



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC APPEAL NO. 40 OF 2019**

**WYCLIFFE SIKUKU WALUSAKA.....APPELLANT**

**VERSUS**

**PHILIP KAITA WEKESA.....RESPONDENT**

**R U L I N G**

On 6<sup>th</sup> July 2020, I directed that the Notice of Motion dated 2<sup>nd</sup> July 2020 be canvassed by way of written submissions. The Applicant was to serve the motion together with his written submissions upon the Respondent on or before 10<sup>th</sup> July 2020. The Respondent would then file his response and submissions on or before 17<sup>th</sup> July 2020. I further cautioned the parties to strictly abide by the time lines and that the ruling would thereafter be delivered through electronic mail on 24<sup>th</sup> July 2020. However, whereas the Applicant filed his submissions on 8<sup>th</sup> July 2020, the record shows that as at the time the file was placed before me on 20<sup>th</sup> July 2020, the Respondent had neither filed any response to the said application or submissions. The Notice of Motion is therefore not opposed.

Notwithstanding the fact that there is no record showing that the Respondent filed any replying affidavit, grounds of opposition or preliminary objection to the application, I must nonetheless consider if it meets the threshold set out in **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules**. That provision states as follows: -

***6(1) “No appeal or second appeal shall operate as a 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 order 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) 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.*** Emphasis added.

Therefore, in an application for stay of execution pending appeal, the Applicant must demonstrate the following: -

**1. Substantial loss.**

**2. File the application without unreasonable delay.**

**3. Requisite security.**

**1. SUBSTANTIAL LOSS: -**

This has been held to be the cornerstone of an application for stay of execution pending appeal. In **KENYA SHELL LTD .V. BENJAMIN**

KIBIRU 1982 – 88 1 KAR 1018, the Court of Appeal stated that: -

***“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”***

And in **MACHIRA t/a MACHIRA & CO ADVOCATES .V. EAST AFRICAN STANDARD (NO 2), 2002 KLR 63**, the Court held as follows: -

***“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.”***

The Notice of Motion principally seeks the order that there be a stay of execution of the Judgment and Decree of **HON S. O. MOGUTE (PRINCIPAL MAGISTRATE)** in **BUNGOMA CMCC NO 418 OF 2017** pending the hearing and final determination of the amended appeal. In paragraphs 3 and 4 of the supporting affidavit of **WYCLIFFE SIKUKU WALUSAKA** (the Applicant herein) he avers as follows: -

**3: “That the Respondent herein has instructed the Auctioneers to evict me and they have filed an application for security. Annexed and marked WSK 1(a) and (a) (sic) letter dated 4<sup>th</sup> June 2020 and an application for security.”**

**4: “That I verily believe in all sincerity that I shall suffer substantial and irrecoverable loss unless an order of stay of execution is made in that if the decree is executed and eventually the appeal succeeds, I will have suffered loss as my house and other structures would have been demolished.”**

What the Applicant is saying is that if the decree is executed, he will lose his home and other properties which, in my view, is not only substantial loss but will also render his appeal, if successful, nugatory. The Applicant has proved this limb.

## **2. UN – REASONABLE DELAY:** -

The impugned Judgment, as per the amended Memorandum of Appeal, was delivered on 23<sup>rd</sup> October 2019. This application was filed on 24<sup>th</sup> June 2020 some eight (8) months later. Whether or not any delay is un – reasonable will be determined by the circumstances of each case. In this case, although the Applicant filed his appeal timeously on 15<sup>th</sup> November 2019 in compliance with the provisions of **Section 79G of the Civil Procedure Act**, the delay of eight (8) months in filing this application is certainly un – reasonable and has not been explained. In **SILVESTAR AUTOMOBILE LTD .V. FIDELITY SHIELD INSURANCE COMPANY LTD 2017 eKLR**, a delay of six (6) months was held to be “**significant**” and disentitled the Applicant to an order of stay of execution pending appeal. In **BENJAMIN KIMELI TANUI .V. OMARI SALIM NASIB & ANOTHER 2020 eKLR**, the Court held that a delay of eight (8) months was un – reasonable. The Applicant herein has clearly failed to surmount the hurdle of filing the application without un – reasonable delay.

## **3. REQUISITE SECURITY:** -

In none of his eight (8) paragraphs supporting affidavit nor the grounds upon which the application is premised has the Applicant averred that he is willing to offer any security for the performance of any decree or order that may ultimately be binding on him. Yet that is a requirement under the law. In **VISHRAM HALAI & ANOTHER .V. THORNTON & TURPIN LTD (1963) LTD 1990 KLR 365**, the Court of Appeal stated as follows with regard to an application such as this one: -

***“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 offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interests of justice and not merely as a decoy to obstruct and delay the Respondent’s right to enjoy the fruits of his Judgment. The Applicant has been silent on this crucial requirement.

From the above, it is clear that a party seeking orders for stay of execution pending appeal must satisfy all the requirements of **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules**. The Applicant herein has failed to meet two of those requirements in that he did not approach the Court without un – reasonable delay and neither did he offer any security. The case of **BASHIR GODANA .V. FATUMA GODANA TUPI 2018 eKLR** which counsel for the Applicant has cited in support of his submissions does not help because in that case, the Applicant had stated in paragraph (h) of his supporting affidavit as follows: -

***(h) “The Applicant will heed to any terms and conditions in terms of provision of security that the Court imposes.”***

No such offer has been made by the Applicant herein.

It is also not lost to this Court that the Applicant only moved to Court on 22<sup>nd</sup> June 2020 shortly after the Respondent’s Auctioneer had filed his application on 19<sup>th</sup> June 2020 seeking security during the execution process. That is a demonstration that this application is not made in good faith and is only meant to scuttle the execution process.

The up – shot of the above is that the Applicant’s Notice of Motion dated 22<sup>nd</sup> June 2020 and filed herein on 24<sup>th</sup> June 2020 is devoid of merit. It is accordingly dismissed with no orders as to costs.

**Boaz N. Olao.**

**J U D G E**

**24<sup>th</sup> July 2020.**

Ruling dated, delivered and signed at **BUNGOMA** this 24<sup>th</sup> day of July 2020. To be 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**

**24<sup>th</sup> July 2020.**