



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC APPEAL CASE NO. 13 OF 2020

DAVID CULLENAPPELLANT

VERSUS

SAMUEL KAPTALAI CHEPTOO.....1ST RESPONDENT

ISAAC KIPYATOR CHEPTOO.....2ND RESPONDENT

MARIKO KISERICH LIMO.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated 3rd June 2020 by the Appellant/ applicant seeking for the following orders:

- a. Spent
- b. That there be stay of execution of the Hounorable Chairman's Judgment/Decree dated 26th May 2020 pending the hearing and determination of this application.
- c. That there be stay of execution of the Hounorable Chairman's Judgment/Decree dated 26th May 2020 pending the hearing and determination of the appeal preferred in the Environment and Land Court.
- d. That the costs of this application be provided for.

The court gave orders of status quo and directed that the application be canvassed by way of written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant gave a brief background of the case and submitted that the applicant was aggrieved by the tribunal ruling on a notice of preliminary objection challenging the jurisdiction of the tribunal to hear and determine the dispute.

The appellant therefore filed this appeal and an application for stay of execution pending the hearing and determination of the appeal.

Counsel submitted on the conditions to be met by an applicant before grant of orders of stay of execution namely:

- a. That the application has been made without unreasonable delay,
- b. The applicant must have an arguable appeal with chances of success
- c. That substantial loss may result to the applicant unless the order is made.
- d. Such security as the court may order for the due performance of the decree or order as may ultimately be binding on the applicant.

It was counsel's submission that the applicant filed the appeal and the application without undue delay as the ruling was made on 26th May 2020 and the application was filed on 3rd June 2020. Counsel relied on the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui**

& another [2018] eKLR where the court held that:

“The judgment was delivered on 18th May, 2017 and the Memorandum of Appeal was filed on 30th May, 2017. The appeal was filed timeously during the same month. There is no doubt that the appeal was filed without undue delay.”

On the issue as to whether the applicant has an arguable appeal, counsel submitted that the applicant’s contention on the issue of jurisdiction of the tribunal to determine a dispute has chances of success.

Counsel further submitted that the applicant is likely to suffer substantial loss as the tribunal allowed a distress for rent amounting to Kshs. 300,000/and noting that this is a huge amount especially during this period on the COVID 19 pandemic. That payment of the amount will render the appeal nugatory.

Counsel relied on the case of **G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR** where the court noted that:

It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

It was counsel’s submission that the 2nd and 3rd defendants have not sworn affidavits to oppose the application hence it remains unopposed. That they have also not shown that they would be able to repay the decretal sum incase the appeal is successful.

On the issue of security of costs, counsel submitted that the applicant is ready to provide a bank guarantee to ensure due performance of the decree. Counsel relied on the case of **Justin Mutunga David v China Road & Bridge Corporation (K) Limited [2019] eKLR** where the court accepted a bank guarantee as a proper and acceptable mode of security and urged the court to allow the application as prayed.

RESPONDENTS’SUBMISSIONS

Counsel for the respondents gave a background to the case at the tribunal and submitted that the respondents have substantial assets including the demised premises whose value is in excess of what the appellants has been ordered to pay. Further that the appellants will be able to recover any amount paid to the respondents through the rent arrears which continue to accrue.

Counsel further submitted that the applicant has not proved the ingredients for a grant of stay of execution as the sale agreement the applicant is relying on was never ratified by the wife. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

In an application for stay of execution, an applicant must meet the ingredients as stipulated in Order 42 Rule 6 of the Civil Procedure Rules. The factors to consider in stay of execution pending appeal is also set out in the Court of Appeal decision in **Butt v Rent Restriction Tribunal [1982] KLR 417**. The Court gave guidance on how a court should exercise discretion in such an application and held as follows:-

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

The court when handling an application for stay of execution, must exercise the discretion judiciously so as not to occasion injustice to either party. The court should also consider the right of the appellants to an appeal and that of the successful litigant to enjoy the fruits of the judgement. In the circumstances, the court must look at the best way possible not to render the appeal nugatory in case the appeal is arguable and has chances of success.

In the case of **Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263**, the court ordered for the preservation of the *status quo* pending the hearing and determination of the appeal. The court therein observed thus:-

“...It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or

the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful...”

This is a monetary decree which can be paid and refunded if the appeal is successful but taking into consideration the current economic situation necessitated by the COVID 19 pandemic, it would be difficult to pay such an amount as the applicant pleads.

In the Court of Appeal case of Housing **Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** the court may grant stay of execution pending appeal in an application involving a money decree so as to alleviate any undue hardship the applicant would suffer if stay is refused.

The applicant being entitled to exercise his right of appeal, it would be in the interest of justice to order that status quo be maintained pending the hearing and determination of the Appeal. The status quo order to operate for a period of 6 months thereafter the parties can approach the court for further directions. Costs of the application in the cause.

DATED and DELIVERED at ELDORET this 5TH DAY OF AUGUST, 2020

M. A. ODENY

JUDGE