



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ENVIRONMENT AND LAND COURT

MISC CIVIL APPLICATION NUMBER 58 OF 2013

CONSTANTIOUS WAMBU MIGWI APPLICANT

VERSUS

GICHUGU WATER & SANITATION TRUST 1ST RESPONDENT

TANA WATER SERVICES BOARD 2ND RESPONDENT

RULING

This is in respect to the appellant/applicant's Notice of Motion brought under **Order 42 Rule 6 of the Civil Procedure Rules** seeking the substantive order that there be a stay of execution of the decree in Kerugoya PMCC No. 3 of 2010 pending the hearing of this intended appeal. The same is supported by the affidavit of the applicant CONSTANTIOUS WAMBU MIGWI.

The application is opposed and a replying affidavit has been sworn by M.M. NAIVASHA the Chief Executive Officer of the 2nd respondent.

Counsels have filed their submissions.

An applicant seeking stay under **Order 42 Rule 6 Civil Procedure Rules** has to show:-

- a. ***That he may suffer substantial loss unless the order sought is granted and also the application is made without un-reasonable delay; and***
- b. ***Such security as the Court orders for 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 KARUGA 1982 – 88 K.A.R. 1** it was held that substantial loss is the cornerstone for granting stay. It is therefore clear that apart from bringing such an application without unreasonable delay, the applicant must also demonstrate to the satisfaction of the Court that substantial loss will ensue if the order is not granted. A stay order will not be granted as a matter of course. To determine whether the applicant herein has demonstrated that substantial loss will ensue, I have looked at his ten (10) paragraphs supporting affidavit and what I gather from it is simply that:-

- ***He was dissatisfied with the judgment in Kerugoya PMCC No. 3 of 2010 which concerned his plot No. 69 in Gichugu***
- ***His appeal has high chances of success and will be rendered nugatory unless stay is granted***
- ***He is a long distance track driver***

- ***Though judgment was delivered in 2012, he was not advised by his advocate and only learnt about it in April 2013***
- ***He will abide by any conditions the Court orders***
- ***The suit involves land which is of sentimental value to him as he inherited it from his deceased father***

From the above, it is clear that the applicant has neither given any evidence of substantial loss nor deponed to the same yet this is a condition for the grant of a stay order. Even the further affidavit of his previous advocate Mr. Mwai who acted for him in Kerugoya PMCC No. 3 of 2010 is only helpful in explaining the delay in bringing this application but does not assist the applicant on the issue of substantial loss.

In **TERESIA KIMANI VS GITHERE INVESTMENT LTD H.C. CIVIL APPEAL NO. 944 of 2003** Visram J (as he then was) addressed himself as follows in a similar application:-

“ A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused. There is no evidence of substantial loss demonstrated in this application”

I think the above is a clear exposition of the law to guide the Court in an application of this nature and I am in agreement with it. Since the law talks of

“***substantial loss***”, an applicant seeking a stay must place before the Court evidence that demonstrates with clarity what “***substantial loss***” will ensue if the stay is not granted. Only then will the Court be in a position to make a finding in his favour. The nearest that the applicant has come to that requirement is to state that the suit involves land which is of sentimental value to him. But being of sentimental value does not necessarily mean the same thing as substantial loss. I would say that to demonstrate such loss, the applicant must place before the Court evidence to show that unless stay is granted, he will suffer real and considerable loss. The applicant has not only not pleaded such loss but has also not demonstrated it. He cannot therefore be deserving of such remedy.

Therefore, the applicant having failed to demonstrate what substantial loss he will suffer if stay is not granted, the application dated 29th April 2013 is dismissed with costs.

B.N. OLAO

JUDGE

10TH FEBRUARY, 2014

10/2/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Ms Thungu for Applicant – absent

Ms Ndegwa for Respondent – present

COURT: Ruling delivered this 10th day of February 2014 in open Court.

Ms Thungu for applicant absent

Ms Ndegwa for respondent present.

B.N. OLAO

JUDGE

10TH FEBRUARY, 2014