REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT OF KENYA AT ELDORET

ELC CASE APPEAL NO.41 OF 2019

CHARLES KIPKOECH TALLAM.....1ST APPELLANT

KIPNGOK ARAP TALLAM.....2ND APPELLANT

KIPKEMOI MARINOI & TESSY MARINOI (*Appealing as The Administrator*

***of The* ESTATE OF KIPTIM MARINOI).....3RD APPELLANT**

GIDEON KIPKOGEI CHEPSOM (*Appealing as The Administrator of the Estate*

***of* KIPCHOLIO CHEPSOM).....4TH APPELLANT**

JOHN KIPCHUMBA TALLAM (*Appealing as The Administrator of the Estate of*

KIPRONO SAMOEI TALLAM).....5TH APPELLANT

VERSUS

ELKANA KIBINGOR.....RESPONDENT

RULING

This ruling is in respect of an application dated 9th March 2020 by the Applicants seeking for the following orders:

a) Spent

b) There be exparte interim order of stay of execution of orders and or directions issued on 16th October 2020 by the Honourable Principal Magistrate in Eldama Ravine Award No. 2 of 2008 pending hearing and determination of this application inter partes.

c) That there be temporary orders of stay execution of orders and or direction issued on 16th October 2019 by the Honourable Principal Magistrate in Edama Ravine PMCC Award No.2 of 2008 pending hearing and determination of this Appeal.

d) Costs be provided for.

Counsel agreed to canvas the application by way of written submissions.

APPLICANTS'SUBMISSIONS

Counsel for the applicants relied on the supporting affidavit of the applicants and the grounds on the face of the application. Counsel submitted that the ruling that gave rise to the current appeal is in respect of an order decreeing that the respondent be registered as a joint proprietor of Plot no. L/R 498/121 with equal shares, an audit of all income be carried out from the 4th June 2008 to date by an audit firm to be agreed by the parties whose appointment should be done within 60 days, and thereafter the respondent be paid his equal share of income after the audit and lastly failure to pay as ordered above, the respondent who was the decree holder was free to take appropriate recourse on the same.

It was counsel's submission that the applicants having been aggrieved by the order of the lower court preferred this appeal and is seeking for stay of execution as there is lurking danger of execution which would render the appeal nugatory. Further that the applicants are of old age,

sickly and of deteriorating health, hence cannot stand rigorous execution proceedings which include committal to civil jail or attachment of properties. Counsel submitted that the applicants filed an application at the lower court but the same was dismissed.

Mr Kipnyekwei counsel for the applicants submitted that the court has original and inherent jurisdiction to grant stay of execution pending appeal as provided under Order 42 and Order 22 of the Civil Procedure Rules. That the applicants are willing to abide by such terms and conditions as ordered by the court.

Counsel cited the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR]eklr** where Justice Gitari held that,

> "*it is the court which determines the security upon ordering stay to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree."*

That the applicants have demonstrated sufficient cause and substantial loss which they may incur incase stay of execution is not granted.

Counsel relied on the case **CARTER & SONS LIMITED V. KENYA FINANCE CORPORATION LTD & 2 OTHERS, HCCC NO. 5638 of 1989** where the Court of Appeal held

> "*….the mere fact that there are strong grounds of appeal would not, in itself) justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensure from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."*

Mr. Kipnyekwei submitted that in this case the appellants appeal is on record and also part of the record. That the substratum/ subject matter of the appeal are the entire orders of the trial magistrate which include the directives that audits be taken, that the property be registered in the joint names of the parties in this suit. Counsel cited the case of Macharia **M. Sande -Vs- Kenya Co-operative Creameries Limited Mombasa CA No. 154 of 1992 (UR) and Nairobi City Council versus Thabiti Enterprises Limited 11995-19981 2EA231** where the court held that a Judge has no power to decide an issue not raised before him through the pleadings of which parties are made aware

On the issue of substantial loss, counsel submitted that the applicants have demonstrated substantial loss as loss of having an appeal rendered nugatory is one that is substantial and irreparable and relied on the case of **James Wamalwa& Another vs Agnes Maliaka Cheseto in Misc. Application No.42 of 2011 at Bungoma High Court** where the court held that

> "*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential of the Applicant as the successful party in the appeal. This is what substantial loss would entail..."*

Similarly in the case of **Selestica Limited —Vs- Gold Rock Development Ltd [2015]** Aburili J held that

> "*..This court is enjoined to find that the right of appeal is a constitutional right and the cornerstone of the rule of law. It is guaranteed under Article 50(1) of the Constitution, Section 75 of the Civil Procedure Act and Order 43 (1) of the Civil Procedure Rules. The said right was exercised under section 79G of the Act and stay sought under Order 42 rule 6 of the Rules. It is not the intention of this court to oust a party approaching it from the judgment seat."*

On whether the applicants need to deposit security, counsel submitted that it was purely on the discretion of the court and that the parties had not taken account of the rental income since they were yet to appoint an auditor. Further that the court had to balance the right of the respondent to enjoy the fruits of the judgment and the right of the appellants to be afforded an opportunity for fair trial in prosecuting the appeal. Counsel urged the court to consider the hardship the applicants may encounter if execution was to take place and prayed that the application be allowed as prayed.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent in opposing the application relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules which the applicant must satisfy before the court can grant the orders of stay of execution. Counsel submitted that the applicants have not met the ingredients for grant of stay of execution.

On the issue as to whether the applicants will suffer substantial loss, counsel submitted that joint registration does not disposes the applicants of the property in any way and if the appeal is successful, the subject matter will still be in existence as a joint owner cannot deal with the property without the consent of the other registered owners. Further, if the appeal is successful, the joint registration can be reversed.

Mr Siboe therefore submitted that the applicants have not demonstrated that they will suffer any substantial loss to warrant the grant of orders of stay of execution. That the allegation that they were too old to live with the consequences of enforcement of the orders is neither here nor there.

It was counsel's further submission that the order has been in existence since 4th June 2020 and no appeal was preferred against this order therefore no appeal can lie against the order. Counsel submitted that an audit of the assets will not prejudice the applicants in any way in a matter that costs would not remedy if the Appeal is successful.

Mr Siboe also submitted that the determination in this case cannot be appealed against as it emanated from the Land Dispute Tribunal on 4th June 2008. Counsel relied on the case of **Kenya Shell Limited vs Kibiru (1986) KLR 410 Platt Ag J. A. (as he was then) at page 416** expressed himself as follows:

> *"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 rare case when on appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner state of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the Respondent should be kept out of their money."*

Counsel submitted that Applicant/Judgment debtors have not demonstrated any risk of the Respondent's inability to refund and or settle any sums owing in the event the appeal succeeds. The burden is upon the applicants to prove and that is the position as it was held in **Caneland Ltd Malkit Singhpandhal & another v Delphis Bank Ltd [2000] eKLR** where the Court of Appeal observed thus;

> *'Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue.'*

Further in the case of **Stephen Waniohi vs Central Glass Industies Ltd Nairobi I-ICC No. 6726 of 1991** it was held:

> *"Financial ability of a decree holder solely is not a reason for granting stay, it is not enough that the decree holder is not dishonourable miscreant without any form of income. Suffice to state that the respondent at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is likely to make good whether sum he may have received in meantime."*

Counsel submitted that the age of the parties is another factor that militates against granting stay and there is real fear that the Respondent may never see the fruit of his judgment. Further that this being a family dispute the applicants have not shown any desire of making any concessions even if it means sharing the piece of pie and include the Respondent.

Mr. Siboe therefore urged the court to dismiss the application with costs to the defendant.

ANALYSIS AND DETERMINATION

The principles that guide the court in an application for stay of execution are as provided for under Order 42 Rule (6)2 of the Civil procedure Rules. An applicant must satisfy the ingredients before the court can grant such an order.

The issues for determination in this case are as to whether the applicants have satisfied the following:

a) Substantial loss occurring if stay is not granted

b) The application has been brought without undue delay

c) Security has been offered for the due performance of the decree

Order 42 rule 6(1) which provides as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

This is a case that has been in the court corridors for many years. It should be noted that the parties are very old and have been in search for justice for many years. They finally got the justice and what is remaining is the implementation of the fruits of the judgment. It should also be noted that the parties are relatives which should have made mediation or alternative justice system the appropriate way to access justice. This was not to be.

On the issue of filing the application timeously, the order being sought to be stayed was issued on 16th October 2019 and the applicant filed an application before the Magistrate's court which was dismissed on 20th February 2020 and the current application was filed on 9th March 2020, which makes it compliant with time.

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

> *"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is 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."*

In the case **KENYA COMMERCIAL BANK LIMITED -vs- SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR** the court held that

"In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced".

The court must balance the interest of the two competing parties. The balance of the competing interest tilts in favour of the respondent and not the applicants.

On the issue of whether the applicants will suffer substantial loss see the case of **Samvir Trustee Limited V Guardian Bank Limited [2000] eKLR**, where Justice Warsame observed thus;

"I agree that every party aggrieved with a decision of this -court has a natural and undoubted right to seek the intervention of the Court of appeal. And as far as this matter is concerned, I do not think this court should put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. In my understanding a stay would be granted unless there is overwhelming hindrance to the exercise of the discretionary powers of the court.

I appreciate and understand that 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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/ defendant.

It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss."

Further in the case of **Macharia t/a Macharia & Co. Advocates v. East African Standard (2002)eklr** the court held as follows on balancing the interest of both parties:

"To be obsessed with the protection of an appellant or intending appellant in total disregard of the successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court."

The applicants must prove that they will suffer substantial loss, mere allegation of substantial loss with no tangible evidence of the loss to be suffered cannot suffuce.The execution sought to be stayed is registration as joint owners and audit of accounts, joint registration does not disposes the applicants of the property in any way and if the appeal is successful, the subject matter will still be in existence as a joint owner cannot deal with the property without the consent of the other registered owners. Further, if the appeal is successful, the joint registration can be reversed. There is no loss that will be occasion by the execution of this order.

In the case of **Silverstein v. Chesoni [2002]1 KLR 867** the court held that:-

"The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory."

On the issue that the applicants are aged and might not withstand the rigorous execution proceedings including being committed to civil jail, this is a more reason why they should obey the court order and allow the implementation of the decree. Age is not one of the principles laid down as a reason to stay execution.

On the last issue of security for due performance of the decree, the court has the discretion to order for security which must not be used to punish any party seeking for stay of execution. The discretion must be exercised judiciously. In this particular case the execution of the decree will not render the appeal nugatory as the same can be reversed without causing any prejudice.

Having considered the submissions of both counsel and the relevant judicial authorities I find that the application lacks merit and is therefore dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 21st DAY OF October, 2020

DR. M. A. ODENY

JUDGE