



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

CASE NO. 152 OF 2007

EMILY TESOT

RUTH MAIYO

DORICAS KESSIO

(Officials of Umoja Wa Wanawake Kipkeikei Women Group).....PLAINTIFFS

VERSUS

DAVID KIPTARUS RUTO.....1ST DEFENDANT

JOHN BETT.....2ND DEFENDANT

HARUN KOLLUM.....3RD DEFENDANT

RULING

1. By a Notice of Motion dated 14/3/2020 and filed in court on 16/3/2020 brought under Section 3 & 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procure Rules (2010), the defendants/Applicants seek the following orders:

(1) Spent...

(2) Spent...

(3) That there be a stay of execution of the decree/judgment herein pending the hearing and final disposal of the applicants' appeal filed in the Court of Appeal at Eldoret to wit CA No. 9 of 2020.

(4) That costs be in the cause.

2. The application is supported by the affidavit of the 1st defendant sworn on 14/3/2020 and also his further affidavit sworn and filed on 2/7/2020. The grounds apparent from the face of the application and the supporting and further affidavits are that the applicants/defendants were aggrieved by the judgment of the court; that the applicants/defendants have already preferred an appeal and the record of appeal has already been prepared, compiled and filed; that the decree has already been signed and execution may commence at any time from now; that the applicants have permanent buildings on the suit land; that the appeal shall be rendered nugatory unless stay is granted; that the applicants shall suffer (substantial) irreparable loss and damage; that the applicants shall abide by any conditions the court may make and that the respondents shall not be prejudiced if the orders are granted.

3. The plaintiffs filed a sworn replying affidavit dated 24/6/2020. They state that the applicant is guilty of inordinate delay, the application having been filed on 16/3/2019 while judgment was delivered on 18/7/2019, that no security for the satisfaction of the decree has been proffered, that the respondents collect rent from the suit property and are able to refund any costs or other monies that may become due at the end of the appeal; that the land in dispute is worth more than **Kshs. 10,000,000/=; that no risk of irreparable loss has been demonstrated to this court by the applicants and that they want to enjoy the fruits of their judgment.**

4. The plaintiffs filed their submissions on 29/6/2020. The defendants filed their submissions on 2/7/2020. I have considered the application, the response and the filed submissions.

5. The issues that arise in the instant application are as follows:

- (1) Whether an order of stay of execution of judgment pending appeal should issue;
- (2) Who should bear the costs of application?

6. The conditions for a grant of stay of execution are contained in **Order 42 rule 6** of the **Civil Procedure Rules**. It provides as follows:-

“6.(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 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 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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

7. It is therefore clear from the provisions of the law set out above that the **4** conditions that a court considers in an application for stay under **Order 42 Rule 6** are as follows:

- (i) Whether there is an appeal in place;
- (ii) Whether the application was made without unreasonable delay.
- (iii) Satisfaction by the court that substantial loss may result unless the order is made; and
- (iii) Whether the Applicant is prepared to offer security.

8. A notice of appeal was filed in the matter on **19/7/2019**. A copy of the front page of the appeal filed in the Eldoret Court of Appeal has been attached to the application. This court is convinced that for the purposes of this application an appeal is therefore in place.

9. As to whether the application was made without inordinate delay I note that the application having was filed on **16/3/2019** while judgment was delivered on **18/7/2019**. Therefore despite the filing of a notice of appeal within one day after the delivery of judgment, the delay in filing the application for stay of execution is about **8** months. A litigant must enjoy the fruits of his/her judgment. As long as there are no orders setting aside the judgment it is capable of being executed by the decree holder at any time.

In the case of **Kenya Railways Corporation v Quicklubes E.A. Limited [2015] eKLR** the Court of Appeal (Mohamed JA) cited the decision in **M/S Portreitz Maternity -vs- James Karanga Kabia, Civil Appeal No. 63 of 1997**, where it was stated as follows:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

10. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** the court observed as follows:

“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”.

11. In the case of **Samwel Kimutai Korir (Suing as Personal and Legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] eKLR** where there was a delay of 8 months in filing an application for stay of execution the court observed as follows:

“The applicant sat pretty after belatedly filing the Notice of Appeal until after the assessment of the respondent’s bill of costs before asking for a stay of execution for 30 days, which stay was rightly construed by the respondent to have been intended to give them time to call for funds for settlement of the decretal only for the applicant to spring a surprise application for stay of execution pending an intended appeal. It is my observation that the conduct of the applicant during the period that preceded the filing of the instant application was that of an indolent litigant not worthy of the courts discretionary orders of stay of execution that it now seeks.”

12. In **Joseph Ouma Onditi v Jane Kisaka Mung’au [2018] eKLR** the court dismissed an application for stay made 4 months after the judgment was delivered.

In **John Odhiambo V Sospeter Otieno [2010] eKLR** the court held that an 8 month delay in bringing a stay application was inordinate.

13. However in recognition of the principle that delay should be assessed on its own merits on a case by case basis, it was stated as follows in the case of **Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another 2014 eKLR:-**

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.

Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore inexcusable. On applying the courts mind on the delay caution is advised for courts not to take the word “inordinate” in its dictionary measuring but in the sense of excessive as compared to normality”.

14. It behoves this court to assess the delay of 8 months in the current case in the context of the events in the court record.

In the present suit the defendants have sworn a further affidavit trying to explain the delay. In their view it is not inordinate. They state that after they requested the proceedings they could not have made an application for stay since the application would have delayed the typing of the proceedings. I hardly think that this is a proper explanation. Whether the application if filed would incommode the typing process should be of the least concern to a serious applicant desiring a stay. The lameness of that excuse can be seen in that even after the completion of the typing of the proceedings time was so far gone that the defendants still had to apply for a certificate of delay which was issued on **4/2/2020**.

15. Further, when the bill of costs came up for taxation on **10/3/2020** Mr. Chebii for the defendants tacitly supported by Mr. Bororio holding brief for Mr. Samba for the plaintiffs stated that the parties intended to record a consent on the same and sought a further mention for the purpose of the intended consent on costs. No mention was made then of the appeal against the judgment herein. In this court’s view the decree holder would have been forgiven then, about 8 months after the judgment was delivered, for thinking that the applicants were not intent on pursuing any appeal. I find that the delay in lodging the application was inordinate.

16. As to whether substantial loss would result if the orders sought were not granted, this court notes that the defendants have averred in their affidavits that they have been in possession of the suit land for a period of about 20 years now. In the further affidavit the defendants aver without attaching any evidence that they have built permanent buildings on the suit land. In this court’s view an applicant seeking stay should not leave the court to guesswork regarding the extent of loss that they would suffer in the event the orders sought are not granted.

In the case of **Masisi Muita -vs- Damaris Wanjiku Njeri -Muranga Civil Appeal No. 107 of 2015 [2016] eKLR** the Court observed that:-

“The cornerstone 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”.

16. This court sees no difficulty that the defendants could have encountered in simply filing photographs of what they claim are permanent buildings on the land so that the opposite party may counter those allegations appropriately. It is safe to conclude that in the absence of evidence of substantial loss that would be suffered by the defendants the instant application can not be granted.

17. As to whether the applicant is prepared to offer security, the court notes from the affidavits in support of the application that this is the case since the applicants have stated that they are ready to abide by any conditions that this court may impose.

18. However, this court agrees with the decision in the case of **Kiraita Abuta Vs Richard Nyandika 2019 eKLR** which is cited by the plaintiff’s counsel, regarding the need for all the four conditions to be met before a stay order can be granted. In that case the court stated as follows:

“In the final analysis, the court must be satisfied that all the conditions set out in Order 42 rule 6 of the Civil Procedure

Rules have been met. As stated by Mutungi J. In the case of Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR it is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal. The court in that case stated as follows:-

“The pre-amble to sub-rule (2) of Rule 4 of Order 41 is couched in very clear language and words: “No order for stay of execution shall be made under sub-rule (1) unless.....” then follows the requirements, above, which have not been met by the applicant herein.

Let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay.”

19. Consequently this court finds that the defendants’ application dated 14/3/2020 having met only some of the preconditions set for the grant of a stay order as stipulated in **Order 46 Rule 2**, has no merit and the same is hereby dismissed with costs to the plaintiff.

Dated, signed and delivered at Kitale via electronic mail on this 27th day of July, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.