



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO 50 OF 1998

WELSA BANGE OGANDA.....PLAINTIFF

VERSUS

1. INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION

2. COAST PROFESSIONAL FREIGHTERS LTD.

3. NADHAIA LIMITED

4. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. Pursuant to a notice of motion dated 26th August 2015 the 2nd defendant /judgment debtor has applied that the court grants to it an order of stay of execution of the Judgment and decree of this court delivered on the 21.8.2015. In that judgment, the court found for the Plaintiff and made orders that:

- a. The alleged auction of 17/9/1997 of the property known as MOMBASA/BLOCK X/291 is declared null and void.
- b. The title No. MOMBASA/BLOCK X/291 shall be rectified to revert back to the Plaintiff WELSA BANGE OGANDA in that regard COASTAL PROFESSIONAL FREIGHTERS LTD. Shall vacate MOMBASA/BLOCK X.291 within 30 days from the date of the Judgment failing which, eviction orders shall issue.
- c. There shall be judgment jointly and severally against 1st defendant & 2nd defendant for Kshs.8,000,000.
- d. The 1st, 2nd & 3rd defendant to pay the plaintiffs costs.

2. The application is expressed to be anchored upon the provisions of Order 42 rule 6, Order 51 Rule 1, section 1A, 1B and 3A Civil Procedure Act and all enabling provisions of the law.

3. The applications sought four orders but as at the date it came up for hearing prayers 1 and 2 had been spent and what remained outstanding was prayer 3 and the consequently prayer for costs.

4. Strictly speaking the application ought to be straight forward and due for consideration under the known and established principles in order 42 Rule 6 save that at trial the applicant raised an issue on jurisdiction to the effect that this court as manned today and as it was manned up to 21.8.2015 by Kasango J, lack jurisdiction to entertain the matter by dint of the provisions of Articles 162 (2) and 165(5) of the Constitution, sections 13 of the Environment and Land Court Act as read with section 150 of the Land Act. That point is, strictly speaking, not due for my consideration in this application as it will be a matter to be considered in the appeal. My short view on that point however is that the arguability or prospects of the success of the appeal are not, in my opinion a fundamental consideration before me as it would be before the Court Of Appeal under the provisions of Rule 5(2)b of the rules of that court. Before me it is a collateral consideration in considering the question of substantial loss. Secondly I am of the view that jurisdiction being everything, it enjoins every litigant their advocates and the court to have it addresses at the earliest opportunity rather than letting the court handle the matter to conclusion spending valuable judicial and public resources only for one of the parties who all along participated in the process to challenge it. That too me negates the constitutional principle and dictate of timely dispute resolution and must be discouraged.

Whether or not to grant stay pending appeal.

5. Under Order 42 rule 6, (5) there being on record a notice of appeal duly filed, an appeal is deemed pending and the court is clothed with jurisdiction to consider an application for stay pending the appeal t the Court Of Appeal.

6. The only other questions to be considered are:

- Was the application for stay filed without unreasonable delay.
- Has the applicant satisfied the court that he stands to suffer substantial loss if the stay sought is not granted and execution allowed to proceed.
- Has the applicant given security for the due satisfaction of the decree that might ultimately be binding upon it.

Timely filing of the application.

7. The Judgment sought to be appealed against was delivered on the 21/8/2015 and this application filed was 27/8/2015. Clearly, the applicant cannot be said to have brought the application after unreasonable delay.

Has the applicant proved that it stands to suffer substantial loss if the stay is declined and execution ordered to proceed?

8. The Judgment by Judge Kasango decreed that the Rectification of title over MOMBASA/BLOCK X/291 reverts back to the plaintiff having declared the auction of 17/9/1997 null and void as well as an award of general damages in the sum of Kshs.8,000,000.

9. To prove this requirement the Applicant has raised the question of the jurisdiction of the court that heard and delivered the judgment and stated that the question of jurisdiction will be an important one for determination before the court of appeal. It was submitted that having bought the suit land, the Applicant has invested heavily on it and if stay is not granted, the decree holder may alienate the property to a third party hence leaving the applicant with nothing to hold onto should the appeal succeed. Additionally it is submitted that there is a running hotel business on the suit property with employees at that if stay is declined, the employees will be lose jobs or be declared redundant and that the creditors of the Applicant will recall their credits.

10. In response to those submissions the Respondent judgment debtor submitted while relying on the replying affidavit filed by the decree holder that the applicant did not lawfully acquire the property, that he did not offer any bid at the auction nor did he pay the requisite deposit. On that score, it was contended that there is no prospects of the appeal succeeding and therefore that there would be no reason

to grant stay and postpone the decree holder from accessing and enjoying his fruits of litigation. It was therefore contended that substantial loss is only prospective if the appeal discloses chances of success. It was also argued on behalf of the Respondent that the applicant upon acquiring the suit as he did acted unlawfully by forcefully evicting the Respondent tenant without a court order contrary to the law and in particular section 90 of the penal code which creates a criminal offence in that regard. It was thus contended that to grant stay would be to reward the judgment debtor for wrongful acts.

11. On the fear that the property may be spirited away if stay is not granted, the Respondent advocate submitted that there is not availed an iota of evidence that such an intention exists and that the Respondent/Decree holder is only interested in keeping and developing his property.

12. On the availability of the property after the appeal should the appeal fail, the Respondent submitted that as the property is charged, the bank may exercise its right of sale and dispose of it during the pendency of the appeal since the status of the loan was never disclosed. It was concluded that to grant stay would be to imperil the suit property.

13. These are the conflicting positions taken by the parties on this point. In my view a substantial loss is the kind of loss that in the circumstances of an appeal would render the entire litigation academic and insubstantial. It is the kind of a loss that an applicant like the one before me would be exposed to if ultimately the appeal succeeds but the subject of litigation cannot be recovered.

14. In monetary decrees it is enough to prove that the decree holder is man of the straw or an alien who will not be able or available to refund the decretal sum once the appeal succeeds. The matter before me involved both the monetary and the suit property being decreed to be due for delivery to the Respondent.

15. I have asked myself the question if the applicant has demonstrated that indeed the decree holder has a plan to spirit the property and that he is a person of the straw and will be unable to effect a refund should the appeal succeed. There is however a mention at ground (v) of the Notice of Motion that if stays is not granted the decree holder may sell the suit property. In the affidavit in support however no attempt is made to show that indeed the property will be put beyond the reach of the court by sale. To that extent the applicants fears have not been grounded yet it is his onus to prove substantial loss.

16. Under sections 107-109, Evidence Act, the onus of proving a point is upon in who would fail if no proof at all is offered. It was thus a tall times rested upon the applicant to prove substantial loss by way of the subject property being unavailable upon the determination of the appeal. Having heard the parties I am not convinced that the burden has been discharged. I say so because the property remains charged and it is inconceivable how one can alienate such a property prior to discharge.

17. In my view to grant or refuse an order for stay is a judicial discretion which must be exercised judiciously and upon cogent facts. Without evidence that the property would be alienated and put beyond the reach of the court should the appeal succeed coupled with failure to demonstrate the Decree holder is a man of the straw who would be unable to effect a refund of Kshs.8,000,000 should the appeal succeeds leave me with no alternative but to find that substantial loss has not been proved.

Has the applicant given security for the due performance of the decree that might be ultimately binding upon him?

18. I have pointed out that the decree commands the transfer of the suit property to the Respondent, payment of kshs.8,000,000 as general damages together with costs of the suit.

19. To comply with the requirement of order 42 Rule 6(2) the applicant need to address and secure the obligations under the decree as may be binding upon him ultimately. In the instant case, the applicant has indeed offered two titles which he says adjoin the suit property and which taken together with the suit land have been valued at a sum of 79,000,000 and unencumbered by any bank loan unlike the suit land. In his affidavit the applicant is not unequivocal that it offers the two as security but may not be in vain that he says he owns both and gives their value. If that was all he was expected to give I would order that

the two titles be deposited with the court accompanied by an undertaking by the advocate that the same shall not be alienated, charged or sold during the pendency of the appeal. I am however aware that the substratum of the appeal and this suit was and will be the suit land MOMBASA/BLOCK X/291. The Respondent has raised a concern, which I cannot dismiss as idle. The concern is that the same remains encumbered by a charge in favour of a bank and that nothing has been offered to give the assurance that pending the determination of the proposed appeal to the court of appeal, there would be no default with the inevitable consequence that the bank would seek to exercise its statutory power of sale. If that were to happen then the very essence of the appeal shall have been lost. In fact the concern and anxiety by the Respondent was that while the three titles were at one time all charged to the bank, the two were discharged in 2011 while the subject land remained encumbered. The foregoing lead me to find that there has not been offered security for the discharge and satisfaction of the decree should the appeal not succeed.

20. In my view the parameters set under the law for grant of stay pending appeal are cumulative and not isolated. Failure to satisfy one requirement is enough for the court to decline stay. Additionally I take cognisance of the fact that the Respondent has decree which it itself is a property protected under Article 40 just as much as the Applicants right to access justice and be heard by the court is protected.

21. Balancing both sets of rights and taking into account the fact that this matter has been in court for the last 16 or 50 years, I hold and find that in this matter the Respondent need not be curtailed from accessing and enjoying the fruits of his litigation any further

22. The upshot of the foregoing is that I decline to grant stay and dismiss the application dated the 26.8.2015 with costs to the Respondent.

Dated, signed and delivered at Mombasa this 4th day of December 2015.

In the presence of

Mr.Munyithya for the Applicant/ 2nd defendant.

Odera for Amuga for the Respondent/plaintiff.

No appearance for the 1st & 3rd Defendant.

P.J.O.OTIENO

JUDGE