offer security**
>
> **(d) Make the application without unreasonable delay.**

The Appellants have properly filed a Notice of Appeal dated 11th June 2019 and even gone further and filed the Memorandum of Appeal following this Court's Judgment delivered on 30th May 2019. While the Notice of Appeal was necessary under **Sub rule (4) of Order 42 Rule 6 of the Civil Procedure Rules**, the Memorandum of Appeal was not necessary since this is an appeal from my decision though that is not fatal to this application. However, the Appellants have gone to great lengths to show that before filing this application, they had applied for certified copies of proceedings and Judgment which they obtained in late October 2019 and a Certificate of Delay on 27th November 2019. The proceedings and Judgment were not necessary for purposes of this application. They are part of this record. Indeed, under **Sub rule (5) of Order 42 Rule 6 of the Civil Procedure Rules**, an application for stay of execution can properly be made informally soon after the delivery of the Judgment or ruling sought to be appealed. It is a requirement of the law that this application ought to have been filed ***"without unreasonable delay."*** The Judgment sought to be appealed was delivered on 30th May 2019 and this application was filed on 15th January 2020 some eight (8) months later. This is clearly unreasonable delay and even assuming that the appellants were waiting for the proceedings, Judgment and Certificate of Delay which they obtained on 27th November 2019, there is no explanation as to why they waited until 15th January 2020 to file this application. In any event, as I have already stated above, all that they needed to do was to file a Notice of Appeal before moving this Court. The proceedings and Judgment were not a necessary requirement for an application under **Order 42 Rule 6 of the Civil Procedure Rules**. On that ground alone, this application must fail.

But that is not all. The Appellants have also to demonstrate that unless the order of stay is granted, they will suffer substantial loss. In **KENYA SHELL LTD .V. BENJAMIN K. KIBIRU 1982 – 88 1 KAR 1018**, the Court of Appeal stated thus: -

> ***"It is usually a good rule to see if Order 41 Rule of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in it's various forms is the cornerstone of both jurisdiction for granting stay."***

In **MACHIRA t/a MACHIRA & CO ADVOCATES .V. EAST AFRICAN STANDARD (NO 2) 2002 KLR 63**, the Court said: -

> ***"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 stay."***

Whether or not to grant a stay pending appeal is a matter of judicial discretion. Such discretion must therefore be exercised on sound basis, rationally and not capriciously or whimsically. In so doing, the Court must bear in mind the need to balance between the two-competing interest of a party who has a Judgment and another who is desirous of exercising his right of appeal. The onus is however on the Appellants to demonstrate what substantial loss they will suffer if the order of stay is not granted. Mere averments will not do. In her supporting affidavit dated 15th January 2020, the 2nd Appellant makes no reference to any such substantial loss. In paragraphs 14, 15, 16 and 17 of the said affidavit, the 2nd Appellant refers to their appeal being rendered nugatory as they will have been evicted, their tenants' tenancies ***"terminated"***, the suit property ***"demolished"*** and the monies ***"impossible to recover."*** That they are ***"elderly and ill and solely depend on the rent from the suit premises for their livelihood and medication."*** That they will therefore suffer ***"great harm and prejudice"*** and the Respondent has never been in occupation of the suit property and will therefore not be ***"disadvantaged."*** No attempt has been made to furnish this Court with evidence of any tenancy agreements, the amount of rent they will lose, that the suit property will be demolished or the nature of their illness and medication. These are generalized averments which fall far short of proving the substantial loss that they may incur if the orders sought are not granted. Indeed, there is no suggestion that the Respondent is a man of straw and will not be able to meet any decree that may eventually be binding on him should execution proceed and the appeal succeeds. If such an averment had been made, then the burden would have shifted to the Respondent to demonstrate that he is in a position to satisfy any decree that the Court may find him liable to satisfy – **NATIONAL INDUSTRIAL CREDIT BANK .V. AQUINAS FRANCIS WASIKE C.A CIVIL APPEAL NO 238 OF 2005 [2006 eKLR]**.

In paragraph 9 of their application, the Appellants confirm their preparedness to furnish security pending the appeal. That is in conformity with **Sub rule (2)(b) of Order 42 Rule 6 of the Civil Procedure Rules**. However, what is contained in paragraph 6(a) to 6(k) of the Appellant's Notice of Motion is a regurtitation of the grounds of appeal which is not really a requirement under **Order 42 Rule 6 of the Civil Procedure Rules**. For instance, in paragraph 6(a) of the application, the Appellants cite the following ground as the basis of the orders sought: -

> ***6(a) "The learned Judge erred in law and fact in holding that the Respondent was legal owner of the suit property despite the fact that he bought it from a person whose lease had been cancelled."***

This Court cannot purport to make any findings on an appeal arising from it's own decision unless perhaps its an obvious case of lack of jurisdiction. That is essentially an issue for the Appellate Court.

An order for stay of execution pending appeal is an equitable remedy to be granted at the discretion of the Court. He who comes to equity must do so with clean hands. The Appellants were ordered to vacate the suit property within six (6) months from 30th May 2019. They are still on the suit property at the delivery of this ruling over one year after that order was issued. A party cannot seek the protection of the Court whose orders he has flouted. The Appellants have approached the Court with un – clean hands. That is clearly a hinderance to their application for stay and a Court of equity will frown against such conduct.

Ultimately, however, even if this Court was minded to allow their application, the Appellants have been un – able to surmount the hurdle that required them to move to Court ***"without unreasonable delay".*** It must be remembered that for a party seeking stay orders, all the requirements set out in **Order 42 Rule 6 of the Civil Procedure Rules** must be established. The Appellants have not done so.

The Appellants' Notice of Motion dated 15th January 2020 is hereby dismissed.

The Respondent has on his part sought the following substantive orders by his Notice of Motion dated 9th December 2019: -

> **1. An eviction order do issue against the defendants, their agents and/or servants and/or tenants to remove them from land reference BUNGOMA/TOWNSHIP/515.**
>
> **2. The Officer Commanding BUNGOMA POLICE STATION do ensure enforcement of the decree and/or provide security during the eviction.**

In the Judgment delivered on 30th May 2019 and which is the one to be executed, I made the following order in paragraph 4 thereof with regard to the eviction of the Appellants who were the defendants in the suit: -

> ***4: "The defendants to vacate from the land parcel NO BUNGOMA/TOWNSHIP/515 within six (6) months from to – day or be evicted in accordance with the law."***

That order was made in response to prayer No (ii) of the amended plaint in which the Respondent, as the plaintiff sought the following order against the Appellants as defendants: -

> ***(11) "The defendants have no legally enforceable claim on land reference NO BUNGOMA/TOWNSHIP/515 and they are thereon as trespassers and they ought to be evicted therefrom."***

It is clear therefore from the Respondent's own amended plaint dated 29th July 2015 that he only sought the eviction of the Appellants from the suit property. There was no mention of the Appellants' agents, servants or tenants. Indeed, there is nothing in the amended plaint to suggest that there were tenants in the suit property. A party is bound by his pleadings and cannot at the execution stage purport to amend those pleadings to enforce orders that were not part of his claim. In any case, if there are tenants in the suit property, there are other lawful ways of dealing with them other than in the manner in which the Respondent now seeks to do.

In the circumstances, the Respondent's Notice of Motion dated 15th January 2020 in so far as it seeks enforcement against persons that were not named in the plaint is devoid of merit and is for dismissal. The order that this Court granted in it's Judgment related to the Appellants who were to ***"be evicted in accordance with the law."*** That law is found in **Section 152 E of the Land Act**.

The up – shot of the above is that having considered both applications by the Appellants and the Respondent, I make the following orders: -

> **1. The Appellants' Notice of Motion dated 15th January 2020 is dismissed.**
>
> **2. The Respondent's Notice of Motion dated 9th December 2019, in so far as it seeks the eviction of any tenants, is dismissed.**
>
> **3. The Respondent must comply with the provisions of Section 152 E of the Land Act if he wishes to evict the Appellants.**
>
> **4. For avoidance of doubt, the interim orders of stay and status quo issued earlier are vacated.**
>
> **5. Each party to meet their own costs.**

Boaz N. Olao.

J U D G E

25th June 2020.

Ruling dated, delivered and signed at BUNGOMA this 25th day of June 2020. This ruling is delivered through electronic mail with notice to the parties in keeping with the guidelines following the COVID – 19 pandemic.

Boaz N. Olao.

J U D G E

25th June 2020.