



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 213 OF 2014

(FORMERLY KERUGOYA ELC CASE NO. 812 OF 2013)

EZEKIEL KAGOYA WAKAGWI.....PLAINTIFF

VERSUS

SAMUEL NGAHU MUNDUI (Sued as legal representative of the estate of

WANJOHI NGAHU).....DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion dated 27th January 2020 and amended on 29th January 2020 expressed to be brought under **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap. 21), Order 22 Rule 22, Order 40, Order 50 Rule 1** of the **Civil Procedure Rules (the Rules)** and all other enabling provisions of the law, the Defendant sought the following orders:

a) *Spent*

b) *That the honourable court be pleased to grant stay of execution or any further execution of the judgement/decree given by the honourable court (Honourable Justice Y.M. Angima) on 30th May 2019 in Embu ELC Case No. 213 of 2014 – pending hearing and determination of an intended appeal therefrom, on any terms that may be deemed fair and just in the circumstances.*

c) *That any directions, orders and/or any further relief that may be deemed incidental, fair and just in the circumstances hereof.*

d) *That costs of this application be provided for.*

B. THE DEFENDANT'S CASE

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Defendant on 29th January 2020. The Defendant contended that he was aggrieved by the judgement of this court dated 30th May 2019 hence he intended to appeal against it. He further stated that the Plaintiff had initiated steps to execute the decree even though he (the Defendant) had filed an application for stay of execution before the Court of Appeal in *Nyeri Civil Application No. 5 of 2020* which was yet to be heard. It was contended that unless the stay sought was granted the Defendant shall suffer irreparable damage and his intended appeal may be rendered nugatory.

C. THE PLAINTIFF'S RESPONSE

3. The Plaintiff filed a replying affidavit sworn on 6th February 2020 in opposition to the said application. It was stated that the hearing date of 12th February 2019 was taken by consent of the parties and that the Defendant's advocate had failed to turn up for hearing without good reason. It was further stated that upon conclusion of the trial the judgement date was given in open court in the presence of the Defendant in person hence he was aware of the date all along.

4. The Plaintiff contended that no good explanation had been given for the delay of about 8 months in lodging a notice of appeal and the application for stay of execution. It was further contended that the Defendant had not demonstrated any risk of substantial loss hence the application should be dismissed to allow him enjoy the fruits of his judgement.

D. DIRECTIONS ON SUBMISSIONS

5. When the said application was listed for hearing on 29th June 2020 it was directed that the same be canvassed through written submissions. The Defendant was granted 14 days to file and serve his submissions whereas the Plaintiff was granted 14 days upon the lapse of the Defendant's period to file his. The record shows that the Defendant filed his submissions on 13th June 2020 whereas the Plaintiff's submissions were not on record by the time of preparation of the ruling.

E. THE ISSUES FOR DETERMINATION

6. The court has considered the Defendant's amended notice of motion, the Defendant's replying affidavit in opposition thereto and the submissions on record. The court is of the opinion that the following issues arise for determination in this matter:

- a) *Whether the Defendant has made out a case for stay of execution pending appeal.*
- b) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a) Whether the Defendant has made out a case for stay pending appeal

7. The application is grounded upon the provisions of **Order 42 Rule 6** of the **Rules**. The relevant parts stipulate 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.” (emphasis added)

8. The Defendant submitted that he had satisfied the requirements for the grant of stay in that the intended appeal, if successful, might be rendered nugatory. He relied upon the cases of **Absalom Dova V Tarbo Transporters [2013] eKLR**; **Butt V Rent Restriction Tribunal [1982] KLR 417**; **Antoine Ndiaye V African Virtual University [2005] eKLR** among others.

9. In the case of **Leonardo Mambo Kuria V Ann Wanjiru Mambo [2017] eKLR** which was cited by the Defendant, the test of whether or not an appeal may be rendered nugatory was considered as follows:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

10. In the case of **David Kipkoskei Kimeli V Titus Barmasai [2019] eKLR** it was held, *inter alia*, that:

“The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough. These rules are put in place to safeguard both the decree holder and the judgement debtor. That a successful litigant is entitled to enjoy the fruits of the judgement and the aggrieved party is also entitled to try his luck in the higher court and that is why there are hierarchy of courts. An aggrieved party should not be denied an opportunity to appeal but must follow and adhere to the rules and procedures ...”

11. Whereas the court is inclined to accept that alienation or disposal of property the subject of an appeal may render the outcome of the appeal nugatory, there is no material on record to justify such finding. The Defendant himself has not alleged in his supporting affidavit that he would not be able to recover the suit property from the Defendant should his intended appeal be successful. He has not alleged that the Plaintiff intends to alienate, charge or deal with the suit property in such manner that it would not be available for restitution upon the conclusion of the intended appeal. The Defendant's advocates attempted to fill the gap by trying to demonstrate substantial loss in their submissions. However, proof of substantial loss must be anchored in the application and it cannot be sneaked in through written submissions. In the premises, the court finds that the Defendant has failed to demonstrate the element of substantial loss.

12. The other important aspect for consideration is whether or not the application was filed without unreasonable delay. The question of whether or not there is unreasonable delay depends on the circumstances of each case and the explanation for the delay. The Defendant submitted that he was not aware of the judgement for a long period of time because he was not present on the date of delivery.

13. The material on record shows that the Defendant fully participated in the hearing. Upon conclusion of the hearing he was given 30 days to file his written submissions and the suit was fixed for judgement on 30th May 2019 in his presence. The record further shows that the firm

of C.N. Kihara & Co. Advocates filed written submissions dated 30th May 2020 on 31st May 2020. The Defendant did not explain why he did not attend court for judgement and why he never bothered to ascertain the outcome of the suit until January 2020. The court is far from satisfied that there is any genuine explanation for the delay of about 8 months. Accordingly, the court finds that the instant application was not filed without unreasonable delay.

14. The court has observed from the material on record that the Defendant has not been a diligent litigant at all. When the suit was initially listed for hearing on 21st November 2018 the Defendant sought an adjournment and more time to file his trial bundle. In spite of the fact that the suit was 8 years old and the Defendant had sufficient time to file his documents the court, nevertheless, granted the adjournment. The court directed the Defendant to pay court adjournment fees and the Plaintiff's costs of Ksh. 6,500/- within 30 days. The suit was thereupon stood over to 12th February 2019 for hearing and it was directed that there shall be no further adjournments at the instance of the parties.

15. The material on record shows that the Defendant had not paid the court adjournment fees and the Plaintiff's costs by the time the suit was heard on 12th February 2019. In fact, the Defendant's advocate did not attend court for hearing even though the Defendant was present. The Defendant had not paid the court adjournment fees by the time of delivery of judgement and by the time of filing the instant application for stay. The record further shows that the Defendant was ordered to pay costs of Ksh. 3,000/- for occasioning an adjournment on 28th January 2020 which remains unpaid. It would thus appear that the Defendant is merely taking the court for a ride and he has no intention of abiding by any orders issued by the court.

b) Who shall bear costs of the application

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Plaintiff shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL ORDER

17. The upshot of the foregoing is that the court finds no merit in the Defendant's application for stay of execution. Accordingly, the Defendant's notice of motion dated 27th January 2020 and amended on 29th January 2020 is hereby dismissed in its entirety with costs to the Plaintiff. It is so decided.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **30TH DAY** of **JULY 2020** and delivered via Microsoft Teams platform in the presence of M/s Rose Njeru for the Plaintiff and Ms. Mbugua holding brief for Mr. C.N. Kihara for the Defendant.

Y.M. ANGIMA

JUDGE

30.07.2020