



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC APPEAL NO. 2 OF 2020**

**ROBERT NJIRIRI MBUGUA.....APPELLANT/APPLICANT**

**VERSUS**

**ERUSTUS MAKARI WATILA.....1<sup>ST</sup> RESPONDENT**

**SIMON WAMALWA.....2<sup>ND</sup> RESPONDENT**

**MOSES WAKORI WAMALWA .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

By his Notice to Motion dated 12<sup>th</sup> February 2020, the Appellant seeks the following orders: -

(a) Spent

(b) Spent

(c) Spent

(d) Pending the hearing and determination of this appeal there be a stay of execution of the decree in BUNGOMA CMCC NO 48 of 2013.

(e) Pending the hearing and determination of the appeal herein, this Honourable Court be pleased to issue a temporary injunction restraining the Respondents, their agents and/or servants from interfering with the property that was the subject matter in BUNGOMA CMCC N 480 of 2013 in any manner prejudicial to the Appellant including but not limited to disturbing, harassing, threatening to remove and/or removing the Appellant's tenants from the premises on the property.

(f) Costs of this application be provided for.

The application is premised on the grounds set out therein and supported by the affidavit of **ROBERT NJIRIRI MBUGUA** the Appellant herein.

The gist of the application is that the 1<sup>st</sup> Respondent was at all time the registered proprietor of the land parcel **NO EAST BUKUSU/NORTH KANDUYI /464** and by an agreement dated 1<sup>st</sup> April 2011, the Appellant agreed to purchase the same at a consideration of Kshs. 1,500,000/= of which a sum of Kshs. 1,200,000/= was paid and the balance was to be paid by the end of the year. The Appellant took possession of the suit property and the title deed was deposited with the firm of **OMUNDI BWONCHIRI & CO ADVOCATES** till the balance of Kshs. 300,000/= was paid. That the Appellant on several occasions before the end of 2011 tried to get the 1<sup>st</sup> Respondent to collect the balance but he became evasive and so the Appellant deposited the same with the said firm of Advocates. The 1<sup>st</sup> Respondent purported to sub – divide the suit property into two parcels being **EAST BUKUSU/NORTH KANDUYI/6573** and **6574**. He then sold the parcel **NO EAST BUKUSU/NORTH KANDUYI/6574** to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Appellant therefore filed **BUNGOMA CMCC NO 480 OF 2013** seeking various remedies against the Respondents but his suit was dismissed and the Respondents' Counter – Claim was allowed. He therefore filed **BUNGOMA HIGH COURT CIVIL APPEAL NO 75 OF 2019 (NOW ELC APPEAL NO 2 OF 2020)** and also filed in the trial Court an application for stay of execution dated 5<sup>th</sup> September 2019 which was dismissed vide a ruling dated 5<sup>th</sup> February 2020. The Respondents have now started harassing his tenants and demanding that they move out or be evicted. The Respondents are also threatening to demolish the suit property hence this application and if the orders sought are not granted, he will suffer substantial loss and the appeal will be rendered an academic exercise.

Annexed to the agreement are the parties pleadings in **BUNGOMA CMCC NO 480 OF 2013**, copy of title deed which is not legible, copy of a letter from the 1<sup>st</sup> Respondent's Advocate dated 23<sup>rd</sup> October 2013 addressed to the Appellant, copy of sale agreement dated 1<sup>st</sup> April 2011, application for consent to transfer and other documents.

The 1<sup>st</sup> Respondent did not file any response to the application.

The 2<sup>nd</sup> Respondent with the leave and authority of the 3<sup>rd</sup> Respondent swore a replying affidavit dated 10<sup>th</sup> March 2020 in which he deponed, inter alia, that the application is an abuse of the Court process and that the Appellant is in possession of the suit property running business and deriving profits therefrom and the mere fact that he has filed an appeal does not entitle him to a stay of execution. That whereas he is the registered proprietor of the suit property since 2013, he has not been allowed to exercise his rights over the same and this application is calculated to deny him and the 3<sup>rd</sup> Respondent the fruits of their Judgment while the Appellant continues earning rent and profits therefrom. That the suit property is now valued at Kshs. 4.6 million and the Appellant has benefited from the rent to the tune of Kshs. 3.456 million. That this Court should weigh the compelling interests of the parties herein and the Appellant can be compensated in monetary terms in the event of the appeal succeeding. That there is no proper appeal and neither has a decree been extracted. That the Appellant has obtained an order for refund of the money deposited with the 1<sup>st</sup> Respondent and will not suffer any prejudice and to the contrary, the Respondents will suffer irreparable loss. Therefore, the Appellant is not deserving of the orders sought.

When the application was placed before me on 17<sup>th</sup> February 2020, I did not certify it as urgent but directed that it be served for inter – parte hearing. On 11<sup>th</sup> March 2020, the parties agreed that the application be canvassed by way of written submissions with the Appellant filing and serving within 14 days and the Respondents replying within 14 days of service. The matter was thereafter to be mentioned on 27<sup>th</sup> May 2020 to confirm compliance. However, by 27<sup>th</sup> May 2020, only Appellant's counsel **OCHARO KEBIRA & CO ADVOCATES** had filed their submissions. I have therefore not had the advantage of any submissions from **J. O. MAKALI & CO ADVOCATES** counsel for the Respondents.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by the Appellant.

