



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 136 OF 2013

MURAGE NJERU.....PLAINTIFF/RESPONDENT

VERSUS

LINUS MBOGO NJERU.....DEFENDANT/APPLICANT

RULING

Introduction

The application before me is the Notice of Motion dated 18th June, 2020 brought under **Order 42 Rule 6 (1) (2) and (3), Order 50 Rule 1 CPR**. The Applicant is seeking the following orders:-

(a) Spent.

(b) That there be a stay of execution of the decree issued on 22nd May 2020 pending the hearing and determination of an intended appeal.

(c) That the Court issues any other orders it deems fit in the interest of justice.

(d) That costs of the application be provided for.

The application is premised on the following grounds:-

(a) The applicant was dissatisfied with the judgment given on 22nd May 2020.

(b) The applicant intends to file an appeal to challenge the judgment and has filed and served the Notice of Appeal.

(c) The applicant has applied for typed and certified copies of the proceedings for the Appeal.

(d) That the Appeal has overwhelming chances of success.

(e) That the Appeal will be rendered nugatory if the respondent is allowed to execute.

(f) That the respondent will not suffer any loss.

The application is supported by the affidavit of the applicant the same date. In response, the respondent filed grounds of opposition dated 6th July 2020 in which he stated that the application is bad in law, vexatious and frivolous. When the application came up for inter-partes on 13th July 2020, the parties through their counsels agreed to dispose of the same by written submissions.

Statement of the facts

The applicant through the firm of Mogusu & Company Advocates filed their submissions on 24th July 2020. From his submissions, the applicant submitted that they applied for the Notice of Appeal on 15th June 2020 and also the typed proceedings. He submitted that the Appeal raises triable issues and that the applicant seeks to pursue his Appeal. He further submitted that the respondent would not suffer

prejudice if the orders are granted since he works and lives on the land.

The respondent on his part submitted that for a party to be granted stay of execution pending appeal under *Order 42 Rule 6*, they must satisfy the three requirements of proof of substantial loss. The applicant must also be made without unreasonable delay and thirdly, the applicant must offer security for the due performance of the decree that could be binding upon him. The respondent submitted that the applicant failed to establish loss and relied on the case of *Machira T/A Machira & Co. Advocates Vs East African Standard No. 2 (2002) K.L.R 63* and *Charles Wachira Geihi Vs Angela Wairimu Geihi C.O.A Civil Application No. 302 of 2007 U.R 2005/2007* where it was held that the applicant must show the substantial loss he will suffer, if stay is not granted.

On security, the respondent submitted that the applicant failed to offer any form of security for the due performance of the decree. He submitted that the applicant did not meet all the three conditions to warrant the stay of execution order.

Analysis

The issue that this Honourable Court is called upon to decide is whether the applicant has met the threshold for the grant of stay pending Appeal under *Order 42 Rule 6 CPR*. The conditions for the grant of stay pending appeal are set out in the *Civil Procedure Rules Order 42 Rule 6 sub-rule 2* as follows:

“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 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 applicant”.

In the case of *Vishram Ravji Halal Vs Thornton & Turpin Civil Application No. 15 of 1990 (1990) K.L.R 365*, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under *Order 41 Rule 6 (now Order 42 Rule 6) of the Civil Procedure Rules* is fettered by three conditions namely; *establishment of sufficient cause, satisfaction of substantial loss and the furnishing of security*. Further, the application must be made without unreasonable delay.

The threshold for stay pending appeal are as follows:-

(a) Arguable appeal/sufficient cause.

(b) Substantial loss to be suffered by the applicant

(c) The application must be made without unreasonable delay and

(d) The security given by the applicant.

In *Gitarau Peter Munya Vs Dickson Mwenda Kithinji – Supreme Court Application No. 5 of 2014 e K.L.R*, the Supreme Court held that conservatory orders should be granted on the inherent merit of a case. The Court reiterated the two requirements of an arguable appeal and that unless stay is granted, the intended appeal would be rendered nugatory. Substantial loss, it also included a third factor of public interest. In the instant case, the application was made without unreasonable delay, therefore the factors remaining for consideration are whether the applicant will suffer substantial loss and whether the applicant has an arguable appeal. On whether the applicant has an arguable appeal, the Court of Appeal in the case of *Kenya Railways Corporation Vs Erdemanu Property Limited (2012) e K.L.R* held that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. The applicant has not raised the triable issue which he intends to argue before the Superior Court in the intended Appeal. As such, we are not able to discern whether the same are indeed arguable or not. He has merely stated that there are triable issues. I do not think this indicates sufficient cause in the appeal. On the issue of substantial loss, *Kimaru J.* in the case of *Century Trading Company Ltd Vs Kenya Shell Limited Nairobi (Milimani) HCCA No. 1561 of 2007* held as follows:-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to all different from that where execution of a money decree is sought to be stayed. In considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. 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 the respondent’s submissions, he cited the case of *Machira T/A Machira & Co. Advocates Vs East African Standard No. 2 (2002) K.L.R 63* where the Court held that it is not enough for one to merely state substantial loss, they must be proved with details and particulars. In the case of *Charles Wachira Geihi Vs Angela Wairimu Geihi C.O.A Civil Application No. 302 of 2007 U.R 2005/2007 (as quoted in Peter Rugu Gikanga & Another Vs Weston Gitonga & 10 others (2014) e K.L.R* held that it is not enough for the applicant to claim he lives on the suit land and will thus suffer substantial loss. The applicants must go further and show the substantial loss that the applicants stand to suffer if the respondent executes the decree in this case against them.

In the case of *Kenya Shell Ltd Vs Kibiru 1986 – 1989 E.A.L.R 266*, the Court of Appeal held thus:-

“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 is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented”.

Again in the case of *Kenya Hotel Properties Ltd Vs Wulesden Investments Ltd (2007) e K.L.R*, the Court of Appeal held that where undue hardship is occasioned on the applicant, then the balance of convenience is in his favour. In this case, the applicant did not give particulars of the substantial loss that he will suffer should the orders of stay sought not be granted. It was incumbent upon the applicant to demonstrate what substantial loss he stands to suffer unless the stay orders are granted. The dispute arising out of this application is a parcel of land L.R. No. BARAGWI/THUMAITA/526 where the respondent’s/plaintiff’s claim to the title on the basis that the land was clan/trust land, held by his maternal uncle on behalf of his mother who was unmarried and maternal grandfather, that was later transferred to the defendant. Both parties have been residing on the land.

In deciding an application of this nature, I am guided by decisions by the High Court and Superior Courts. In the case of *Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC No. 795 of 1997, Warsame J.* (as he then was) was faced with a similar conundrum and held as follows:-

***“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the Court. The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. For the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the Court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation At the stage of the application for stay of execution pending appeal, the Court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides*”**

Considering that the applicant in this case has only made assertion of substantial loss without empirical or documentary evidence to support the same, this Court cannot therefore put unnecessary hindrance to the right of the respondent to enjoy the fruits of his judgment. Though the parties have been residing in the disputed parcel of land parcel No. BARAGWI/THUMAITA/526, the grant of stay would be a great injustice to the respondent as he would not have enjoyed fully the fruits of his judgment over the portion of land he was given as he would not be able to have the title in his name and obtain the benefits accruing from such a title e.g. bank loan. On the other hand, if stay is not granted and the land in dispute changes hands to third parties and the intended appeal succeeds, the appeal shall be rendered nugatory. However, there is no evidence adduced by the applicant that the respondent is likely to dispose of the land in dispute before the intended Appeal is heard and determined. As such, I do not think the applicant has demonstrated any substantial loss and therefore the respondent should be left to enjoy the fruits of his judgment.

Conclusion

For the reasons aforesaid, I find that the applicant has failed to meet the threshold that would merit stay of execution orders pending an appeal in his favour. Therefore the application dated 18th May 2020 fails and the same is hereby dismissed with costs to the respondent.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 18TH DAY OF SEPTEMBER, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Mwangi Maina holding brief for Mugusu for Applicant
2. Ms Waweru holding brief for Wangechi Munene for Respondent
3. Mbogo - Court clerk