



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC 143 OF 2017

LUCY GATHONI KIRERU.....RESPONDENT /PLAINTIFF

VERSUS

JAMES KARUKU KIRERU.....APPLICANT/DEFENDANT

RULING

1. This ruling is in respect to the Notice of Motion dated 22/1/2020 filed by the Applicant seeking orders for stay of execution of the decree dated the 22/5/19. The application is supported by the affidavit of the Applicant where he deposed that he has filed an Appeal against the judgement of the Court in this suit and in the meantime the Respondent has commenced the process of execution of the judgement. That unless execution is stayed, he stands to suffer substantial loss if the stay is not granted.

2. The application is opposed by the Replying affidavit of the Respondent dated the 1/2/2020 where she stated that the application does not meet the threshold for granting stay of execution. That she is entitled to the fruits of her judgement. Interalia, she submitted that the delay in filing the application is inordinate and no demonstration of willingness on the part of the Applicant to meet the security of the due performance of the decree has been demonstrated.

3. The parties filed written submissions which I have read and considered.

4. The issue for determination is whether stay of execution can be granted.

5. Order 42, Rule 6 (2) of the Civil Procedure Rules provide as follows;

(2) No order for stay of execution shall be made under subrule (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.

6. The purpose of an application for stay of execution pending Appeal is to preserve the subject matter in the dispute so that the right of the Applicant to Appeal is safeguarded and the Appeal if it turns out to be successful is not rendered nugatory and reduced to a scholarly exercise. Of course, of most importance and running parallel to this right is equally the right of the successful litigant in the contest not to be deprived of the fruits of his judgment in his favour without a just course. Once a decree holder's right has been determined by a competent Court it should not be taken away lightly and that is why the procedural law set the parameters that the Court must satisfy itself before granting the orders of stay of execution.

7. The Applicant has explained that the Respondent has commenced the execution of the decree and enclosed a copy of a letter ostensibly from the chief of Mathioya subdivision summoning him to the office in addition to a partially signed application for Land Control Board consent. He has argued that the subdivision and transfer of 1.5 acres of the suit land to the Respondent would render the prosecution of the Appeal a futile exercise, a consequence that would render the Applicant to suffer irreparable loss.

8. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“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 a stay.”

9. In my view the Applicant has not proved substantial loss. The mere fact that execution has commenced does not demonstrate substantial loss. Execution pursuant to the judgement of the Court is a legal process. It is upon the Applicant to show the substantial loss that he stands to suffer if the stay orders are not granted. The Applicant has failed in this regard.

10. With respect to whether the application was filed without delay the Applicant, the judgement was delivered on the 11/4/19 and the application was brought on the 22/1/2020, a period of 10 months. The Applicant has not given reasons for the delay in filing the application for stay given that the judgement ordered the applicant to transfer the suit land within 45 days from the date of the judgment in default the Deputy Registrar of the Court was to execute the documents to satisfy the orders of the Court. The delay may not be inordinate but no explanation was advanced by the applicant nevertheless to warrant the exercise of discretion in his favour.

11. Though the Applicant has not offered any security for the due performance of the decree nor shown any willingness to do so, I have always held that it is the Court that orders the nature of the security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered. That said the duty to show readiness and willingness to meet this condition is key in unlocking discretion in his favour.

12. In the end the application is unmerited. It is dismissed with costs to the Respondent.

13. **It is so ordered.**

DATED, DELIVERED AND SIGNED AT MURANGA THIS 22ND DAY OF JUNE 2020.

J G KEMEI

JUDGE