REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 49 OF 2015

JAMES MURIITHI KAREU.....PLAINTIFF

VERSUS

NDEGE NDEBU.....DEFENDANT

RULING

The application before me is the Notice of Motion dated 16th June 2020 brought under *Section 1A, 1B and 3A CPA, Order 21 Rule 12, Order 42 Rule 6, Order 51 Rule 1 CPR* and all enabling provisions of the law. The Applicant is seeking the following orders:-

(1) Spent.

(2) That there be a stay of execution of the judgment of this Court delivered on 29th May 2020 pending hearing and determination of the application.

(3) That there be a stay of the judgment of this Court delivered on 29th May 2020 pending hearing and determination of the Appeal.

(4) That the costs of this application be provided for.

The application is supported by grounds shown on the face of the said application and the affidavit of Ndege Ndembu sworn the same date. The application is opposed with a replying affidavit sworn by James Muriithi Kareu, the Respondent herein on 14th July 2020.

APPLICANT'S CASE

According to the Applicant, he was aggrieved by the decision of this Honourable Court delivered on 29th May 2020 and has preferred an Appeal to the Superior Court. He stated that the land belonging to him is in danger of being sub-divided, alienated or otherwise disposed off in light of the fact that a decree has since been extracted. He contends that there is real danger of being interfered with by the Respondent unless the orders sought are granted. The applicant further stated that he is justifiably apprehensive that unless this application is heard and disposed of, the plaintiff/respondent will proceed execution of the said Decree and he stands to suffer irreparable loss and damage and the intended Appeal will be rendered nugatory. He attached a Notice of Appeal to the supporting affidavit.

RESPONDENT'S CASE

The respondent on the other hand opposed the said application stating that the said application is frivolous and does not meet the threshold for the grant of stay orders. The respondent further deponed that the Notice of Appeal is only intended to delay this matter and to keep him away from enjoying the fruits of the judgment. The respondent also deponed and stated that the applicant is inconsiderate to him and his family for being homeless after the applicant forcefully chased them out upon demise of his parents.

LEGAL ANALYSIS

I have considered the affidavit evidence and the legal arguments by the parties. I have also considered the applicable law. The applicant is seeking substantive orders of stay pending Appeal under ***Order 42 Rule 6 (2) CPR***. The provisions of the law under the said order states 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 …...".***

it is clear from the provisions of the law that before an order for stay pending appeal is granted, an applicant must establish the following three tenets:-

> ***(1) That he will suffer substantial loss unless the order is granted.***
>
> ***(2) The application has been brought without unreasonable delay; and***
>
> ***(3) The applicant has given security or an undertaking for the due performance of the decree/order as may ultimately be binding on him.***

SUBSTANTIAL LOSS

Substantial loss in its various forms is the corner stone of stay pending appeal. It is what the Court must prevent so that the intended appeal is not rendered nugatory and the applicant if he finally succeeds will not reap a barrent judgment. In a money decree/order, the applicant would ordinarily demonstrate to the Court that the respondent is a man of straw and would not be in a position to refund the money if the appeal succeeds. The subject of the decree in this case is a parcel of land and the applicant must demonstrate that the respondent is likely to sell, transfer and/or dispose of the suit land if execution is allowed to proceed. None of those has been alleged by the applicant. In fact the respondent has indicated that he wants to occupy the suit land since he has been living in rented houses in town. The applicant has not shown in what way his intended appeal will be rendered nugatory. The only way the intended appeal will be rendered nugatory is where the subject matter of the appeal which is land is either going to be sold or disposed of to third parties. The applicant has not suggested that the respondent is likely to sell or dispose of the suit property if the decree is allowed to proceed. It is to be remembered that we are dealing with two competing interests in this application. The applicant's interest as an unsuccessful litigant who has undoubted right of appeal and the respondent who has a right to enjoy the fruits of a judgment. That was the reasoning in the case of ***M/S PORTREITZ MATERNITY VS JAMES KARANGA KABIA, CIVIL APPEAL No. 63 of 1997*** where it was held:-

> ***"That right of Appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right".***

I agree with the above decision. There is no evidence of substantial loss to the applicant either in the matter of disposing of the suit land or failing to give vacant possession if the intended appeal succeeds. There is absolutely no reasons advanced by the applicant which would interfere with the status quo and therefore render the intended appeal nugatory if the stay orders are not granted.

Again in the case of ***KENYA SHELL LTD VS KIBIRU & ANOTHER, CIVIL APPEAL NO. 97 of 1986, NAIROBI,*** the Court stated as follows:-

> ***"The application for stay made to the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the respondents would be unable to pay the money".***

I agree with the above decision. Failure by the applicant to prove substantial loss by itself is sufficient to determine this application. For the reasons I have given, I find that this application is only meant to deny the respondent his right to enjoy the fruits of the judgment delivered in his favour. In the result therefore, the Notice of Motion dated 16th June 2020 lacks merit and the same is hereby dismissed with costs. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 16th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Otuke holding brief for Ikahu Nganga for Plaintiff

2. Defendant – present

3. Mbogo – Court clerk.