



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO. 68 OF 2017

(FORMERLY NAKURU 278 OF 2013)

ARCHBISHOP ELIJAH B. WAMBURI

SIMON KAMAU

SAMWEL GITHINJI

(Being the Registered Trustees of Israel Assemblies

of God and suing for and on behalf

of the aforesaid Society).....RESPONDENTS

VERSUS

ARCHBISHOP JOSHUA WILSON MUTHIOMA

JOHANA MOSES CHEGE

JOSEPH KIMANI GITAMA

SILA MACHARIA

MICHAH KIRAGU

ELIZABETH NYAMBURA

JACOB KIMANI

(Sued as the Registered Trustees of Israel Assembly

of Kenya for and on behalf

of the aforesaid Society).....APPLICANTS/APPELLANTS

RULING

1. Before me for determination is the Notice of Motion dated 16th December 2019 brought under Order 22 Rule 22, order 42 Rule 6 and Order 51 Rule 1 the Civil Procedure Rules, Sections 3A of the Civil Procedure Act, Article 159 of then Constitution and all other enabling provisions of the law where the Applicant seeks for Orders that;

i. Spent

ii. This Honorable Court be pleased to grant order for stay of execution of the judgment and orders delivered on 19th December 2019 by the Hon. Lady Justice M.C Oundo in ELC No. 68 of 2017 pending the hearing and determination of the appellant (sic) Appeal.

iii. That costs of this application be provided.

2. The said application is premised on the grounds on the face of it as well as the supporting affidavit of Harun Maina Kigotho, on his behalf and on the behalf of the other Appellants, sworn on the 16th December 2019.

3. The Application was opposed by the Respondents herein vide their Replying affidavit sworn on the 4th February 2020 on the following grounds:

i. That the application was misconceived, incompetent, an abuse of the Court process and that the same had no merits to warrant any discretion by this honorable Court.

ii. That the application was presented by a party who was not a party to the current suit and there was no legal basis why he would be presenting the application bearing in mind that he was neither a trustee of the Applicant nor one of the Applicants affected by the said judgment and neither had he sought to be enjoined as a party to the proceedings.

iii. That further, the notice of Appeal dated 16th of December 2019 was incompetent and bad in law as the same was not filed within 14 days of delivery of the judgment as required by the law and could therefore not form a basis for granting stay of execution of the judgment delivered by the Court.

iv. That the Applicants were not in occupation or possession of the suit property at any time during the pendency of the suit, and had neither demonstrated the kind of loss or prejudice they would suffer if the application was not allowed.

v. That further, the Applicants had not shown their desire to offer security to balance the scales of justice and equity.

vi. That the present application was only meant to infringe on their rights and freedoms, but that the same should be dismissed with costs.

4. Despite parties having agreed by consent, to have the present application disposed of by way of written submissions, by the time I am writing this ruling, the Court had only received the Respondents' written submissions wherein they had also submitted that they were yet to receive the Applicants' written submissions.

5. The Respondents' submissions were that the orders as sought by the Applicants were discretionary in nature and the jurisdiction to grant the same was provided for under Order 42 Rule 6(1) of the Civil Procedure Rules.

6. That Rule 2 of Order 42 of the Civil Procedure Rules, provided the conditions that one had to meet before an order of stay of execution could issue to wit that;

i. Unless stay of execution is allowed she or he will suffer substantial loss

ii. The application for stay was filed without unreasonable delay.

iii. There was willingness to offer security.

7. On the first limb of substantial loss, the Respondents submitted that they had moved the Court via their plaint dated 29th of July 2009 seeking among others on order of cancellation of certificate of lease issued in favour of the Applicants in respect to parcel of land known as Nyandarua/ North Kinagop Township/34, and the rectification and issuance of a fresh certificate of lease reflecting the true ownership of the suit land. That they had also sought for restraining orders against the Applicants from interfering in any manner with the said land. That parties had adduced their evidence and judgment entered in their favour.

8. That the Applicant was a society and not a legal entity and as such it did not have legal capacity to sue or be sued on its own capacity but through its registered trustees. That the deponent in the supporting Affidavit to the present application one Harun Maina Kigotho was neither a registered trustee nor a party to the suit. He was therefore a stranger to the proceedings before Court and therefore the application before Court was incompetent and ought to be dismissed.

9. That secondly, the Applicants had not demonstrated the kind of loss they would suffer and if the application was not allowed keeping in mind that they had never been in occupation of the suit land and the same has always been in possession and occupation of the Respondents who had been carrying out the church services on the same. The Respondents relied on the decided case in **Karungu Estate Limited vs. Beatrice Wamere Karanja [2012] eKLR** to submit that in the absence of any evidence of substantial loss that the Applicant would suffer, the said application should be dismissed.

10. The Respondents' submission on the second limb was that judgment in the subject matter of the Appeal had been delivered on the 19th November 2019 wherein the present application was filed on the 16th December 2019, that there was no unreasonable delay to that extent.

11. The Respondents' submission on the third limb was that the Applicants had not even demonstrated their willingness to provide security and the Application must also fail on this ground. They relied on the decided case in **Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat [2013] eKLR** to submit that there was nothing before the Court to warrant it interfere with the rights of the Plaintiff to enjoy the fruits of their Judgment.

12. The Respondents' response to the Applicants' application to have the application granted in the interest of justice because their Appeal had high chances of success was that in the decided case in **Carter & Sons Limited vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997** as cited in **Richard Kubondo vs Ndungu Waweru [2019] eKLR**, the court had held that the mere fact that there were strong grounds of Appeal was not justification in itself to procure an order for stay.

Determination.

13. To begin with, the Court notes that the supporting affidavit to the Application was sworn by one Harun Maina Kigotho who had not been enjoined to the Pleadings, however under the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, the same is clear that '*affidavits shall be confined to such facts as the deponent is able on his own knowledge to prove.*'

14. Harun Maina Kigotho, by swearing the affidavit on behalf of the Appellants, made himself viable as a witness for cross examination in the case of facts within his knowledge. I find that the same did not prejudice the Respondents in the circumstance.

15. That said and done, I have considered the submissions by Counsel for the Respondent, I have also considered, the supporting affidavit, the replying affidavit as well as the authorities cited by Counsel for the Respondent in respect to the Applicants' application dated 16th December 2019 seeking for orders of stay of execution of the Judgment delivered on the 19th November 2019 pending the hearing and determination of their intended Appeal

16. The law applicable in an application seeking orders of stay of execution pending the hearing and determination of an Appeal is found under 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.

17. 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.

18. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules cannot be severed. The key word is "**and**" which connotes that all three (3) conditions must be met simultaneously.

19. The Court of Appeal set out the guiding principles in Applications for stay of execution pending Appeal in the case of **Butt –vs- Rent Restriction Tribunal [1979] eKLR (Madan Miller and Porter JJA)** where the Court held that:-

“i) 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.

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

iii) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.

iv) 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 requirement.”

20. In the Application before me, it is clear that the Applicant has not pleaded any of the three conditions while seeking for stay orders pending an Appeal therefore quite clearly the Application is a non-starter.

21. On the first Condition as is stipulated under Order 42 Rule 6 (2) of the Civil Procedure Rules, I find that the purpose of an application for stay pending Appeal is to preserve the subject matter upon which failure to do that would render the Appeal nugatory.

22. In **Silverstein –vs- Chesoni [2002]1 KLR 867** the Court held that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the Appeal nugatory.”

23. It was therefore incumbent upon the Applicants to demonstrate to the Court the kind of substantial loss that would result to them if the stay of execution was not ordered. Further, the Applicants ought to establish that the execution will create a state of affair that will irreparably affect or negate the very essential core of Applicant as a successful party in the Appeal. The Respondents have submitted that they were in possession of the suit land where they held their prayers and therefore even if the orders were not issued, the Applicants would not suffer any loss. In short I find that the Applicant has failed to avail evidence to support its alleged claim of irreparable loss, should the application for stay of execution be denied.

24. In the case of **Machira T/A Machira & Co. Advocates –vs- East African Standard (No. 2) [2002] 2 KLR 63**, the Court held as follows:-

“In this kind of applications 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...”

25. On the second Condition there is no contestation that the application herein was brought without undue delay.

26. On the 3rd Condition as is provided for under Order 42 Rule 6(2) (b) of the Civil Procedure Rules the Applicants ought to have offered such security for the due performance of the orders as may ultimately be binding on them. In the instant matter, no security or proposal for due performance had been offered and no commitment had been exhibited by the Applicants.

27. In the case of **Equity Bank Ltd –vs- Taiga Adams Company Ltd[2006] eKLR**, the Court held as follows:-

“.....of even greater impact is the fact that an 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...” which principle was also emphasized in **Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others**.

28. The Applicants have been silent on the issue of security and I find that they have therefore failed to meet the three mandatory tenets under which this application is brought and therefore have failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion and the application is not merited.

29. The Applicants have also urged that they have an arguable Appeal. I note that no draft Memorandum of Appeal has been attached to their Application. Whether an Appeal is arguable or not can only be deciphered not from the supporting affidavit or submissions but on the face of a Memorandum of Appeal.

30. In the case of **Mohamed Salim T/A Choice Butchery (supra)**, the Court had upheld the decision in **M/S Portreitz Maternity (supra)** that had held that:-

“That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.....”

31. The end result is that I find that the intended Appeal would not be rendered nugatory by declining stay of execution. The Applicant’s application dated 16th December 2019 is without merits and is dismissed with costs to the Respondents

Dated and delivered at Nyahururu this 23rd day of June 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE