



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 161 OF 2009

EVA MUKHWANA JOMO PLAINTIFF

VERSUS

KHAVAKALI MAINA 1ST DEFENDANT

THE DISTRICT LANDS REGISTRAR, KAKAMEGA 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. **EVA MUKHWANA JOMO**, (the applicant), moved this court by way of a Notice of Motion application dated 22/5/2013 and filed in court on even date seeking a stay of execution of the judgment and decree of this court pending the hearing and determination of an intended appeal. There were other prayers in the application but which were not pursued.
2. The application was brought under Order 42 rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap. 21), Laws of Kenya, and was supported by the affidavit of the applicant sworn on 22/5/2013.
3. The applicant raised several grounds in support of the application, including an assertion that there are several triable issues of law, and that the applicant and her five (5) children live on the suit land N/KABRAS/KIVAYWA/1507, the only place they know as home hence they need a stay of execution pending the hearing and determination of the intended appeal.
4. In her affidavit in support of the application, the applicant has deponed that she resides on the suit land with her 5 children and that there is real danger of being evicted if stay of execution is not granted. The applicant further deponed that she has instructed her counsel to appeal against the judgment of this court (Chitembwe, J.) dated 9/5/2013, and has duly filed a Notice of Appeal. If the order of stay is not granted, the applicant further depones, her children stand to suffer as their right to shelter will be violated.
5. **KHAVAKALLI MAINA**, (the respondent), opposed the application and filed a replying affidavit sworn on 24/6/2013 and filed on 27/6/2013. The respondent, has in essence, denied that the applicant is residing on the suit land. The respondent says that she is the one residing on the land and not the applicant. The respondent has further deponed that the applicant is residing at Matete market with her children. The respondent says that just like the applicant, she is also a woman who has rights that should be protected and that she stands to suffer irreparable loss if the orders sought were to be granted.

6. The respondent depones that unlike the applicant who has an alternative land where she can live with her husband, the respondent depends solely on the suit land N/KABRAS/ KIVAYWA/1507 for her livelihood.

7. When this application came up for hearing on 10/2/2015, Mr. Samba appeared for the applicant while Mr. Onyando was for the respondent. Mr. Samba, learned counsel for the applicant, submitted that the applicant was at some point the registered owner of the suit land and has a Title Deed. Counsel submitted that the applicant wishes to pursue her right of appeal in the Court of Appeal and therefore urged the court to grant a stay of execution. According to counsel, the Notice of Appeal was lodged on 14/5/2013 and served on 17/5/2013, all done within time. The applicant also applied for copies of proceedings and judgment which are yet to be supplied.

8. Counsel also submitted that the Title Deed for the suit land is already in the hands of the 1st respondent and that being a land matter, the court should exercise its discretion and grant a stay. The applicant, counsel submitted, is a woman of “straw” and as a poor person she should not be prevented from going to the Court of Appeal for failure to provide security. If the application is not granted, the respondent is likely to dispose of the subject matter which may render the appeal nugatory, counsel argued.

9. Mr. Onyando, learned counsel for the respondent, opposed the application and submitted that the application is misplaced and an abuse of the court process. Counsel submitted that a stay of execution cannot be granted because a decree has not been extracted; that there is no appeal yet filed despite the judgment having been delivered on 9/5/2013. Counsel argued that in dismissing the suit, the court found that the actions by the applicant were fraudulent.

10. It was also submitted that the appeal will not be rendered nugatory, that the application was filed on 22/5/2013 but was not heard until now, and that this shows indolence on the part of the applicant. According to counsel there is nothing to show that the applicant will suffer substantial loss. The respondent lives on the land and it will be her who will suffer substantial loss instead if stay of execution is granted. The respondent relied on the case of ***Tende Drive Villas Ltd. -vs- David Kamau & Others [2005] eKLR*** and asked that the application be dismissed with costs.

11. I have considered the application, submissions by counsel and the authority cited in this matter. This is an application brought under Order 42 rule 6 of the Civil Procedure Rules, 2010 for stay of execution of the judgment of this court pending the hearing and determination of an intended appeal to the Court of Appeal.

