REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

APPEAL No. 28 OF 2019

MUSA KIPROTICH KIPKURUI …….... APPELLANT

VERSUS

TABITHA MOKAYA …..... RESPONDENT

RULING

1. By Notice of Motion dated 7th November 2019, the appellant seeks the following orders:

> *1. Spent*
>
> *2. The firm of Gichina, Macharia, Matotse & Co. Advocates be granted leave to come on record for the Appellant/Applicant (Applicant).*
>
> *3. That pending inter parte hearing of this Motion, the Honourable Court be pleased to stay and/or suspend the execution of the judgment delivered on 9th October 2019 in CM ELC 46 of 2018 as delivered by Hon K. Bidali (CM) at the Naivasha Chief Magistrates Court.*
>
> *4. That the costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the appellant/applicant. He deposed that the respondent is in the process of evicting him from the suit property, that there is need to preserve the suit property and that this appeal will be rendered nugatory if stay is not granted.

3. The respondent opposed the application through a replying affidavit in which she deposed that instead of the applicant vacating the suit property as directed in the judgment, he has continued to occupy it to her detriment and prevented her from enjoying the fruits of the judgment. She added that the suit property is located in a rich agricultural area where she could be cultivating maize crop leading to a yield of 20 bags per acre and that she is therefore suffering loss of 100 bags being the expected annual yield valued at KShs 300,000 yet the applicant has not offered any security for due performance of the decree. Further, that the applicant has not demonstrated how the appeal will be rendered nugatory or how he will suffer any loss if the orders sought are not granted.

4. The application was canvassed through written submissions which both sides duly filed. The applicant's submissions were on the principles for granting interlocutory injunctions yet the application before the court is for stay pending appeal. On her part the respondent argued that other than filing the appeal timeously, the applicant has not met the conditions for granting stay pending appeal and that the application should consequently be dismissed.

5. I have carefully considered the application, the affidavits and the submissions. The application is brought, among other provisions, under **Order 9 rule 9** and **Order 42** of the **Civil Procedure Rules, 2010**. Under prayer 2, the applicant seeks an order that the law firm of Gichina, Macharia, Matotse & Co. Advocates be granted leave to come on record for him. **Order 9 rule 9** provides:

> ***9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court -***
>
> ***(a) upon an application with notice to all the parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.***

6. No basis whatsoever is laid in the supporting affidavit for the order sought under prayer 2. It is not stated which advocates they are taking over from and I am therefore unable to ascertain if the said advocates have been served. In any case, the judgment referred to under **Order 9**

rule 9 is in this case a judgment of the subordinate court. The application for leave to change advocates ought to have been made before the subordinate court since this court is yet to render a judgment in this appeal. In the circumstances, I dismiss prayer 2 of the application.

7. Regarding the aspect of stay pending appeal, **Order 42 rule 6 (1)** and **(2)** of the **Civil Procedure Rules, 2010** provides as follows:

> ***6. (1) 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***.

8. Thus, an applicant seeking stay of execution pending hearing and determination of an appeal must satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. As Platt Ag JA (as he then was) stated in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, substantial loss is the corner stone of the jurisdiction to grant stay of execution pending appeal. It is virtually impossible for such an application to succeed when an applicant fails to demonstrate that he will suffer substantial loss if stay is not granted.

9. The applicant contends that the respondent is in the process of evicting him from the suit property. Beyond that generalized allegation, no evidence is tendered to show any impending eviction. Even if there were to be eviction, that *per se* is not proof of substantial loss. Each applicant must demonstrate to the court how an eviction amounts to substantial loss in the unique circumstances of his case. Further, I note that the learned magistrate stated in the judgment appealed from that "*I hereby enter judgment in favour of the plaintiff as prayed for in the plaint*". Since the applicant has not annexed a copy of the plaint, I am unable to ascertain the full scope of the judgment so as to determine if there will be substantial loss. All in all, the applicant has not surmounted the test of substantial loss.

10. In view of the foregoing, I find no merit in Notice of Motion dated 7th November 2019. The application is dismissed with costs to the respondent.

11. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 18th day of June 2020.

D. O. OHUNGO

JUDGE