



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C.A NO. 8 OF 2020

BEATRICE KARIUKO MURITHI.....APPELLANT

VERSUS

PETER KARANI WANJAU.....RESPONDENT

RULING

The Applicant has moved this Honourable Court vide a Notice of Motion brought under certificate of urgency dated 29th May 2020 seeking the following orders:

(1) Spent.

(2) That this Honourable Court be pleased to issue a temporary stay of execution of the orders given on the 12th day of May 2020 pending the hearing and determination of this application.

(3) That this Honourable Court be pleased to issue a stay of execution of the orders given on 12th day of May 2020 pending the hearing and determination of this Appeal.

(4) That the costs of this application be provided for.

The application is brought under *Order 42 Rule 6 CPR* and all enabling provisions of the law. The application is supported by grounds apparent on the face of the said application and the affidavit of the applicant sworn the same date. The application is opposed with a replying affidavit sworn by the respondent on 9th June 2020. Both affidavits are supported by numerous annexures thereto.

APPLICANT'S CASE

The applicant deponed that he filed a case in the Magistrate's Court being M.E. & L Case No. 89 of 2019 simultaneously with a Notice of Motion under certificate of urgency seeking for injunctive orders. He stated that on 12th May 2019, the trial Court dismissed the aforesaid application and that the respondent has threatened to evict him from the suit land on several occasions. He stated that he was dissatisfied with the aforesaid ruling and has preferred an appeal before this Honourable Court and that it is imperative that this application be allowed in order to preserve the subject matter of the appeal and the main suit before the trial Court.

RESPONDENT'S CASE

The respondent in his replying affidavit stated that the application is incompetent, bad in law and an abuse of the Court process as the same has been overtaken by events since he has already taken possession of the tea bushes on the suit land parcel No. MUTIRA/KIRUNDA/69 which he had leased to the applicant. The respondent also deponed that the applicant had paid Ksh. 20,000/= as tea price and that they had agreed that in breach of the agreement, the damages payable would be 40% of the lease price which is Ksh. 8,000/=.

The respondent further deponed that he deposited the sum of Ksh. 28,000/= with the firm of MAGUTA KIMEMIA & CO. ADVOCATES and that the applicant was to collect the same. He stated that the application cannot lie since the loss the applicant is likely to suffer can be compensated by an award of damages. The respondent also contends that the orders sought cannot be granted since the orders issued by the lower Court were negative orders and as such cannot be stayed.

LEGAL ANALYSIS

I have considered the affidavit evidence and the annexures. I have also considered the applicable law. The applicant in the Notice of Motion dated 29th May 2020 is seeking a stay of execution pending appeal. The application is brought under *Order 42 Rule 6 CPR*. The law under the provisions of **Order 42 Rule 6** provides that an applicant must demonstrate the following:-

(a) Substantial loss may result to the applicant unless the order was made;

(b) The application was made without unreasonable delay; and

(c) 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.

My reading of the said order clearly indicates that the three prerequisite conditions cannot be severed. The words “**and**” connotes that all the three conditions must be met before an order of stay is granted. I also note that counsel for the respondent Mr. Magee submitted that the order of the lower Court granted was not a positive order. It was a negative order. The applicant/appellant had filed a suit simultaneously with a Notice of Motion seeking a temporary injunction. Upon hearing the parties, the trial Court disallowed the orders for injunction and dismissed the application with costs. The dismissal of an application is a negative order. It was an order incapable of execution. In the case of *Milkah Jeruto Vs Fina Bank Ltd (2013) e K.L.R.*, the Court held that an order for stay cannot be granted where a negative order had been issued. *Section 2 CPA* defines a decree holder as the holder of an order/decreed that was capable of being executed. The Court of Appeal in the case of *Kanwal Sarjit Singh Dhiman Vs Keshavji Jivraj Shah (2008) e K.L.R* dealt with a stay of a negative order and stated as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the Superior Court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the Superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only. (See *Western College of Arts & Applied Science Vs Oranga & Others (1976) K.L.R 63 at Page 66 Paragraph C*”. (Emphasis mine).

Save for the issue of costs, execution of the ruling cannot be stayed because there is nothing to execute. Since there is no decree and/or order capable of being stayed, I find this application brought under *Order 42 Rule 6 CPR* therefore incompetent and bad in law. The same is hereby dismissed with costs to the respondent.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 17th day of July, 2020.

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. M/S Githaiga holding brief for Magee for Respondent
2. Mr. C.S. Macharia for Appellant
3. Mbogo, Court Assistant – present