



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 261 OF 2017

PETER KIMANI NJENGA.....PLAINTIFF/APPLICANT

VERSUS

MUGO KAMAMBUNI MUGO.....1st DEFENDANT

MARY NJERI KABUKI.....2nd DEFENDANT

PAUL MUGANE KABUKI (Being Administrators

of the Estate of JOSEPH KABUKI MWANGI).....3rd DEFENDANT

DISTRICT LAND REGISTRAR LAIKIPIA.....4th DEFENDANT

RULING

1. Pursuant to a ruling by this Court dated the 26th day of June 2018, striking out the Plaintiff/Applicant's suit for being time barred by virtue of the provisions of Section 7 of the Limitation of Actions Act, the Applicant has filed the present Application dated the 18th November 2019 under the provisions of Order 42 Rule 6, and Order 22 Rule 22 of the Civil Procedure Rules, and Section 63 E (sic) of the Civil Procedure Act where he seeks for orders of stay of execution in the matter pending the hearing and determination of an Appeal.

2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Peter Kimani Njenga the Applicant herein dated the 18th November 2019.

3. The Application was opposed vide the 3rd Respondent's Replying Affidavit dated 11th December 2019 in which the Respondents sought that the said application be dismissed with costs for being without merit.

4. Despite there being orders that the said application be disposed of by way of written submissions, as per the consent entered into by the parties on the 14th January 2020, by that time the Court is writing this ruling, only the 2nd and 3rd Respondents had filed their joint written submissions which the Court shall address as follows.

2nd and 3rd Respondents' submissions.

5. The Respondent's submission was that the Applicant's application was omnibus and a mongrel of different rules, practice procedures and parameters and therefore incapable of any proper response, adjudication and determination and the same ought to be dismissed.

6. The Respondents framed their issues for determination as follows;

i. Whether the Decree of Court issued on 26th June 2018 is capable of being stayed.

ii. Whether the Applicant has met the threshold for stay of any Order by this Court.

iii. Who should bear the cost of this suit

7. On the first issue for determination, it was the Respondents' submission that the orders issued on 26 June 2018 were negative orders and therefore could not be stayed as there had been no specific obligation imposed on the parties by the striking out order.

8. That the Applicant did not specifically plead that he was seeking stay of the order on costs and therefore and it was clear that he intended to stay the whole of the judgment and the resultant Decree.
9. That stay of execution is ordinarily an interim order which seeks to delay the performers of positive obligations that are set out in an order as a result of a ruling.
10. The Respondents relied on the decided case in **Kanwal Sarjit Singh Dhiman to vs Keshaji Jivarj Shah [2008] eKLR** and **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** to submit that the Courts have held that an Order for stay cannot be granted where a negative Order had been issued as the same was incapable of execution.
11. That pursuant to the Court's ruling, the only Order that was capable of execution was the Order in regard to costs wherein the same had not commenced and therefore the Applicant could not claim that he was in imminent danger.
12. That in the case in **B vs Attorney General [2004] 1KLR 431** the Court had held that Courts needs not make orders in vain otherwise the Court would be exposed to ridicule.
13. On the Second issue for determination, the Respondents submitted that the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules provided three conditions upon which an application for stay of execution could be pegged on.
14. That in the case of **Runda water Limited & Another vs Timothy John Nicklin & Another [2017] eKLR** the Court had held that the stay of execution could only be granted after the Court was satisfied that the Applicant has met these conditions.
15. That on the 1st condition as to whether the Applicant would suffer substantial loss if the orders were not granted, it was the Respondent's submission that the Applicant had not presented any sufficient material to enable the Court to determine whether he stood to suffer any harm.
16. Reliance was placed on the decided case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** to submit that the Applicant's reliance on an unproven and unfounded fear of execution could not form the basis for grant of stay on the grounds of substantial loss.
17. Further that the Applicant had filed the Application after a period of 1 year 5 months after the Court had delivered its judgment which delay was unreasonable. That the Memorandum of Appeal was also filed in the superior Court on the 13th August 2018 wherein the Appeal had not been prosecuted almost 1 year and 3 months down the lane signifying that the Applicant was unwilling to commence the Appeal.
18. That timelines were not technicalities of procedure which may be accommodated indiscriminately especially in instances of excessive and inordinate delay as was the case in the instant matter.
19. That on the third condition as to whether the Applicant had placed any security or due performance of the decree as parties await the outcome of the Appeal, the Respondents submitted that the Applicant had not offered any provision of security and therefore he had failed to discharge the duty imposed on him under Order 42 Rule 6 of the Civil Procedure Rule and therefore the stay of execution could not be granted. They relied on the decided case in **Anne Njeri Mwangi vs Muzaffer Musafee Essajee & Anotehr [2014] eKLR**
20. The Respondents also submitted on the issue of costs to the effect that the same followed the event and that upon dismissing the present Application, the Court to grant them costs.

Determination.

21. I have also considered, the supporting affidavit and the replying affidavit as well as the written submissions made by Counsel to the 2nd and 3rd Respondents. I find two issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make.

22. On the issue of whether the Applicant is deserving of the orders of stay of execution of decree pending the hearing and determination of the Appeal herein, the law applicable is Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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.

23. There are three conditions for granting of stay Order pending an Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

24. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “**and**” which connotes that all three (3) conditions must be met simultaneously. None of the said conditions had been met by the Applicant herein.

25. Having said so, and having regard to the Application before me, I note that the orders issued vide the Ruling delivered on the 26th day of June 2018 were to the following effect:

‘..The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.....’

Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection herein succeeds in its entirety with the result that the plaintiff’s suit is herein struck out with costs to the 2nd and 3rd Defendants.’

26. These orders, were in my humble opinion and in agreement with the 2nd and 3rd Respondent’s submission, negative orders.

27. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** the Court had held as that an order for stay could not be granted where a negative Order had been issued.

28. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

any person in whose favour a decree has been passed or an Order capable of execution has been made...”

29. It therefore obtains that there are orders that are capable of execution while others are not. In the present matter, the Court in its finding did not order the Applicant or Respondents in the matter to do anything or to abstain from doing anything or to pay any sum of money.

30. In the case of **Western college of Arts and Applied Sciences vs. Oronga (1976) KLR 63** at p. 66 Law V P said:-

“But what is there to be executed under the judgment, the subject of the intended Appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs ... In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay, to enforce or to restrain by injunction.”

31. In the decided case of **Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 others [2008] eKLR** the Court of Appeal held:

‘As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.’

32. For the foregoing reasons, the Court’ finds that the Applicant’s Notice of Motion Application dated the 18th November 2018 and filed on the equal date is not merited and the same is hereby dismissed with costs to the 2nd and 3rd Respondents.

Dated and delivered at Nyahururu this 25th day of June 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE