



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 46 OF 2014

(Being an application for stay of execution)

BETWEEN

JOHN ODONGO APPELLANT/APPLICANT

VERSUS

JOYCE IRUNGU MUHATIA RESPONDENT

RULING

1. This is an application by way of Notice of Motion dated 17/11/2014 premised to have been brought under **Order 42 rule 6 (1), (2)(a) and (b)** of the Civil Procedure Rules and other enabling provisions of the Civil Procedure Rules. JOHN ODONGO, (the Applicant), has moved the court for a stay of execution of all the orders issued in Kakamega CMCC No. 263 of 2001 pending the hearing and determination of this appeal.
2. The application is supported by the grounds appearing on the face of the Motion and an affidavit by the applicant sworn on 17/11/2014.
3. From the Memorandum of appeal, the applicant was the defendant in the suit before the magistrate's court and the respondent who was the plaintiff was the successful plaintiff in that court. The applicant lodged an appeal before this court and thereafter filed this application seeking a Stay of execution of the judgment and decree of the lower court given on 28/4/2014 pending the hearing and determination of his appeal.
4. The applicant has deponed that he was dissatisfied with the judgment delivered by the magistrate's court and therefore moved to this court on appeal. He says that the suit before that court involved land on which he had undertaken substantial developments. He further asserts that the court below granted the suit property to the respondent together with the developments on the land despite what he had spent in those developments. He also said that the respondent's agents had started threatening his tenants in the premises with eviction. The applicant therefore fears that if the respondent executes the judgment and decree of the magistrate's court, he will suffer substantial loss. The applicant undertakes to abide by any terms the Honourable court may impose, and says that the respondent will not suffer any prejudice if the order of stay is granted.
5. The respondent on her part opposed the application through a replying affidavit sworn on 8/12/2014. The respondent has taken on the applicant's application saying that the applicant has not

shown that his appeal has high chances of success, or that he will suffer loss if the orders are not granted. The respondent says that she is the owner of the suit properties and is entitled to quiet enjoyment of those properties including collecting rents. The respondent says that she used her resources to start developments on the suit properties before the applicant trespassed thereon despite orders restraining the applicant from trespassing onto those properties. The respondent contends that if the orders sought are granted, she will be exposed to further trespass.

6. When this application came up for hearing, Mr. Manyoni appeared for the applicant while Mr. Osango was for the respondent.

7. Mr. Manyoni, counsel for the applicant, moved the application and submitted that although the applicant had made an application for stay in the lower court, it was dismissed prompting the applicant to move to this court. He reiterated the contents of the supporting affidavit saying that the applicant had undertaken substantial developments on the land and the tenants in the premises are being threatened and that if this was allowed to continue, the applicant would suffer substantial loss. He reiterated that the applicant was ready to abide by any conditions the court may impose.

8. Mr. Osango, counsel for the respondent, on his part opposed the application and submitted that the applicant had not demonstrated that he had an appeal with high chances of success and also that he had not shown that he would suffer substantial loss or that the loss could not be compensated by damages. Counsel was of the view that the application was calculated to deny the respondent the enjoyment of the fruits of her judgment. He further argued that the applicant has approached the court with unclean hands having continued to develop the suit property during the pendency of an injunction. Counsel argued that although the respondent was awarded general damages of Khs.500,000/=, the applicant had neither deposited the money in court nor provided security. He prayed that the application be dismissed with costs.

9. I have carefully gone through the application, the affidavit in support as well as that in opposition. I have also considered submissions by counsel on their respective positions in this matter. This being an application for stay of execution under Order 42 rule 6, the principles upon which stay of execution can be granted are clear. They are;

1. the applicant has to show that he will suffer substantial loss if the application is not granted, and
2. that the application has been made without delay, and finally
3. that the applicant has provided security for the due performance of the decree should the court find him liable to pay.

10. I have to state here that while considering an application for stay under Order 42 rule 6, the consideration is not whether the appeal has any chances of success, but rather, whether the applicant will suffer substantial loss if the order of stay is not granted. This position is clear from Order 42 rule 6 and has been stated numerous times in decisions of this court differently constituted.

11. The same position was restated by *Gikonyo, J.* in *Apar Industries Limited –vs- Joe’s Freighters Limited [2015] eKLR* when he said;

“The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by requiring the applicant to satisfy the decree which is reversed on appeal.”

12. This position was also echoed in the case of *Jason Ngumba [2014] eKLR* where it was again stated that;

“Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the applicant to do what the judgment requires, he will become a pious explorer in the Judicial Process.”

That is the principle of law that I fully agree with.

13. Will the Applicant suffer irreparable loss if the application is refused? The dispute herein relates to some two plots namely Jua Kali Plot Nos. 142 and 143. I have not seen the pleadings or the impugned judgment and therefore I am not able to tell how the dispute arose. However, going by the affidavits and submissions by counsel, the two parties seem to lay a claim over the plots. The applicant says he developed the plots and that there are tenants in those houses. He therefore says that those tenants are being threatened by the Respondent. He also says that the court below gave the plots to the Respondent and the developments thereon.

