



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO.18 OF 2020**

**SAMUEL MURIGI WAIGWA.....APPELLANT/APPLICANT**

**VERSUS**

**FRANCIS BABU MWANGI.....RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated **6<sup>th</sup> May 2020** by the Appellant/Applicant seeking for the following orders;

***1. THAT a temporary stay of Execution be andis hereby issued of the Judgment delivered in MCL&E No. 41 of 2019 Ruiru on 29<sup>th</sup> April 2020, decree and all consequential orders thereof pending the hearing and determination of this Appeal.***

***2. THAT this order be served upon the land Registrar Ruiru.***

***3. THAT costs of this Application be provided for.***

The Application is premised on the grounds that Judgment in **MCL& E No. 41 of 2019**, was delivered in favor of the Respondent and the trial Court ordered the cancellation of registration of the name of the Appellant as the proprietor of land parcel **No. Ruiru Kiu Block 2 (Githunguri) 14214** and that the Appellant be evicted therefrom. That the Appellant/ Applicant had acquired registration lawfully and extensively developed the said land parcel and that the execution of the Decree should be stayed pending the finalization of the Appeal. That the Appellant has filed an Appeal and the same will be rendered nugatory or an academic exercise, if orders not granted. Further that the subject matter being land, the Appellant/ Applicants stands to suffer irreparable loss and damage since his name will be cancelled from the land register and he will be evicted.

The Application is supported by the Affidavit of **Samuel Murigi Waigwa**, sworn on **6<sup>th</sup> May 2020**. He averred that being aggrieved with the Judgment of the trial Court, he promptly filed a Memorandum of Appeal without undue delay. It was his contention that he has an arguable Appeal, which will be rendered nugatory unless the execution is stayed. He further averred that the Respondent will not suffer any harm or prejudice if the stay of execution is granted. That he was ready to abide by any conditions that would be set by the Court including security for costs.

The Application is opposed and the Respondent **Francis Babu Mwangi**, swore a Replying Affidavit on **27<sup>th</sup> May 2020** and averred that the Memorandum of Appeal and the grounds thereof do not demonstrate any arguable Appeal capable of staying the decision of the Learned Trial Magistrate. He also averred that he has been advised by his Advocate which advise he believes to be true that the dispute emanated from a mutual agreement, which was tendered and admitted in evidence by both parties whose contents are clear and leave no room for ambiguity. Further that it was clearly stipulated in the said Agreement dated **23<sup>rd</sup> October 2018**, that the purchase price of **L.R Ruiru/Kiu Block 2(Githunguri)14214** was **Kshs.2,800,000/=** out of which the Applicant only paid **Kshs.999,999/=** despite having the property registered in his favour. It was his contention that the Applicant admitted in evidence that he never paid the outstanding amount of **Kshs.1,800,000/=** to the Respondent and failed to pay the balance within the stipulated **ninety(90)** after the execution of the agreement.

That he has been advised by his Advocate which Advice he believes to be true that the trial magistrate properly and legally and justify ordered the cancellation of the title to the suit property from the Applicant's name as he failed to pay the balance of the purchase price and or adhere to the notice of rescissions issued pursuant to special conditions clause. That the execution of the Judgment and decree against which the appeal is made shall not occasion loss to the Appellant, as he is in total default of the terms of the agreement and he is not entitled to possession of the property. It was his contention that the Appellant/ Applicant developed the suit property with full knowledge that he was only entitled to possession and vacant possession upon payment of the full price. That the trial Court rightly ordered the cancellation of the registration of the transfer effected on **19<sup>th</sup> February 2019** against the suit property.

He further alleged that upon failure by the Appellant/ Applicant to complete payment of the purchase price within **(90) ninety days** as per the sale agreement, he properly exercised his right to rescind the agreement under the special conditions and upon rescission, any interest which the Appellant/ Applicant had over the suit property was extinguished. Further that the trial Court rightly observed that the Appellant/ Applicant was not entitled to a claim of **Kshs.713,494** or any amount at all from the Respondent as there was no such provisions in the agreement. That no such amount was pleaded by way of counter claim or otherwise and proved. It was his further contention that there being no sound ground for Appeal, an order of stay of execution of Judgment and Decree cannot issues, as findings and order made by the trial Court are legally sound and fair. That the intended appeal has no chance of success. That in compliance with the trial Magistrate order for forfeiture of 10% of the purchase price paid by the Appellant/ Applicant herein and a refund of the balance without any interest less other costs within 21 days from the date of the Judgment, he was capable and willing to do so.

