

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 2 OF 2016

JOHN MWANGI NDIRITU.....APPELLANT/APPLICANT

VERSUS

JOSEPH NDIRITU WAMATHAI.....RESPONDENT

RULING

On 10th February 2016, the applicant moved this court under certificate of urgency seeking orders that:-

- a. ***That*** the said application be certified as urgent, be heard on a priority basis and service thereof on the respondent be dispensed with.
- b. ***That*** this honourable court do order a stay of execution of the judgement and decree made on 13th January 2016 pending the hearing and determination of the applicant's civil appeal no. 2 of 2016.
- c. ***That*** this honourable court orders stay of execution of the judgement delivered on 13th January 2016 pending the hearing and final determination of this application.
- d. ***That*** costs of this application be in the cause.

The application is expressed under the provisions of **Order 42 Rule 6** as read with **Order 51 Rule 1** of the Civil Procedure Rules, 2010. The application is premised on the grounds enumerated on the face of the application and the annexed affidavit of the applicant sworn on 3rd day of December 2015. Essentially, the grounds relied upon are as follows:-

- i. ***That*** the Respondent obtained judgement against the appellant/applicant in CMCC No 75 of 2010 and extracted a decree and is ready to execute by evicting the applicant from his only known home and being aggrieved by the said decision the applicant has appealed against it and if execution proceeds, the appeal will be rendered nugatory and he will suffer irreparable loss and damage.
- ii. ***That*** there was an error in passing the judgement and that the application has been brought without delay and that the applicant has an arguable appeal with a high probability of success.

The applicant in his affidavit in support of the said application avers *inter alia* that:-

- i. ***That*** judgement was delivered against him in CMCC No. 75 OF 2010 evicting him from a parcel of land he has occupied for over 20 years and that the Respondent is his biological father.
- ii. ***That*** his counter claim in the lower court was dismissed without cogent explanation and that his appeal has high chances of success, hence it is only fair that the status quo be maintained pending the hearing of the appeal.
- iii. ***That*** he has a wife and school going children and eviction will with cause injustice to them.
- iv. ***That*** the Respondent will not be prejudiced by the orders sought.

The Respondent filed grounds of opposition and stated as follows:-

- i. *The application does not satisfy the requisite conditions for granting a stay pending appeal and that the pending appeal has no chances of success.*
- ii. *The orders sought will greatly prejudice the Respondent if granted and that the application is otherwise without merit and should be dismissed.*

The applicant did not deem it necessary to annex copies of the pleadings filed in the lower court to give this court a clearer picture of the nature of the dispute in the lower court. Nevertheless, I will determine the application on the strength on the material before me.

Both parties filed written submissions. Counsel for the applicant summarized the facts of the case as follows, that applicant is a biological son of the Respondent, that the applicant resides in the Respondents land number **Nyandarua/Ndaragwa/Kiriogo Block 1 (Kamiruri)/1**, that the Respondents sued him seeking to evict him from the said land, that the Applicant filed a defence and a counter-claim claiming *inter alia* **4** acres out of the said land, that in a family meeting it was agreed that the applicant would relocate to **Ndaragwa/Abadare Forest Block 1/722** and that the cost of the said relocation was to be borne by the Respondent which was assessed at **Ksh. 150,000/=** and since the Respondent was not able to raise the said costs it was agreed that the applicant would get **4** acres out of **Nyandarua/Ndaragwa/Kiriogo Block 1 (Kamiruri)/1** and the applicant relocated to the said portion and has been in occupation for 21 years and that he has extensively developed the said land. The applicant also averred that the Respondent has since started selling his land and despite the alleged counter claim the magistrate found that the respondent was the absolute registered proprietor of the said land. Counsel cited the inherent powers of this court and urged the court to allow the application so that the appeal is not rendered nugatory. Counsel cited *Consolidated Marine vs. Nampija & Another*[1] and *Stephen Wanjohi vs Glass Industries Ltd*[2] in support of his contention that the application satisfies the necessary conditions for granting applications of this nature, namely **(a)** proof of substantial loss, **(b)** that the application is filed without unreasonable delay and **(b)** the applicant must furnish security.

Counsel for the Respondent opposed the application and submitted that the dispute involves father and son and the subject matter is land registered in the name of the father, that the Respondents intention to distribute his properties among his children have been curtailed by the applicants refusal to move to the parcel of land allocated to him, that the position became sour to the extent that the Respondent herein was compelled to file the suit in the lower court and after a protracted dispute of **5** years the decision now the subject of the intended appeal was rendered the crux of which was the Applicant was ordered to vacate the suit premises within **30** days from the date of the judgement.

Counsel submitted that the applicant ought to be allowed to enjoy the fruits of his judgement and argued that the applicant does not have an arguable appeal since there is no dispute that the Respondent is the registered proprietor of the suit premises. Counsel also cited the case of *Muriuki Mari vs Riachard Marigi Kariuki & 2 others*[3] where the Court of Appeal held that rights of children to their parents estate only accrue after the death of the parent, otherwise they remain inchoate and are not legally enforceable in any court of law or otherwise.