14. The Respondent on the other hand, claims the plots and says that the Applicant trespassed thereon and started constructing the buildings. It is therefore clear that the ownership of the plots is in dispute but clearly the Applicant has developed those buildings. It is not so clear whether the Respondent played a role in their development. There is a real danger that the Applicant will suffer substantial loss if those buildings are taken over by the Respondent or the tenants chased away or if buildings are demolished.

15. My finding is emboldened by the holding by *Makhandia J.* (as he then was) in *Anne Wanjiru Waigwa & Another -vs- Joseph Kiragu Kibarua* when he stated;

“The applicant’s difficulties in recouping their money is only one consideration. The other consideration is whether the loss, if any, arising from those difficulties would be substantial.”

16. On a similar issue, *Ogola, J.* while considering an application similar to the one before me, in *Tropical Commodity Suppliers Ltd. & Others -vs- International Credit Bank (in liquidation) [2004] EA* stated as follows;

“Substantial loss does not represent any particular size or amount but refers to any loss, greater or small, that is of real worth or value as distinguished from a loss without value or loss that is merely minimal.”

These decisions point out what a court should take into account when considering substantial loss, and on this point I am satisfied that the applicant has made a case.

17. I now turn to the second consideration, that is, whether the application was brought without delay. The judgment whose execution the applicant seeks to stay was made on 28/4/2014. The applicant then lodged the appeal on 22/5/2014, but the application for stay was not filed until 17/11/2014, more than six months after the date of the judgment. I have scrutinized the application, the affidavit and submissions by counsel for the applicant and nowhere has the applicant given any explanation why the application was not filed timeously. It is therefore plain that the application was not filed promptly or without delay and in this regard, the applicant is guilty of laches. The applicant has taken it for granted that an application such as the one before me will be granted as a matter of course. An applicant who seeks to benefit from the exercise of Judicial discretion must show that he deserves the exercise of that discretion in his favour and that he did what was practically possible to come to court without delay and if there was any delay, explain the delay. The applicant has not done that.

18. I would have dismissed this application on this ground alone. However, the nature of the appeal that is pending is one that requires full consideration so that the rights of the parties are determined. The applicant has argued that he put up the buildings which house tenants and that the respondent is threatening to collect rent from those tenants. The respondent on the other hand says that the court gave her the plots together with the buildings standing on those plots. She also says that she had started construction of those buildings before the applicant trespassed thereon. But she also seems to concede that the applicant constructed those houses even though there was a court order restraining the act of trespass.

19. These being the rival contentions it is important that the court exercises caution and give the applicant an opportunity to ventilate his appeal rather than allow the execution to proceed given these contradictions. In doing so, I will be guided by the holding in the case of E. **Muiru Kamau & Another –vs- National Bank of Kenya Ltd. [2009] eKLR** where the Court of Appeal stated as follows;

“The courts including this court in interpreting the Civil Procedure Act or the Appellate Jurisdiction and or exercising any power must, take into consideration the overriding objective as defined in the two Acts. Some of the Principle aims of the overriding Objectives include, the need to act justly in every situation and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the Principle of equality of all is maintained and that as far as it is practicable to place the parties on an equal footing.”

20. If execution of the judgment and decree is allowed to proceed and eventually the applicant suffers substantial loss while his appeal is pending, this court will not have placed the parties on equal footing pending the hearing of the appeal, and the Principle of equality will not have been maintained.

21. The last point I have to consider is whether the applicant has provided security for the due performance of the decree should he be found liable. The applicant has deponed, and it has also been submitted on his behalf by counsel, that he is willing to abide by any conditions the court may impose. Although he has not given security, the applicant submits to the court’s discretion and is willing to provide security should the court order him to do so. The respondent has argued that the applicant has not even deposited the damages awarded to her in court as a gesture of good faith.

22. To the extent that the applicant is willing to abide by any conditions the court may impose, I am satisfied that the applicant has satisfied this condition. In my view, it does not have to be the physical deposit of money but the preparedness as well as readiness to provide security should one be called upon to do so.

23. For the above reasons, I am inclined to allow the application.

The application dated 17/11/2014 is hereby allowed. Execution of the Judgment and Decree dated 28/4/2014 is stayed pending the hearing and determination of this appeal on condition that the applicant deposits Kenya Shillings two Hundred Fifty thousand (Kshs.250,000/=) in a joint interest earning account to be operated by the two firms of Advocates for the parties herein within Forty Five (45) days from the date hereof. In default, the order for stay will stand discharged.

Dated and delivered at Kakamega this 5th day of May, 2015

E. C. MWITA

J U D G E