12. A court hearing an application like the one before me, must consider the following factors on whether to grant or reject such an application;

1. That the applicant may suffer substantial loss should the application be refused;
2. That the application has been made without delay; and
3. That the applicant has furnished security for the due performance of the decree should the court find him/her liable.

These conditions are clear in the reading of Order 42 rule 6 (2) which provide as follows;

O.42 r.6 (2) “No order of 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.”***

13. On the issue of time, the application was filed timeously and on that, the applicant cannot be faulted. Although the application was filed on 22/5/2013, it was not heard until 10/2/2015, and the

Respondent has argued that the applicant was indolent. However, a perusal of the court record shows that several attempts were made to have the application heard but it was not possible for various reasons. The applicant cannot be blamed for delay in the hearing of the application because whatever happened was not within her control.

14. Regarding substantial loss, it has been submitted on behalf of the applicant that she is a woman with five (5) children who resides on the suit land. It was argued that the applicant stands to suffer substantial loss if the order of stay is not granted. The respondent has however denied that the applicant resides on the suit land. According to the respondent, the applicant resides with her children at Matete market. The respondent has also stated that the applicant has an alternative land belonging to her husband where she can move to for accommodation. The respondent contends that she is the one who resides on the land and instead it is her who stands to suffer substantial loss if the order of stay is granted.

15. The applicant has not denied the assertion that she and her children reside at Matete market and not on the suit land. Residence on the suit land is a question of fact and the judge hearing the matter resolved it through evidence. What is clear though is that the applicant's title to the suit land was cancelled prompting her to file the suit in court seeking cancellation of the 1st defendant's registration as the proprietor of the suit land, which suit was dismissed. The suit land is no longer in the name of the applicant. The respondent on her part has stated that she resides on the land and that she has no intention of disposing it.

16. In order to succeed, the applicant has to show that she will suffer substantial loss if the order of stay of execution is not granted. An order for stay of execution involves the exercise of judicial discretion which must be exercised judiciously, and only upon satisfying the conditions for granting such stay. In the case of *Machira t/a Machira & Co. Advocates –vs- East African Standard (No.2) [2002] 2KLR 65 Kuloba, J.* had the following to say on what would amount to substantial loss;

“Commonly the applicant may obtain a stay of further proceedings or execution if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before the appeal is concluded would let an impecunious party to pocket and squander or Pilfer what may be needed in restitution if the appeal succeeds and is allowed.”

17. In another case *DANIEL CHEBUTUL ROTICH & 2 OTHERS –vs- EMIRATES AIRLINES – HCCC NO. 368 OF 2001, Musinga, J.* (as he then was) stated as follows;

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is forced to pay the decretal sum...”

18. Although this decision was dealing with an application for stay where the decree involved payment of money, it is correct to say that the totality of the consequences an applicant will suffer if stay was refused must be considered in making a decision whether or not to grant such a stay.

19. It has been said that the applicant obtained registration of the suit property into her name fraudulently and that is why that registration was cancelled. None other than the applicant's husband testified that the applicant transferred the said land into her name without his consent. He also said that it was him as owner of the land who sold the land to the Defendant/ Respondent. Taking the totality of these matters into account, I am not satisfied that the applicant stands to suffer substantial loss if stay is not granted.

20. On the issue of security, the applicant had deposed that she was willing to abide by any conditions the court would order or impose. However, during the hearing of the application Mr. Samba submitted that the applicant is a “woman of straw” who should not be denied the opportunity to pursue her right of appeal because of inability to provide security. My

understanding of this submission is that the applicant is not in a position to provide security in this matter even if she were to be ordered to do so.

21. On my part, I would be prepared to grant stay of execution if the applicant showed that she would suffer substantial loss. However, I am not satisfied that the applicant has succeeded in doing that. Although the applicant says she stays on the land, the evidence on record shows otherwise. The land is also in the Respondent's name and the respondent has stated that she is not intending to dispose of it. There is also evidence that the applicant though residing at Matete market, can still be accommodated by her husband on his land. I do not see the loss the applicant fears she may suffer if her application is not granted.

22. For the above reasons, the applicant's application dated 22/5/2013 is declined and it is dismissed with costs.

Dated and delivered at Kakamega this 4th day of March, 2015

E. C. MWITA

J U D G E