



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO 90 OF 2019

MUKTAR DUBOW HASSAN.....APPELLANT

=VERSUS=

SHAMSA HAJI ISMAIL.....1ST RESPONDENT

ABDIFATAH ISMAIL.....2ND RESPONDENT

RULING

1. This is the notice of motion dated 29th November 2019 brought under rule 3 of part I of the rules of court under the Judicature Act (Cap 8 Laws of Kenya).
2. It seeks orders: -
 - (1) *Spent.*
 - (2) *Spent.*
 - (3) *That the court be pleased to grant a further stay of execution of the orders granted in Civil Case No. 1 of 2010 in the Principal Magistrate's court at Mandera issued on 23rd February 2012 pending the hearing and determination of the appeal herein.*
 - (4) *That a permanent stay of execution be issued in this matter.*
3. The grounds are on the face of the application and are set out in paragraphs 1 to 13.
4. The application is supported by the affidavit of Muktar Dubow Hassan, the appellant/applicant sworn on the 29th November 2019.
5. The application is opposed. There is a replying affidavit sworn by Shamsa Haji Ismail, the 1st respondent herein sworn on the 27th January 2020.
6. On the 10th March 2020, the court with the consent of the parties directed that the application be canvassed by written submissions.
7. The appellant's submission are dated 25th June 2020 and filed in court on 1st July 2020. It is his submissions that the application has met the conditions for grant of stay of execution under order 42 rule 6 of the Civil Procedure Rules. He has put forward the case of **Stephen Wanjohi vs Central Glass Industries Ltd Nairobi HCCC 6726 of 1991.**
8. Further that he has shown sufficient cause. He has put forward the case of **Antoine Ndiaye vs African Virtual University [2015] eKLR.** That he and his family could become homeless if those orders are not granted.
9. It is his submissions that he has demonstrated substantial loss. He has put forward the case of **Ann Njeri Mwangi vs Muzaffer Musafee Essajee & Another [2014] eKLR** where it was stated that substantial loss is not always measured in terms of amount and can be determined based on the consequences that would be visited upon the applicant if stay of execution is not granted. The appellant further submits that he is in possession of the suit property.

10. He further states that this application has been brought without unreasonable delay. He has put forward the case of **Trattoria Ltd vs Joaminah Wanjiku Maina [2013] eKLR**.

11. The right of ownership and possession of the suit property is what is in question in appeal and if the appellant is evicted from the suit property, the appeal will be rendered nugatory. He has put forward the case of **Mukuma vs Abuoga [1988] KLR 645; Butt vs Rent Restriction Tribunal [1982] KLR 417**.

12. He further states that the respondent will not be prejudiced if these orders are granted. He prays that the application be allowed.

13. The 1st respondents, submissions are dated 6th July 2020. She states that the appellant is not keen on prosecuting the appeal because he does not have an arguable case. She has put forward the case of **John Mwangi Ndiritu vs Joseph Ndiritu Wamathai [2016] eKLR**. In discharging the stay orders of 26th March 2011, Lady Justice Njuguna was alive and aware of the attempts to enforce the judgment in Manderu CMCC No 1 of 2010 had been made in July 2019.

14. She further submits that that each case should be decided on its own circumstances while considering the inconvenience of denying a successful party the fruits of the judgment. The appellant does not deserve the issuance of the stay orders given his behavior. When he was granted stay orders he abandoned the appeal until the 1st respondent alerted him that the same had been dismissed. She has put forward the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR. Machira t/a Machira & Co. Advocates vs East African Standard [2002] eKLR**.

15. There are no sufficient grounds tendered by the appellant/applicant to warrant the reissuance of the orders of stay of execution. He has no arguable appeal. She ought to be left to enjoy the fruits of the judgment.

16. The 2nd respondent did not file a response to the application nor filed submissions.

17. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

18. It is clear that the appellant was granted orders of stay of execution pending appeal on 26th March 2012. Upon the grant of these orders the appellant/applicant went to sleep. He did not set down the appeal for hearing until it was dismissed for want of prosecution on 15th June 2016. The 1st respondent, states that the appellant was not aware of the dismissal until she alerted him. He was jolted into action and he filed the notice of motion dated 5th August 2019 seeking to reinstate the appeal.

19. Upon considering the application Lady Justice Njuguna reinstated the appeal but discharged the orders of stay granted on 26th March 2012. The Judge also transferred the matter to this court.

20. The first thing the appellant does is to file another application for stay of execution pending appeal. In my view he ought to have set down the appeal for hearing as soon as possible so that the appeal can be heard and determined on merit.

21. It is almost one year since the matter was transferred to this court. Chances are the appeal could have been heard and determined. I find this application to be an abuse of the court process and a delaying tactic by the appellant who is in possession of the suit property.

22. I find that the appellant/applicant has failed to demonstrate that he deserves the orders sought. In the case of **Machira t/a Machira & Co. Advocates [2002] eKLR** the court stated thus:-

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far 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. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal. Of course, 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 the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

23. In conclusion, I find that the appellant/applicant has failed to demonstrate that he deserves the orders sought. I find no merit in this application and the same is dismissed with costs to the 1st respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 21st day of October 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Mercy Mutemi for the Appellant

Mr. Nyabuto for the 1st Respondent

No appearance for the 2nd Respondent

Kajuju - Court Assistant