This application is premised under the provision of **Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Order 42 Rule 6(1)(2) and (6) of the Civil Procedure Rules** and also the inherent powers of this Court. The Appellant seeks the following substantive orders: -

- 1. Stay of execution of the decree in BUNGOMA CMCC NO 480 OF 2013.**
- 2. A temporary injunction restraining the Respondents, their agents and/or servants from interfering with the property that were subject of BUNGOMA CMCC NO 480 OF 2013 pending the appeal.**

I shall consider them in that order.

**STAY OF EXECUTION:** -

**Order 42 Rule 6(1)(2) and (6) of the Civil Procedure Rules** provides as follows:-

**6(1) “No appeal or second appeal shall operate as 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 orders 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) Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a Subordinate Court or tribunal has been complied with.”**

It is clear from the Memorandum of Appeal dated 29<sup>th</sup> August 2019 and filed herein on 3<sup>rd</sup> September 2019 that the Judgment sought to be appealed was delivered on 7<sup>th</sup> August 2019. This application was filed on 14<sup>th</sup> February 2020 but prior to that, a similar application had been filed in the trial Court on 5<sup>th</sup> September 2019 but was dismissed on 5<sup>th</sup> February 2020. This application having been filed on 14<sup>th</sup> February 2020 was therefore filed without un – reasonable delay which is a requirement for the grant of the orders of stay of execution pending appeal. The other requirement is that the Applicant must satisfy the Court that unless the order sought is granted, he will suffer substantial loss. Also, the Applicant is required to offer such security that the Court may order for the due performance of such decree or order as may be binding upon him.

At this stage, this Court must bear in mind that there is a pending appeal and avoid comments that may prejudice it.

Substantial loss is the cornerstone of the jurisdiction for granting stay pending appeal. If there is no evidence of such loss, the order will not

be granted – **KENYA SHELL LTD .V. BENJAMIN K. KIBIRU 1982 – 88 1 KAR 1018**. Similarly, 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. It must therefore be exercised on sound basis, rationally and not capriciously or whimsically. The interest of justice must be paramount bearing in mind that the Court has to balance between the two competing interests of one party who has a Judgment in his favour and another who wishes to exercise his right of appeal. The onus is however on the Appellant to demonstrate what substantial loss he will suffer if no stay is granted. Other than mere averments in paragraphs 21, 22 and 23 of his supporting affidavit that he will **“suffer substantial loss”**, and **“lose rent”** and also **“lose the premises”** which the Respondents are **“threatening to demolish”**, no evidence has been placed before me to demonstrate what **“substantial loss”** the Appellant will suffer or the **“rent”** that he will lose nor any evidence that there is a threat to **“demolish”** the premises.

Further, no evidence has been placed before this Court to suggest that if the Appellant succeeds in his appeal, the Respondents will not be in a position to meet any decree against them. If the Appellant had made any such averment, then the burden would have shifted to the Respondents to demonstrate that they are in a position to satisfy any such decree – **NATIONAL INDUSTRIAL CREDIT BANK.V. AQUINAS FRANCIS WASIKE C.A CIVIL APPEAL NO 238 OF 2005 [2006 eKLR]**.

Finally, in an application for stay pending appeal, the Applicant must offer security for the due performance of any decree should the Court find against him.

In **VISHRAM HALAI & ANOTHER .V. THORNTON & TURPIN 1963 LTD C.A CIVIL APPLICATION NO 15 OF 1990 [1990 eKLR]**, the Court of Appeal stated as follows with regard to the jurisdiction of this Court to grant an order of stay pending appeal: -

***“Thus, the superior Court’s discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause; secondly, the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the Applicant must furnish security. The application must, of course, be made without unreasonable delay.”*** Emphasis added

Whereas the Court of Appeal’s discretion to grant a stay pending appeal is unfettered, this Court’s powers to do so is fettered by the conditions set out in **Order 42 Rule 6(2) of the Civil Procedure Rules**. The Appellant herein has not offered any security for the performance of any decree should he be found liable yet the thread that runs through the cases is that such security must be offered. Indeed, **Order 42 Rule 6(2)(b) of the Civil Procedure Rules** is very clear that no order of stay shall be granted unless such security **“has been given by the Applicant.”** In the circumstances, the Appellant is not deserving of the order of stay pending appeal.

