



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 66 OF 2012

MWANIKI KIBUL.....PLAINTIFF

VERSUS

JANE MUTHONI WAWERU.....1ST DEFENDANT

KARURI WERU.....2ND DEFENDANT

MARY MUTHONI WAMBUGU.....3RD DEFENDANT

ANTONY GITHINJI WERU.....4TH DEFENDANT

FRANCIS MURUGA WERU.....5TH DEFENDANT

JAMLECK NDEGE WERU.....6TH DEFENDANT

AND

FRANCIS MURUGA WERU.....APPLICANT

RULING

The applicant Francis Muruga Weru moved this Honourable Court vide a Notice of Motion dated 8th June 2020 brought under certificate of urgency seeking the following orders:-

(1) Spent.

(2) That this Court do, pending the hearing and determination of this application do issue ex-parte stay orders preventing the respondent/plaintiff from registering and/or further executing the order of the Court dated 30th April 2020, from alienating in any way whatsoever, changing, or further altering the green cards for parcels L.R. No. INOI/KIAMBURI/1019 or any title derivative of the above titles both inclusive pending the hearing and determination of this application.

(3) That there be a stay of execution of the orders of the Court dated 30th April 2020 pending the lodging, hearing and determination of an appeal and or until further directions of the Court as the case may be.

(4) That this Court do enlarge the time for appealing and/or the lodging and the serving of the Notice of Appeal against the ruling of the Court dated 30th April 2020.

(5) That costs be provided for.

The application is brought under Section 1A, 1B and 3A 63 (e), 80 CPA and Order 50 Rule 6 CPR and under the Administrative and Contingency Management Plan to mitigate Covid-19 in Kenya Justice Sector Rules 15/3/2020 and review thereof. When the application was placed before the duty Court, the same was not certified urgent and the duty Judge directed that the applicant to serve and dates taken in the ELC Registry in the usual manner. On 30th June 2020, the plaintiff/respondent filed a replying affidavit with numerous documents annexed thereto.

APPLICANT'S CASE

In the affidavit in support of the application, the applicant deponed and stated that previously, it was his mother who was handling this case but she passed on sometime in June 2019. He also deponed stating that the land which is the subject of this suit is registered in the names of the defendants with respective titles and ground occupation. The applicant also stated that after the judgment of the Court was read, an appeal was preferred through the filing of a Notice of Appeal on 23rd May 2016, a copy of which was annexed to the supporting affidavit and marked "M2". The applicant further stated that the appeal has not been heard owing to lack of proceedings which have not been provided by Court due to the incessant applications by the respondents and the delay by Court in granting the ruling of 30th April 2020 owing to the demise of the former Judge Justice Mukunya.

He stated that after the death of his mother, they lost contact with the advocate and only became aware after the respondent visited the suit land with persons identified as buyer on 2nd June 2020. He stated that he then contacted the advocate in his office who proceeded to the Court registry where he obtained a copy of the ruling. He said that his advocate advised him that the time for lodging an appeal has since lapsed. He stated that the stay home advice during the Covid-19 affected both himself and his advocate as he was only technically appearing in office. The applicant further deponed that the letter from Court advising on the ruling was delivered to his advocate's office on 8/6/2020. He stated that if the orders are not granted and the decree is executed, the appeal will be rendered nugatory as the titles and the land shall have been transferred. Finally the applicant stated that the respondent will suffer no prejudice as he has never occupied the 2 acres granted in the judgment.

RESPONDENT'S CASE

The respondent stated that the application is incompetent, bad in law and an abuse of the Court process. The respondent further stated that the application before Court has been overtaken by events as the order of the Court was effected on 28th May 2020 against the register of L.R. INOI/KAMBURI/172. He further stated that the applicant has neither filed an appeal against the judgment of the Court nor the ruling made on 8th May 2020 and therefore the orders of stay he seeks are legally not available to him. The respondent also stated that the applicant and his mother had filed Civil application No. 75 of 2016 before the Court of Appeal seeking for stay of execution of the judgment of this Court but the same has never been prosecuted. In conclusion, the respondent stated that he should be allowed to enjoy the fruits of his judgment.

LEGAL ANALYSIS

I have considered the Notice of Motion dated 8th June 2020, the supporting affidavit and the annexures thereto. I have also considered the replying affidavit and the applicable law. The applicant has moved this Court under Section 80 CPA for the substantive orders of review and the inherent powers of the Court under Sections 1A, 1B, 3A and 63 (e) CPA. From the orders being sought, the applicant is seeking substantive orders of stay of execution of the orders of this Court issued on 30th April 2020 pending an intended appeal. An application for stay pending appeal and/or intended appeal is founded under **Order 42 Rule 6 CPR**. Though the applicant did not invoke this Court under the relevant provisions of the law, the Court will nevertheless establish whether the threshold for the grant of the orders of stay pending appeal has been met. **Order 42 Rule 6 (2) CPA** provides as follows:-

"No order for stay of execution shall be made under sub-rule (1) unless:-

(a) The Court is satisfied that substantive 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.

It is clear from the provisions of the law that an applicant who seeks to benefit from an order of stay of execution pending appeal must satisfy the Court on the following conditions:-

(i) That substantial loss may result unless the stay order is granted.

(ii) That the application has been brought without unreasonable delay; and

(iii) That the applicant has given security or undertaking for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Besides his averments that his proposed appeal will be rendered nugatory, the applicant has not shown how he will suffer substantial loss unless the stay orders are not granted. The quintessential decision of the Court of Appeal in the case of **Shell Ltd Vs Kibiru & Another (1986) K.L.R 40** sets out two different circumstances when substantial loss could arise as follows:-

"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages ... It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6 (2) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two Courts

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. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”.

The question whether substantial loss would be suffered is a matter of evidence. The onus of prove lies squarely on the applicant and not the respondents. The subject of this application which is also the subject of the intended appeal is a parcel of land. The applicant has not shown how he stands to suffer substantial loss if the stay orders are not granted. If the respondent who is the successful litigant in the judgment of this Honourable Court takes possession of the portion he was awarded or even gets registered as proprietor of the same, there is no evidence that the property will not be available to the applicant should the intended appeal be successful. The Court must balance the right of a successful litigant and the undoubted right of appeal in respect of an unsuccessful party.

In regard to the second condition, I am satisfied that this application was brought without unreasonable delay. The applicant has stated that he moved this Court as soon as he came to be aware of this Court’s ruling on 30th April 2020. The third and last condition is giving security for the due performance of the decree and/or order as may ultimately be binding on him. The applicant has not given any security or undertaking to abide by any condition(s) that this Honourable Court may give. The issue of security was discussed in the case of ***Equity Bank Ltd Vs Taiga Adams Company Ltd H.C. Misc. No. 42 of 2012 (2012) e K.L.R*** where it was held as follows:-

“....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”.

The applicant in this case has not met all the three conditions for the grant of the orders sought. I am satisfied that the applicant has not shown that he will suffer substantial loss or that the intended appeal will be rendered nugatory if the orders sought are not granted. That was the holding in the case of ***Hassan Guyo Wakalo Vs Straman E.A. Ltd (2013) e K.L.R*** where it was stated:-

“In addition, the applicant must prove that if the orders 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”.

The author of ***Halsbury’s Laws of England 4th Edition Vol. 37 Pages 330 – 332*** stated as follows:-

“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”.

I agree with the learned author’s interpretation on when stay of execution can issue. A party seeking stay of execution orders must demonstrate beyond any reasonable doubt that she will suffer substantial loss unless the order is granted. The respondent in his replying affidavit in paragraph 4 stated that the application before Court has been overtaken by events as the order sought to be stayed was effected on 28th May 2020 against the register of L.R. No. INOI/KAMBURI/172. He annexed a copy of the green card evidencing the changes made in the register in execution of the alleged Court order. The applicant did not seek leave to file a supplementary affidavit to challenge those depositions. In the case of ***James Wangatwa & Another Vs Agnes Naliaka Cheseto (2012) e K.L.R, Justice Gikonyo*** observed as follows:-

“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 CPR. 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 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 (2002) 1 K.L.R 867* 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”.

I can’t agree more. The essence of substantial loss is to ensure that a successful appellant does not reap a barren judgment. The subject of this application is land which the applicant has not demonstrated how he will suffer substantial loss if execution which has commenced is completed. He has not shown that the respondent will dispose of the portion he has been awarded or any other state of affairs likely to interfere with the status quo such as to render his appeal nugatory. I also note that the applicant is seeking extension of time for appeal on grounds that no notice was issued. From the Court record, the impugned ruling was delivered on 30th April 2020 in the presence of Mr. Asimwe who was holding brief for Magee for the plaintiff and Mrs Makworo who was holding brief for Karweru for the defendant. The applicant cannot therefore be heard to say that they were not issued with notice for the said ruling. For all the reasons stated above, I make the following orders:-

(1) Prayers No. (b) and (can you) are disallowed.

(2) The applicant is granted 14 days within which to lodge appeal against the decision of this Honourable Court on 30th April 2020.

(3) The applicant to bear the costs of this application.

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

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E.C. CHERONO

ELC JUDGE

In the presence of: