



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

E.L.C.A CASE NO. 9 OF 2015

JAMLECK KIURA MURATHI.....APPLICANT

VERSUS

ANGELOUS GICHOBI KARURI.....1ST RESPONDENT

STANLEY NJOGU J. MARIA.....2ND RESPONDENT

RULING

I have before me an application dated 21st July 2015 brought under the provisions of **Order 42 Rule 6 (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** in which the applicant seeks the following orders:-

1. *A stay of execution against the respondents from executing the judgment or decree in Chief Magistrate's Court Embu Civil Case No. 8 of 2008 pending hearing and judgment of this appeal.*
2. *Costs be provided for.*

The application is based on the grounds set out therein and also on the supporting affidavit sworn by the applicant. The applicant seeks to appeal against the said judgment delivered on 23rd June 2015 and it is clear from his supporting affidavit that he is aggrieved with the orders issued by the trial Court directing him to pay the respondent the sum of Ksh. 330,000/= being the refund of purchase price after the collapse of a sale agreement for two (2) acres of land out of parcel number KABARE/KIRITINE/919.

The application is opposed and in his replying affidavit, the 2nd respondent has deponed, inter alia, that the purchase price of Ksh. 330,000/= was paid to the applicant in 1996 some nineteen (19) years ago which is not denied and his only complain is the interest thereon. In any case, the applicant has not demonstrated what irreparable harm he will suffer and the respondents are quite capable of refunding the same.

The application was canvassed before me orally on 13th October 2015 with the applicant arguing that he is not satisfied with the judgment of the subordinate Court in Embu Civil Case No. 8 of 2015 since he was ordered to pay the respondent their money and costs yet they have used the land and up-root his crops.

On behalf of the respondents, Ms Wairimu submitted that what was in the subordinate Court was the issue of refund of the purchase price after a land sale transaction failed and the applicant was ordered to refund the Ksh. 330,000/= plus interest because he chased away respondents from the land. She added that if this application is allowed, the applicant should deposit the purchase price.

I have considered the application, the rival affidavits and the oral submissions by the applicant and Ms Wairimu for the respondent.

The principles guiding the Court in the grant of a stay of execution pending appeal are well settled. They are provided under **Order 42 Rule 6 (2) of the Civil Procedure Rules** and are as follows:-

1. ***The applicant must satisfy the Court that substantial loss may result if the order sought is not granted.***
2. ***The application must be made without un-reasonable delay and***
3. ***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.***

In **KENYA SHELL LTD VS KIBIRU & ANOTHER (1986) K.L.R 410 at page 416**, Platt Ag. J.A (as he then was) said the following about the principle of substantial loss:-

“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 in the cornerstone of both jurisdictions for granting a 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”

I have looked at the applicant’s eleven (11) paragraph affidavit in support of this application and also his further affidavit filed on 12th October 2015 (notwithstanding that the same was infact filed without the Court’s leave) and I do not find anywhere in those two affidavits in which he has shown what irreparable or substantial loss he will suffer if a stay is not granted. It must be appreciated that in an application under **Order 42 Rule 6 of the Civil Procedure Rules**, the Court is not concerned about the merits of the appeal. In any case, the applicant herein does not dispute that he received a sum of Ksh. 330,000/= for a land transaction which has gone sour and he was therefore ordered to refund the same. His complaint is that he was also ordered to pay interest on that sum. As a matter of good faith, an offer should have been made by him in his application with regard to depositing that sum or even a substantial part of it in Court pending the appeal. No such offer has been made. The Court under **Order 42 Rule 6 (1) of the Civil Procedure Rules** has a discretion to stay execution “***for sufficient cause***”. In the circumstances of this case, the applicant has neither shown what substantial cause he will suffer if a stay is not granted and neither is there any “***sufficient cause***” that would

warrant the exercise of my discretion in his favour.

For the foregoing reasons, the application dated 21st July 2015 is dismissed with costs.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

COURT: Ruling delivered, dated and signed this 4th December, 2015 in open Court.

Applicant present in person

Respondent absent.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015