Counsel also submitted that there is no prove of substantial loss and that the refusal by the Applicant to move to the parcel of land allocated to him will also inconvenience other children who will also suffer substantial loss. Counsel urged the court to consider the inconvenience of denying the successful party the fruits of the judgement. Finally, counsel submitted that the appeal will not be rendered nugatory and argued that each case has to be considered within the nature of the underlying circumstances.

As earlier mentioned, the application is expressed under Order **42** Rule **6** and Order **51** Rule **1** of the Civil Procedure Rules, 2010. Order **42** Rule **6 (1) & (2)** provides as follows:-

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 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 of stay 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 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

The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal*^[4] (**Madan, Miller and Porter JJA**) while considering an application of this nature had this to say:-

- i. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*
- ii. *The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*
- iii. *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*
- iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a)** Substantial loss may result to the applicant unless the order is made; **(b)** The application has been made without undue delay; **(c)** such security as to costs has been given by the applicant.

The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.^[5] What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto*^[6] where it was held *inter alia* that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein vs. Chesoni*.^[7]the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”*(Emphasis added)

In the present application, the applicant has not demonstrated that he would suffer substantial loss as defined by **Gikonyo J** in the above cited judgement. It has not been shown that the Respondent is a person of straw and that he may not repay the cost of relocation (if claimed) in the event of the appeal succeeding. In *Equity Bank Ltd vs Taiga Adams Company Ltd*,^[8] the court stated a follows:-

“..... The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no

means. Here, no such allegation is established by the appellant.”

In *Elena D.Korir vs Kenyatta University* [9] Justice Nzioki Wamakau had this to say:-

“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* [10] where the Court of Appeal (Gicheru JA, Chesoni & 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.” (Emphasis added)

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* [11] (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**.” (Emphasis added)

Apart from proof of substantial loss the applicant is enjoined to provide security. [12] The applicant has not offered any security at all. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. [13] However, the offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others*. [14]

In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd* [15] it was held that:-

“.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.....**let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...**” which principle was also emphasized in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*. [16]

The importance of complying with the said requirement in my view was well emphasised in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [17] where it was held that:-

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

I have carefully considered the application before me and the law, I am persuaded that proof of substantial loss and proof that the appeal will be rendered nugatory have not been established as stated above. First, the applicant seems to be worried by the relocation costs which he claims was assessed at Ksh. 150,000/=. He has not pleaded or demonstrated that in the event he wins the appeal and his counter-claim allowed he will not be in a position to recover the said sum from the Respondent. Further, the applicant has correctly listed the conditions for granting applications of this nature among them furnishing security, yet there is no offer of security by the applicant either in the grounds or in the supporting affidavit. As was held in *Hassan Guyo Wakalo vs Straman EA Ltd* [18] “These twin

principles go hand in hand .. and failure to prove one dislodges the other”.

I am fortified in my finding by the following excerpt from *Halsburys Laws of England*^[19] wherein the learned writers observe that:-

“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings **should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.**”

In the case of *Global Tours and Travels Ltd*^[20] it was held that:-

“.....Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.” (Underlining provided).

Even though I am not determining the appeal, it is important to note that the applicant must demonstrate that he has an arguable appeal. I am fully aware that I cannot go into the merits of the appeal at this stage but for purposes of the application before me, it is necessary to satisfy myself that the applicant has arguable grounds. From the facts, the Respondent is a father the applicant. The Respondent is the lawful registered absolute proprietor of the parcels of land mentioned in the pleadings, and that the Respondent in his wisdom decided to divide his land and give various portions to his children among them, the applicant herein. The applicant is reluctant to move to the portion given by his father. The father obtained the decree complained of which ordered the applicant to vacate he currently occupies. From the above facts, I am not persuaded the applicant has an arguable appeal.

The upshot is that the application before me has no merits. I hereby dismiss it with costs to the Respondent.

Right of appeal **30** days

Signed, dated and delivered at **Nyeri** this 1st day of April 2016

John M. Mativo

Judge

[1] Civ. App No. 93 of 1989

[2] HCC No. 6726 of 1991

[3] {2008}1KLR 1073

[4] Civil App No. NAI 6 of 1979

[5] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of

Investigations & Enforcement

[6] HC Misc No. 42 of 2012 OR {2012} eKLR

[7] {2002} 1 KLR 867

[8] {2006}eKLR

[9] {2012}eKLR

[10] {1993} KLR 365

[11] {2013}eKLR

[12] See judgement in Republic vs Commissioner for Investigations & Enforcement, Misc App no 51 of 2015 (NBI),

[13] Ibid

[14] Civil Appeal No. 291 of 1997

[15] Supra note 6

[16] Supra note 14

[17] {2002} KLR 63

[18] {2013}eKLR

[19] 4th Edition, Vol 37 pages 330-332

[20] WC No. 43 of 200 (UR)