



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYAHURURU

ELC NO 211 OF 2017 (Formally Nakuru ELC No. 212 of 2015)

PETER NGURE MACHARIA.....PLAINTIFF/RESPONDENT

VERSUS

PATRICK GAITHO MACHARIA.....DEFENDANT/APPLICANT

RULING

1. Pursuant to a judgment that was delivered by the Court on the 6th day of May 2020, the Applicant has now filed the present Application by way of a Notice of Motion dated 14th May 2020 brought under the provisions of Order 42(1) and Order 51(1) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act and all enabling provisions of the law where he seeks for orders of stay of execution of the judgement and decree pending the hearing and determination of an intended Appeal.

2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Patrick Gaitho Macharia the Applicant herein dated the 14th May 2020.

3. The Application was opposed vide the Respondent's Replying Affidavit dated the 22nd June 2020 in which the Respondent stated that the Application had not been within the set down principles for granting stay of execution order and further that the Notice of Appeal had never been served upon him as required by the law therefore making the said intended Appeal incompetent bad in law and an abuse of the Court process.

4. Direction had been issued to the effect that the said application be disposed of by way of written submissions, to which the Applicant filed their submissions dated 25th June 2020 where he framed his issues for determination as follows:

- i. Is the present application an abuse of the Court process
- ii. Does the present application merit the condition for grant of stay of execution?

5. On the first issue for determination, the Applicant relied on the decided case of **Chairman of Co-operative Tribunal & 8 Others ex-parte Management Committee, Konza Ranching and Farming Co-operative Society Limited [2014] eKLR** to submit that the issue of an abuse of Court process was a serious one to which once raised by a party, the Court had to make a determination thereon at the earliest opportune time.

6. That in the instant proceedings the Applicant had not in any way abused the Court process but had exercised his constitutional right to challenge the decision of the trial Court before an Appellate Court as is enumerated in Section 66 of the Civil Procedure Act. That there was no demonstration to the Court in any way that the present application was an abuse of the Court process. That the Applicant only sought to enforce his rights to Appeal and for the purpose of preserving the status quo which was the subject matter of the Appeal, pending the hearing and determination of the said Appeal. That to deny such a party the said right would therefore be in essence, impinging on their right of Appeal and thus denying them the rights to access to justice.

7. On the second issue for determination, the Applicant relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules as well as the decided case in **Chris Munga N. Bichage vs Richard Nyagaka Tongi & 2 Others (sic) eKLR** which laid down the three conditions that the Applicant ought to illustrate to wit that;

- i. The Court has been approached without unreasonable delay
- ii. The Applicant must satisfy the Court that substantial loss may result unless the order sought is granted

iii. The Applicant must be willing and ready to furnish security for the due performance of the Decree Appealed from.

8. The Applicant submitted on the first condition that the present application had been filed 8 (eight) days after judgment had been delivered. That the swift filing of the instant application showcased that the Applicant was not out either to bog down the Court with unnecessary litigation or deny the Respondent, being the successful party, the rights to enjoy the fruits of his judgment. That although stay of execution pending Appeal is granted at the discretion of the Court, yet this application was made without unreasonable delay. Reliance was placed on the decided case in **Tarbo Transporters Limited vs Absalom Dora Lumbani [2012] eKLR**.

9. On the second condition as to whether substantial loss would be suffered by the Applicant, it was their submission that pursuant to the pronouncement of the Court that the Respondent had acquired the suit land by way of adverse possession and the authorization of the Deputy Registrar to execute all necessary documents to facilitate the transfer of the said land in favour of the Respondent who was on the verge of executing the judgment within 30 days from the date of delivery of the judgment, that substantial loss would be suffered by the Applicant unless an order for stay of execution was granted failure to which the execution of the judgment and Decree arising therefrom would divest the ownership of the suit property from the Applicant thus rendering the prosecution of the Appeal a futile exercise. Reliance was placed on the decided case in **Northwood Service Limited vs Mac & More Solutions limited [2015] eKLR**.

10. That since the element of substantial loss was the core factor to granting a stay of execution of a Decree pending Appeal, in dire circumstances as this one, an order of stay of execution was appropriate since the Applicant was at the verge of losing the suit land which was presently registered in his name. That the rectification of the registrar would divest the Applicant of his entitlement and investment acquired from the purchase of the suit property.

11. That on the other hand the Respondent would not suffer any prejudice if the application was allowed and in any event should the Appeal be dismissed the Respondent could always proceed to comply with the Decree once and for all. That should the pending Appeal be allowed there would have to be on another order for the registration of the title which would in turn add hardship to the parties. The Applicant relied on the decision in **Kipsang Chepwony vs David Kiptoo Cheluget & Another [2014] eKLR**.

12. That the Appeal raises weighty issues and had a high probability of success and it would be in line with the principles of natural justice for the Courts to make the appropriate orders at this stage. That by granting the orders so sought the same would reserve the subject matter of the Appeal and prevent acts which would foist upon the Court a situation of complete helplessness or render nugatory any judgment or order that may be made on Appeal.

13. On the third condition on the issue of security, it was the Applicant's submission that he was ready and willing to offer such security as the Court may deem fit proper and just. The Applicant thus submitted that he had satisfied the threshold required for such an application to be allowed with costs to the Respondent.

14. In opposition to the Applicant's application, the Respondent vide his written submissions dated the 5th August 2020, submitted that the Respondent's application was incompetent bad in law and an abuse of the Court process for reasons that;

i. The Applicant had never served the notice of Appeal upon the Respondent as required by the Court of Appeal rules.

ii. That the Applicant had failed to demonstrate the kind of prejudice he was bound to suffer should the transfer of the suit land be effected in favour of the Respondent as ordered.

iii. That payment of costs as ordered by a Court could not be sufficient grounds for granting of the order of stay of execution

iv. That the Applicant had not demonstrated how his Appeal was bound to be rendered nugatory should the orders sought not be granted.

15. The Respondent then framed their issues for determination as follows:

i. Whether the application is incompetent and an abuse of the Court process.

ii. Whether the Applicant had adequately demonstrated the grounds necessary for grant of stay of execution.

iii. Costs of the application.

16. On the first issue for determination, the Respondent relied on his sworn affidavit dated 22nd June 2020 where he had deponed that the notice of Appeal had never been served upon him or his counsel, a fact which had not been rebutted. Reliance was placed on Rule 77 of the Court of Appeal rules as well as on the decided case in **Justus Aloo Ogeka & 6 Others vs Kenya Union of Commercial Foods And Allied Workers & 2 Others [2018] eKLR** to submit that a Notice of Appeal and in effect the Appeal itself had been rendered incompetent and was liable to be struck out because the mandatory requirement of service of Notice of Appeal on the affected parties had not been complied with.

17. That further, pursuant to Rule 82 of the Court of Appeal rules, the Appellant had a duty to request for the copy of proceedings and serve the same upon the Respondent which he failed to do. In the circumstance, the Applicant's notice of Appeal and by extension the instant application herein were incompetent and an abuse of the Court process.

18. On the second issue for determination, the Respondent's submission was that the conditions for granting stay of execution pending Appeal had been set out under Order 42 (sic) to wit on the first condition, it had not been denied that the Respondent had been in occupation

of the suit land since the year 1996. That the Applicant through his own admission had never occupied or benefited from the suit land since the year 1984 when he acquired it. That in the decided case in **Justus Kyalo Musyoka vs John Kivungo [2019] eKLR**, the Court had substantially dealt with the issue of substantial loss as is provided for under order 42 Rule 6. That it was therefore incumbent upon the Applicant to demonstrate to the Court the kind of substantial loss which may result if the stay of execution was not granted. That it was not sufficient just to state as the Applicant did, that he stood to suffer substantial loss. That in the present instance, the question that begged to be answered was whether the Applicant would suffer any loss as alleged yet he had never had any dealings with the suit land.

19. The Respondent conceded, in regard to the second condition, that the application had been brought without undue delay.

20. On the third condition as to whether the Applicant had provided security for the due performance of the Decree, the Respondent's submission was that although the Applicant had expressed his willingness to offer such security, however he had not suggested the kind of security he had intended to provide. That the Court should not consider the mere demonstration of good faith by the Applicant as adequate in satisfying the requirement stated under Order 42 Rule 6. That the Applicant ought to have proposed the security he had intended to provide so that the Court could interrogate its adequacy or otherwise.

21. The Respondent's the third issue for determination was on the issue of costs to which they submitted that pursuant to Section 27 of the Civil Procedure Act, costs were a discretion of the Court. That the application herein lacked merit and the same ought to be dismissed with costs to the Respondent.

Determination.

22. I have considered the Applicant's Application for stay of execution of the decree and judgement delivered by this Court on the 6th May 2020 pending the hearing and determination of his intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.

23. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.

24. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- i. The Court is satisfied that substantial loss may result to the 1st Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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 Applicants.

25. I find the issues for determination arising therein being:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

26. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicant to demonstrate the kind of substantial loss he would suffer if the stay order was not made in his favour and not merely stating that he would suffer loss if the order of stay of execution was not issued.

27. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma v Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

28. The Applicant contends that he would suffer irreparable loss if stay is not granted, because then he would lose the suit land which was presently registered in his name. I have considered the submission of both the Applicant and the Respondent and find that indeed there is no contestation that the Applicant has never been in occupation and possession of the suit land since 1996 when the land was first registered to his name but rather it has been the Respondent who has been in occupation and possession therein. With due respect, this Court fails to understand how the Applicant would suffer any loss if the orders sought are not granted since he is not in occupation of the suit land herein and there is no evidence adduced that the Respondent is desirous of disposing off the same.

29. In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

30. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the Court should not only consider the interest of the Applicant but also, in all fairness, the interest of the Respondent who could be denied the fruits of his Judgment see **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410**.

31. It was stated by Kuloba, J in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

32. In an application of this nature, the Applicant should show the damages he would suffer if the order for stay is not granted since by granting stay it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see **Kenya Shell Ltd** (Supra) and therefore the Application on this ground must fail.

33. On the second condition, I find that it is not contested that the Application was brought without undue delay. There is nothing to add.

34. On the last condition as to provision of security, I find that the Respondent has intimated his willingness to avail security for due performance of the decree. In the case of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] eKLR** the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

35. I find that save for the first condition that has not been met by the Applicant herein, however there has been no evidence adduced to the effect that the Respondent herein being the successful party shall suffer any prejudice if stay is granted. To this effect and in the best interest of justice I order that;

- i. That there shall be stay of execution of decree pending the hearing and determination of the Appeal herein on condition that the Applicant shall within 30 days from the date of this ruling deposit Kshs.300,000/=(Three Hundred Thousand shillings) in a joint earning interest account.
- ii. That the Applicant shall lodge an Appeal against the Court's judgment within 14 days of this date.
- iii. That the Applicant shall further, within 30 days from this date compile, file and serve upon the Respondents a complete record of Appeal.
- iv. In default, of any of the clauses (i) (ii) and (iii) above the stay herein granted shall automatically lapse.
- v. Cost to abide as per the outcome of the Appeal.

It is so ordered.

Dated and delivered at Nyahururu this 29th day of September 2020

M.C. OUNDO