The Appellant/ Applicant filed a further Affidavit and averred that the trial Court as well as the Respondent selectively quote and give the terms of the sale agreement narrow interpretation. It was his contention that page 6 of the subordinate Court's Judgment, stated that **ninety (90) days from 23<sup>rd</sup> January 2018**, would be **23<sup>rd</sup> January 2019** then it continues to state that the transfer of the suit property was done on **19<sup>th</sup> February 2019**. He averred that the trial Court failed to note that the Plaintiff fundamentally breached the sale agreement. Further that when the Plaintiff failed to meet the deadline of **23<sup>rd</sup> January 2019** the parties never extended time by mutual consent and thus the Plaintiff cannot claim that he was in breach of the Sale Agreement. Further that according to special condition (b) of the Sale Agreement, rescission is followed by refund of advanced amount and to date no refund has ever been made. It was his contention that the Respondent still holds the original title deed for the suit property and on **11<sup>th</sup> March 2019**, he lodged a caution against it claiming beneficial interest. That it follows that the demand served upon the Defendant on **25<sup>th</sup> March 2019**, and notice of completion dated **9<sup>th</sup> April 2019**, were of no consequence and in fundamental breach of clause 8 of the Sale Agreement which provides that the property is sold free from any encumbrance. Further that the sale agreement never provided for issuance of notice of completion but it instead provided for an extension of time that must be mutually agreed on between the parties. That from the records, there is nothing to show when the plaintiff allegedly availed the completion documents as he has never seen them. That it is the Respondent who processed the transfer and retained the original document and that he commenced development with the full knowledge of the Respondent. He further averred that they orally agreed that his company incur expenses on behalf of the Respondent and the same be deemed as part of the purchase price and the Respondent signed client registration form and authorization letter, which forms a binding contract. Further that the Respondent failed to acknowledge receipt of the deposit of **one million Kenya shillings (1 million)** and this complicated and delayed the transaction.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered together with the cited authorities and provisions of law. The Court has carefully considered the whole proceedings and the said Judgment issued by the Subordinate Court on **29<sup>th</sup> April 2020**, and renders itself as follows;

The guiding provision of law with regards to stay of Execution pending Appeal is **Order 42 Rule 6(2)**. The said provision set out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

*“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.”*

There are also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR, where the Court held that:-

*“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-*

*“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.*

*In addition, the Applicant must demonstrate that the intended*

*Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-*

*“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”*

*These twin principles go hand in hand and failure to prove one dislodges the other”*

With the above in mind the Court will then determine if the Appellant/ Applicant has met the threshold required for it to exercise its discretion and grant the stay pending Appeal. It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that:-

***“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.***

The Court is further persuaded by the case of Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991, where the Court held that:-

***“For the court to order a stay of execution there must be:-***

- i. Sufficient cause***
- ii. Substantial loss***
- iii. No unreasonable delay***
- iv. Security and the grant of stay is discretionary”.***

As the Court also embarks on its determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. Further the Court will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

***“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.***

The conditions that the Applicant herein should satisfy is as stated in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the Applicant is deserving of the orders sought.

The first principle that the Appellant / Applicant should satisfy is that he will **suffer substantial loss**, unless the orders sought are issued. The Court has perused the Judgment by the subordinate Court delivered on **29<sup>th</sup> April 2020** by **Hon. C.K Kisiangani** and it is not in doubt that amongst the orders that the Court granted were orders that the Appellant/ Applicant gives vacant possession, cancellation of the registration of the transfer and rectification of the register. It has been the Respondent's contention both in his Replying Affidavit and submissions that the Judgment entered by the Court was lawful and that the Execution of the Judgment and decree against which the intended appeal is made shall not occasion loss to the Appellant/ Applicant as he is in default of the terms of the agreement and therefore **not** entitled to possession of the suit property. However, it is not in doubt that the Appellant/ Applicant had the suit property transferred in his name, he had taken possession of the same and has carried out various developments on the suit property. As the Appellant/ Applicant had already taken possession and the fact that the orders that were granted by the subordinate Court will have an effect of dispossessing him of the suit property and having his registration cancelled, it is the Court's considered view that the Appellant/Applicant will suffer substantial loss if the decree from the lower Court is executed.

