



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NUMBER 220 OF 1992

ANGELO CONSTABIR. 1ST
PLAINTIFF

IDRIS HAJI OSMAN 2ND
PLAINTIFF

VERSUS

HUSSEIN ALI ODEY

AMINA ALI ODEY

FATUMA ALI ODEY REPRESENTATIVES
OF

AHMED ALI ODEY (DECEASED).
1ST DEFENDANT

JUSTUS NYAMU GATONDO.
2ND DEFENDANT

GERALDINE JAMES t/a

FLAVE ENTERPRISES. 3RD
DEFENDANT

WOOL WICH INVESTMENT LIMITED.
4TH DEFENDANT

REGISTRAR OF GOVERNMENT
LANDS. 5TH DEFENDANT

R U L I N G

The application before the court is the Notice of Motion dated the 2nd February, 2012. It was filed by the 1st Defendant and seeks stay of execution of Mugo J's judgment made on 29th November, 2012, pending the filing, hearing and final determination of an intended appeal to the Court of Appeal.

The Application is opposed by the Plaintiffs and both sides filed written submissions.

In his submissions the Applicant argues that not only did he file this application without any delay but also that unless the stay sought is granted, the intended appeal to be filed will be rendered nugatory if the subject premises are disposed off by the Judgment creditor to whom a conveyance of the property is likely to be done under the judgment in question. Finally, the applicant also offered to deposit any security or obey any terms that the court may attach to the granting of the stay sought.

On the other hand, the Respondent/Judgment Creditors argued that the Applicant is not entitled to the stay of execution sought for the reasons that: -

1. There was delay in filing this application seeking stay.
2. They waited for over 20 years to get the judgment and it would be unjust to continue subjecting them to a further delay from enjoying the fruits of their judgment.
3. The Applicant failed to offer any specific security even against a liquidated part of the judgment of Kshs.762,752/=.
4. No substantive appeal to the Court of Appeal has been filed despite the filing of the Notice of Appeal on 2nd December, 2011.

I have carefully considered the arguments advanced by both the applicant and the Respondents. This application was filed in court on 2nd February, 2012. The court's judgment was delivered on 29th November, 2011 when the court, on oral application by the 1st Defendant, granted on interim stay of execution for 60 days. The said stay would last until end of January, 2012. The filing of this application on 2nd February, 2012 cannot therefore, by any standards, be said to have been inordinately delayed and the respondent's argument on delay has no merit.

As to the second objection by the Respondents that it took them over 20 years to obtain the judgment, the court agrees with the applicant that such delay was not shown to have been deliberately caused by the applicant besides the fact that such delay before Judgment has no bearing on the principles upon which stay is granted by courts.

I will now turn to the other principles upon which stay of execution is considered. In this application as the court understands it, the applicant offered to fulfill any terms on conditions the court might attach to the granting of a stay. In the court's view, that was a sufficient offer for security.

Turning now on the issue as to whether the Applicant will suffer substantial loss if the stay is not granted, the court agrees with the applicant. The subject matter of this suit is the named piece of land. If the piece of land is presently transferred to the Plaintiffs, there is a likelihood that they might alienate it by transfer or charge or any other way alienation. The result would be to indeed render the appeal nugatory if the same were successful. That would mean a substantial loss which will not be easily compensated to the successful Appellant. There is therefore, a reasonable cause to grant a stay.

The concern of the court however, is that no substantive appeal has been filed up to this moment. The court would expect the Applicant to have filed an additional supporting affidavit to explain the delay in filing the appeal at the Court of Appeal instead the applicant treating the issue in a casual away, even blaming the plaintiffs in raising the point. Treating the Notice of Appeal as an appeal for the purpose of obtaining stay, is trite law. However, this court cannot ignore the provisions of Rul3 83 of the Court of Appeal Rules 2010 which states: -

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

The relevant period within which a substantive appeal should be filed after the notice of appeal is filed, is given by Rule 82 (1) as 60 days. While the Registrar of the High Court can give a certificate of delay cases where applicants attempt to misuse the provision are not unknown

In this case, the court is concerned that the Applicant is not doing enough to file a substantive appeal and move on with it. He blames the court for failing to provide him with the lower court records by relying only on correspondences. In a case where the court appears not to act, a visit by counsel to the Registrar, can solve any outstanding obstacle.

Be that as it may, for reasons already indicated above, this court finds that this is a suitable case in which to grant a stay of execution on terms in the following manner.

- 1. Stay of execution is hereby granted abiding the filing, the hearing and the final determination of the intended appeal on the following terms: -**
 - a. That the applicant/1st defendant shall deposit in court the sum of Judgment of Ksh.762,752/25 together with court interest from the day of filing the suit, within 30 days.**
 - b. The substantive appeal to the Court of Appeal under the Registrar's certificate of delay shall be filed within 30 days.**
- 2. In default of either (a) or (b) or both of (1) above, the stay of execution order herein made, shall automatically stand discharged or cancelled.**
- 3. Costs will be in the appeal.**

Orders are made accordingly.

Dated and delivered at Nairobi this 11th day of February, 2014.

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D A ONYANCHA

JUDGE