



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

ELC CASE NO. 26 OF 2019

GEORGE MUTISYA.....APPELLANT/APPLICANT

-VS-

FAITH MWENDE PHILIP.....1ST RESPONDENT

SAMUEL MUTUA KIOKO.....2ND RESPONDENT

RULING

1. The application for determination is dated 29/10/2019 and was filed under certificate of urgency. It is brought under Article 164(3) of the Constitution of Kenya, Order 42 Rule 6 and 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A & 66 of the Civil Procedure Act and all enabling provisions of the Law. It seeks;

a) Spent.

b) Spent.

c) THAT there be a stay of execution of the judgment delivered on the 9th day of October 2019 by Hon. J. Mwaniki (SPM) In Makueni PMCC No. 34 of 2012- Faith Mwendé Philip –vs- George Mutisya & Samuel Mutua Kioko pending the hearing of the appeal.

d) THAT costs be in the cause.

2. The application is supported by the grounds on its face and the affidavit of George Mutisya sworn on the same day. The primary ground is that the trial Court declared the Respondent as the owner of plot 160 Wote town and the 90 days within which the Appellant was to demolish his structures have lapsed. He is apprehensive that the Respondent will commence execution and in the event that he succeeds in the appeal, his structures will have been demolished. He has deposed that such turn of events will cause him irreparable loss and the appeal will be rendered nugatory.

3. The application is opposed through the replying affidavit sworn by Faith Mwendé Philip on 26/11/2019. The gist of the opposition is that the Appellant has already been declared a trespasser by a Court of competent jurisdiction and his appeal has minimal chances of success. She has deposed that the application does not meet the conditions of stay.

4. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The Applicant submitted that the orders of stay are necessary to preserve the suit property pending determination of the boundary dispute.

6. He submitted that an Applicant seeking stay of execution pending appeal must demonstrate the following;

a) Substantial loss unless the order is made,

b) That the application was made without unreasonable delay,

c) Arguable appeal,

d) Furnishing of security for due performance of decree.

7. On substantial loss, he submitted that he spent millions of shillings in constructing the structures which are now at the risk of being demolished because the 90 day period given by the trial Court has lapsed.

8. On whether the appeal is arguable, he submitted that one of the major contests is that the trial Court did not make a determination on the third party notice despite the fact that he entered appearance, filed defence, was heard and cross examined. He contends that the effect of the notice was to make the third party liable for selling land to him while aware that he (3rd party) lacked a good title.

9. He submitted that the application was filed before the lapse of the stay given by the trial Court hence there was no unreasonable delay.

10. On substantial loss, the 1st Defendant/Respondent submitted that the Applicant has not furnished sufficient evidence to show the substantial loss that he will suffer if the stay order is not granted. Relying on the Court of Appeal decision in **Mukuma –vs- Abuoga (1988) KLR 645**, he submitted that substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.

11. She submitted that the Applicant is silent on whether he is ready and willing to abide by such terms and conditions as this Court may order. She relied *inter alia* on the case of Equity **Bank Ltd –vs- Taiga Adams Company Ltd (2006) eKLR** where the Court held;

“...of even greater impact is the fact that the 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...”

12. It is also her submission that the Court should balance the rights of both parties whenever it is invited to determine applications of this nature.

13. As rightly submitted by the parties, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.

14. Judgment in the case appealed from was delivered on 09/10/2019 and this application was filed on 29/10/2019 which is within the period allowed to file appeals. It is therefore evident that the application was filed timely.

15. As for substantial loss, the execution of the trial Court’s decree means demolition of some of the Appellant’s structures which he claims to have invested heavily in. Order 3 of the judgment states as follows; *“An order for the defendant within 90 days from this judgment to demolish his structures in so far as the same encroach on to the plaintiff’s plot number 160.”* It is therefore discernible that there is a boundary dispute between the parties.

16. In ground one of the memorandum of appeal, the Appellant is faulting the trial magistrate for failing to determine the measurement of plot 161 as per the sale agreement. Demolition of property of whatever kind undeniably comes with a financial implication and I am of the considered view that the prudent thing to do is to preserve the Appellant’s structures until the appeal is conclusively determined. I am therefore convinced that substantial loss will result if execution proceeds.

17. As for security, the Court should balance the two competing interests i.e. that a successful litigant should enjoy the fruits of the judgment and at the same time allow an aggrieved party to exercise his right of appeal. Although this is not a money decree it is worth noting that costs were awarded in the judgement that the Appellant/Applicant has appealed against. As a sign of good faith, the Appellant/Applicant ought to furnish security for the due performance of the decree or given an indication that he is willing to abide by any condition that the court may impose on him. Having observed in this ruling that the Appellant/Applicant may suffer substantial loss unless the order is made and that the application was made without unreasonable delay, balancing the compelling interests of the parties herein, it is only fair that he be granted a chance to argue his appeal. This will however be on condition that the Appellant/Applicant furnishes security for the due performance of the decree. The Appellant/Applicant has not indicated whether or not the costs were assessed and how much they were. It therefore poses a challenge to the Court on what would be reasonable security.

18. Given the above circumstances, I am of the view that the sum of Kshs.300,000/= would suffice. Consequently I will proceed to grant prayer C on condition that the Appellant/Applicant does deposit Kshs.300,000/= in an interest earning account in the joint names of the parties herein within 45 days from the date hereof failure of which the 1st Defendant/Respondent may proceed to execute. Costs of the application shall be in the cause.

Signed, dated and delivered at Makueni via email this 25th day of **June, 2020**.

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka