



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 37 OF 2016

JOHN KAMANGU

JACKSON MWANGI

CHARLES NJUGE

(Suing on behalf of Ya Mumbi Farmers' Co-operative Society).....PLAINTIFFS

VERSUS

ANNAH NJERI KAMAU.....DEFENDANT

AND

REGISTRAR FOR LANDS UASIN GISHU COUNTY.....1st INTERESTED PARTY

NATIONAL LAND COMMISSION.....2ND INTERESTED PARTY

RULING

This The plaintiff /applicant filed his application dated 27th November 2018 seeking the following orders.

- a) Spent
- b) That this Honorable court be pleased to grant stay of execution of the Ruling delivered on 21st June 2018 and the taxation of the Fill of costs herein pending hearing & determination of this application.
- c) That this Honorable court be pleased to grant stay of execution of this taxation pending the hearing and determination of the appeal.
- d) That this Honorable court be pleased to grant a conservable order preserving the suit land from being sold, transferred, charged, registered or any such dealing on pending the hearing and determination of this appeal.
- e) That this court be pleased to provide for costs.

The plaintiff vide his plaint dated the 17th February 2016 and amended on 19th September 2016 instituted a suit against the Defendant /Respondent. The matter was fast tracked and the Defendant /Respondent herein filed his preliminary objection dated 18th January 2018 seeking the plaintiff applicant suit be struck out.

Ruling on the Defendant's preliminary objection was delivered and the suit struck out with costs.

The defendant respondent on 2nd July 2018 filed his party and party bill of costs dated 28th June 2018 and the same was set for taxation thereby necessitating the plaintiff /Applicant's application before this Honorable court.

APPLICANT'S CASE

Counsel for the plaintiff/applicant relied on the affidavit of sworn by John Kamangu with the authority of the other plaintiff and stated that the legal requirement for stay of execution is provided for by order 42 Rule 6 of the Civil Procedure Rules 2010 which gives three prerequisites that: -

- a) The application is brought without undue delay
- b) Substantial loss may result
- c) Security for performance be provided for

Counsel submitted that the application was made on 28th November 2018, the plaintiff/applicant having been dissatisfied with the ruling filed a notice of Appeal on the 5th July 2018 together with a request for typed proceedings that occasioned the delay within which this application for stay was filed. Counsel submitted that the delay is not unreasonable as the same was occasioned by delay in supply of the typed proceedings to enable the applicant prepare a record of appeal.

Mr. Maritim relied on the case of **Florence Hare Makha V Pwani Tawakal Mini Coach & Another (2014) eKLR** where the court allowed an application for stay though it was filed almost a year after the delivery of judgment by the trial court.

On the question of whether substantial loss may result, Counsel submitted that the court should exercise its discretion in favour of the applicant as per the decision of the Court of Appeal in **Butt —vs- Rent Restriction Tribunal (1982) KLR 417** where the court held that discretion ought to be exercised in a manner that would not prevent an appeal.

Counsel further submitted that the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay.

On the question of security, counsel submitted that this is a non-monetary claim and the subject matter is land. Counsel cited the case of **Focin Motorcycle Company Limited -vs- Ann Wambui Wangui & Another (2018) eKLR** where the court stated that it is sufficient for the applicant to state that he is ready to provide security or propose the kind of security but it is the discretion of the court to determine the security.

The Court of Appeal in **Butt V Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

1. The Power of the court to grant or refuse an application for a stay of execution is a discretionary Power. The discretion should be exercised in such a way as not to Prevent an appeal.
2. The general Principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the Proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its Powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.

Mr Maritim urged the court to find that the applicant has met the threshold for grant of stay of execution hence the application should be allowed as prayed.

RESPONDENT'S CASE

Counsel for the Respondents also relied on the provisions of t Order 42 rule 6 (2) of the civil procedure rules 2010 on stay of execution Counsel relied on the case of Antoine Ndiaye —Vs- African Virtual University 2015 eKLR where Justice Gikonyo held that

"Stay of execution should only be granted where sufficient cause has been shown by the applicant and in determining whether sufficient cause has been shown the court should be guided by the three prerequisites provided under order 42 rule 6 of the civil procedure rules",

Mr Mathai also relied on the case of **Scofinaf Company Limited Vs- Nelphat Kimotho Muturi [20131 eKLR** where Justice Odunga stated that

"The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under order 42 rule 6(2) of the civil procedure rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made, that the application has been made without unreasonable delay; and that such security as the court orders

for the due performance such decree or order as may ultimately be binding on him has been given by the applicant.

In Antoine Ndiaye —Vs- African virtual University [20167 eKLR Justice Gikonyo cited the holding in the case of Sewankambo Dickson —VS- Ziwa Abby HCT-OO-CC MA 0178 of 2005 where it was held that,

"Substantial loss is a qualitative concept. It refers to any loss great or small that is red worth or value as distinguished from a loss without value or loss that is merely nominal insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals especially in a commercial court such as courts where the underlying transactions typically tend to lead to colossal decretal amounts".

Counsel submitted that the applicants have not demonstrated that they would suffer substantial loss. Further that the ruling which the plaintiffs intend to be stayed was delivered on the 1st June, 2018 and the plaintiffs filed this current application on the 27th November, 2018. The same was filed after a period of 5 months from the date of the ruling and no explanation has been given for the unreasonable delay in the filing of this application.

Counsel relied on the case of Utalii Transport Company Limited and 3 others -Vs- NIC Bank Limited and another 2014 eKLR where the court said "

"Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads an escapable, conclusion that it is inordinate and therefore inexcusable/e on applying the courts mind on the delay caution is advised for courts not to take the word "inordinate" in this dictionary measuring but in the sense of excessive as compared to normally". The plaintiffs have not given any explanation as to why they took five months to file this application even after being served with the defendant's bill of cost. It was not an awakening call to them that they ought to have filed this application hence the delay of five months is unreasonable.

On the requirement on security for due performance of the decree, counsel submitted that the applicants have not stated what security they are willing to give and relied on the case of Arun C Sharma —Vs- Asha Rairunda/ia & Co. Advocates Justice Gikonyo stated that,

"The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant it is not to punish the judgment debtor civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules act as for due performance of such decree or orders as may ultimately be binding on the applicants. I presume the security must be one which can serve the purpose."

That security has not been offered even though it is the court to determine the security the same can be done only where the applicant has demonstrated willingness to give that security which has not been done by the plaintiffs herein.

Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

An application for stay of execution is anchored on Order 42 Rule 6(2) of the Civil Procedure Rules which provides that no order for stay of execution shall be granted 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 orders as may ultimately be binding on him has been given by the applicant

Therefore, the issues for determination are as to whether the applicant has met the above threshold. On the first issue of application being brought without undue delay, the application was filed on 28th November 2018. The plaintiff/applicant filed a Notice of Appeal on 5th July 2018 together with a request for typed proceedings. This was a period of 5 months as the ruling appealed against was delivered on 1st June 2018. There is a letter requesting typed proceedings by the applicant's advocates that was written on 29th June 2018.

In the case of Jaber Mohsen Ali & another v Priscillah Boit& another E&L NO. 200 OF 2012[2014] eKLR it was stated:

"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay being dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."

I find that the explanation given for the delay is sufficient and therefore there was no unreasonable delay.

On the issue as to whether the applicants will suffer substantial loss, the applicants contend that the subject matter of the suit is land and the only other issue is costs. According to the applicant, in the event that stay is not granted, the subject matter could cease to exist and therefore the right of appeal will not be exercisable.

In the case of **David Kihara Murage v Jacinta Karuana Nyangi & another [2015] eKLR** the court held;

“The applicant ought to have placed beyond the Court facts to show to the satisfaction of the Court that if no stay is granted, he will suffer a loss that is substantial. The mere fact that land is concerned does not make any loss substantial.”

The applicants’ only explanation of substantial loss is that the appeal would be rendered nugatory if stay is not granted. However, noting that the grant of stay orders is discretionary, I will exercise my discretion in favour of the applicant.

I have considered the application, the submission by counsel and grant the order of stay of execution as prayed.

DATED and DELIVERED at ELDORET this 28TH DAY OF October, 2020

DR. M. A. ODENY

JUDGE