#### **TEMPORARY INJUNCTION: -**

The Court no doubt has the jurisdiction to grant an order of temporary injunction pending appeal. In doing so, the guidelines set out by **VISRAM J** (as he then was) in **PATRICIA NJERI & OTHERS .V. NATIONAL MUSEUM OF KENYA [2004 eKLR]** are helpful. These are: -

- 1. An order of injunction pending appeal is a discretionary one which will not be available to a party whose appeal is frivolous.**
- 2. The discretion should be refused where it would result in greater hardship than it would avoid.**
- 3. The Applicant must show that unless the injunction is granted, the appeal would be rendered nugatory.**
- 4. The Court should also be guided by the principles in **GIELLA .V. CASMAN BROWN LTD 1973 E.A. 358**.**

The well-known principles in the **GIELLA** case (supra) are that the Appellant must show: -

- 1: A prima facie case with a probability of success.**
- 2: That he will suffer irreparable injury which cannot be compensated by an award of damages.**
- 3: If in doubt, the Court will determine the application on a balance of convenience.**

In an application such as this, the Court must yet again be alive to the fact that there is a pending appeal before it. It must therefore be cautious not to appear to be delving into the appeal itself. The most it can do is consider the issues raised in the Memorandum of Appeal in light of the decision appealed from. In the circumstances of this application, the decision appealed was not among the documents annexed to the Appellant’s supporting affidavit. Therefore, this Court is not in a position to gauge whether or not the appeal is frivolous.

On whether or not the Appellant can be compensated by an award of damages for whatever injury he may suffer, it is clear from paragraph 24(d) of his amended plaint dated 29<sup>th</sup> April 2014 and which is part of the annexures to his supporting affidavit that among the prayers he seeks include: -

**24(d) “In the alternative and without prejudice to the foregoing prayers, an order directing the defendants to compensate the plaintiff to the extent of the current market value of the subject property.”**

In his replying affidavit dated 10<sup>th</sup> March 2020, the 2<sup>nd</sup> Respondent has averred in paragraph 15 that the suit property was valued at Kshs. 4.6 million as at 1<sup>st</sup> February 2014. A valuation report is annexed to that affidavit. Given that un – controverted fact and in view of the Appellant’s pleading that other than the main remedy of specific performance with respect to the transfer to him of the parcel **NO EAST BUKUSU/NORTH KANDUYI/4642**, he would be content in the alternative with an award of the current market value of the aforesaid property, it is obvious that an award in damages would be sufficient compensation if he succeeds in the appeal. Therefore, even if this application is rejected, his appeal will not be rendered nugatory. This Court is also cognizant of the fact that the land subject matter of the sale agreement between the Appellant and the 1<sup>st</sup> Respondent no longer exists having been sub – divided and a portion sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Finally, an injunction is an equitable remedy. It is therefore only available to a party who has approached the Court with clean hands. A perusal of some of the annexures herein suggest that the Appellant has not come to Court with clean hands. Among the documents which the Appellant has annexed to his application is a letter dated 23<sup>rd</sup> October 2013 addressed to him by counsel for the 1<sup>st</sup> Respondent. Paragraphs 1, 2, and 3 of the said letter are relevant to this application and I shall reproduce them.

**“RE: ERASTUS MAKARI WATILA – E. BUKUSU/N KANDUYI/4642**

*We have been retained by our above mentioned client to write and address you as hereunder.*

*That on 1<sup>st</sup> April 2011 you entered into an agreement with our client for the sell of land measuring 0.025 Ha at a consideration of Kshs. 1,500,000 of which upon execution of the sale agreement you paid to our client Kshs. 1,200,000 leaving a balance of Kshs. 300,000.*

*That efforts of our client requesting you to complete the purchase price vide letters dated 9.3.12, 18.4.12 and 30.4.12 from M/S Onchiri & Company Advocates and M/S Otsiula Kweyu & Company Advocates have been futile and instead you resorted to cause the arrest of our client who was later charged vide BUNGOMA CM CR NO 2115 OF 2013 for allegedly assaulting you.”*

The letter then goes on to demand that the Appellant makes efforts to receive the refund of the Kshs. 1,200,000. That letter suggests, and the Appellant has not rebutted the contents thereof in his replying affidavit, that although the balance of the purchase price of Kshs. 300,000 was supposed to have been paid before the end of 2011 as per the agreement dated 1<sup>st</sup> April 2011 between the Appellant and the 1<sup>st</sup> Respondent, that balance still remained un-paid 2½ years later. The Appellant was therefore in breach of the said agreement and is therefore not deserving of this Court’s exercise of its discretion in his favour. In **KENYA BREWERIES LTD & ANOR .V. WASHINGTON OKEYO C.A CIVIL APPEAL NO 332 OF 2000 [2002 eKLR]**, the Court stated as follows: -

**“It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party.”**

See also **RIPPLES LTD .V. KAMAU MUCUHA 1992 eKLR**. The Appellant herein is in default of a term of the contract dated 1<sup>st</sup> April 2011 yet he has approached this Court seeking an equitable remedy. He who comes to equity must do equity and it would not be proper for the Appellant to obtain an advantage from his own breach. I am, in the circumstances, un – able to exercise my discretion in his favour.

The up – shot of the above is that the Appellant’s Notice of Motion dated 12<sup>th</sup> February 2020 is devoid of merit. It is accordingly dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**Boaz N. Olao.**

**J U D G E**

**18<sup>th</sup> June 2020.**

Ruling dated, delivered and signed at Bungoma this 18<sup>th</sup> 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**

**18<sup>th</sup> June 2020.**