It is important to note that while the Respondent is of the view that the Judgment of the subordinate Court is sound and lawful, the Appellant/ Applicant has contended that the learned Magistrate misapprehended the Law when he gave the Law of Contract a narrow misinterpretation in view of the evidence and therefore granted the orders of rescission, cancellation and an order of vacant possession. The Appellant/ Applicant is fighting against the order requiring him to give vacant possession which in effect will displace him. Therefore, it is this Court's considered view that if the orders as granted were to be executed, then the Appeal by the Appellant/ Applicant would be rendered nugatory as those orders which he will be seeking to fight will already have been overtaken by events in the event that the Appeal is successful.

The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment. Further, the Applicant should also have an assurance that his Appeal will not be rendered nugatory. However, taking into account that the Appellant herein was in possession, then he has satisfied this Court that he will suffer substantial loss if the orders sought are not granted.

Secondly the Appellant must satisfy the Court that the Appeal was made without inordinate delay. The subordinate Court entered Judgment on **29<sup>th</sup> April 2020**. The instant Appeal was filed on **5<sup>th</sup> May 2020** through the Memorandum of Appeal and the Application for stay was filed on **6<sup>th</sup> May 2020**. Therefore, the Court finds that there was no inordinate delay in filing this Application.

On the issue of security of costs, the Applicant has averred that he is ready to provide security for costs. The Appellant/ Applicant has submitted that he is ready to abide by any orders of the Court as to costs. The Court will therefore order him to deposit in Court **KShs. 500,000/=** as security for costs.

It is also important for the Court to determine whether the Appellant/ Applicant has an arguable Appeal as it has been submitted by the Respondent that the Appellant/ Applicant does not have an arguable Appeal as the Judgment is detailed and articulates both parties testimonies and documentary evidence. Further that the Court rightfully observed that it cannot impose other terms which were not in the agreement, the agreement did not have any provision for a set off and that the Appellant was only entitled to possession of the property upon payment of the purchase price. The Court of Appeal in the case of Josephine Koki Raymond ...Vs... Philomena Kanini Mainigi (personal representative of Mainigi Musila Mutava (Deceased) & another [2018] eKLR quoted the case of Stanley

KangetheKinyanjui=Versus= Tony Ketter and 5 Others [2013] eKLR; and stated that we find it prudent to reproduce them hereunder as follows:

***“An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.”***

The question then begs whether the instant Appeal can be argued before the Court. It is the Appellant's/ Applicant's submissions that the trial Court as well as the Respondent selectively gave the terms of the agreement a narrow interpretation and that the trial Court relied on extraneous issues. Further that the Appellant/ Applicant was ready and willing to pay the balance of the purchase price. In their submissions the parties have made allegations and Counter allegations. It is this Court's considered view that the various contentions by the parties in the Affidavits and submissions are issues that ought to be argued fully before the Court.

Further the Court finds that the issues as to whether the subordinate Court correctly interpreted the Law is also a factor that ought to be fully argued before a Court of Law. This is so because the High Court (in this case Environment and Land Court) has supervisory powers over the subordinate Court and a question as to whether the said subordinate Court correctly interpreted the Law must then be fully argued before the Environment and Land Court for it to be determined. Therefore, the Court finds and holds that the Appellant/ Applicant has an arguable Appeal. Equally, the Court herein finds that the **Order** sought of stay of execution would protect and preserve the suit property

Having now carefully considered the instant application, the written submissions, the cited authorities and the relevant provisions of law, the Court finds that the said application is merited and it is allowed entirely with a condition that the Applicant/Appellant do deposit **Kshs.500,000/=** as security of costs within **60 days** from the date hereof. Failure to do so, the stay order will automatically lapse.

It is so ordered.

***Dated, signed and Delivered at Thika this 30<sup>th</sup> day of July 2020.***

**L. GACHERU**

**30/7/2020**

**JUDGE**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With consent of:**

**Milimo Muthomi Advocates for the Applicant/Appellant**

**Kimandu & Ndegwa Advocates for the Respondent**

**L. GACHERU**

**30/7/2020**

**JUDGE**