



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 120 OF 2014**

**MARY NJERI.....1<sup>ST</sup> PLAINTIFF**

**NICHASIO KABUNYI NGIRIGACHA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL CHOMBA.....DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 14<sup>th</sup> July 2020 brought under Sections 1A, 1B and 3A Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 Civil Procedure Rules. The Applicant is seeking the following orders:-

1. Spent.
2. That the Honourable Court be pleased to grant stay of execution of the judgment delivered on 12<sup>th</sup> June 2020 pending the filing, hearing and determination of the intended Appeal.
3. That the Honourable Court be pleased to grant any further relief as may be necessary for the ends of justice to be met.
4. That the costs of this application be in the cause.

The said application is premised on the supporting affidavit of the applicant and the following grounds:-

- a. That the respondent in this case claimed title by adverse possession of the suit property land parcel No. BARAGWE/GUAMA/434.
- b. That judgment was delivered in favour of the respondents.
- c. That the applicant intends to appeal against the orders made on 12<sup>th</sup> June 2020 and has already filed a Notice of Appeal.
- d. That the applicant has already applied for typed proceedings herein to facilitate filing of the record of Appeal.
- e. That the appeal has high chances of success.
- f. That the appeal will be rendered nugatory unless the orders sought herein are issued.
- g. That it is only met and just for Court to allow this application.

**Statement of the Facts**

The applicant in paragraph 6 of his supporting affidavit stated that the intended Appeal will be rendered nugatory unless the stay orders sought herein are issued for the following reasons:-

- a. That he has been in occupation of land parcel No. BARAGWE/GUAMA/434 since the title was registered in his name.

- b. That the Court ordered that portion of 3.08 Acres be registered in the name of the respondents.
  - c. That in essence land parcel number BARAGWE/GUAMA/434 shall be sub-divided to give out of the portion of 3.08 acres.
  - d. That the subject matter shall therefore change hands before his appeal is heard and determined.
  - e. That it would be proper for the Court to preserve the subject matter herein pending the filing, hearing and determination of the appeal.
- a. That in the event that the judgment is executed, the Appeal shall only be an exercise in futility since the land might be transferred to other third party.

The respondents did not file any reply to the application and the application was heard Ex-parte.

**Analysis and Determination:-**

The conditions for stay pending appeal are set out in *Order 42 Rule 6 (2) Civil Procedure Rules* 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”.**

The threshold for stay pending appeal under the provisions are as follows:-

- a. Arguable appeal/sufficient cause.
- b. Substantial loss to be suffered by the applicant
- c. The application was made without unreasonable delay and
- d. The security given by the applicant.

In this case, the applicant has stated that unless the stay order is granted, the subject matter of this suit shall change hands before his appeal is heard and determined and therefore the intended appeal will be rendered nugatory. It is a legitimate expectation in every litigation that once judgment is delivered, the successful party shall enjoy the fruits of the judgment unless the same Court or the appellate Court finds that there are special circumstances to enable it exercise its discretion to stop a successful litigant from enjoying the fruits of his judgment. A Court can only exercise such a discretion where there are empirical and/or documentary evidence that the applicant will indeed suffer substantial loss unless the stay order is granted.

That was the decision of the Court in the case of *Kenya Shell Limited Vs Kibiru (1986) K.L.R 410 at page 416, Platt Ag. J.A.* (as he then was) held 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 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 a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money”.**

In the same decision, *Gachui, Ag. J.A.* (as he then was) *at 417* held:-

**“It is not sufficient by merely stating that the sum of Ksh. 20,380.00/= is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment”.**

Again in the case of *James Wangalwa & Another Vs Agnes Naliaka Cheseto, High Court of Kenya at Bungoma Misc. Application No. 42 of 2011 (U.R)* where it was held thus:-

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

The respondent is the successful litigant in this case while the applicant was unsuccessful. The undoubted right of appeal by an unsuccessful litigant cannot in my view supersede that of a successful litigant unless special circumstances given under **Order 42 Rule 6(2) Civil Procedure Rules** have been demonstrated. The assertion by the applicant that the respondent will dispose of the portion of land awarded measuring 3.08 acres unless the orders of stay are granted is not supported by any empirical evidence. There is no evidence shown that the respondent will dispose of the land if the orders sought are not granted. The assertions by the applicant that the respondent will dispose of the suit property are mere allegations not backed by documentary evidence. The applicant must demonstrate the basis of his assertion that the respondent will dispose of the same. The same way an applicant seeking stay pending appeal in a money decree must show that a respondent would not repay back the decretal sum if execution was allowed, an applicant in applications for stay relating to land must demonstrate the propensity of the respondent to sell land. He has to demonstrate a real fear that unless the stay order is granted, there is a real danger that the respondent will dispose of the subject of the intended appeal. A mere apprehension by the applicant without evidence cannot stand. It must be supported by empirical or documentary evidence.

If the stay is granted, the injustice to the respondents would be that they are likely to be kept away from a title deed to the suit property which they would have been able to have it transferred into their names and use as collateral to secure a bank loan and other facilities to better their lives. I also note that the applicant has not given security for the due performance of the decree that will ultimately be pending on him or an undertaking to give such security as this Court may deem just. In my view, there is no just cause why the respondents who are successful litigants should be denied the fruits of their judgment. The right of Appeal in my view must be balanced against the right of a successful plaintiff. There must be a just cause for depriving him that right.

In the *Macharia t/a Macharia & Co. Advocates Vs East African Standard (No. 2) (2002) K.L.R 63*, the Court held as follows:-

**“To be obsessed with the protection of an appellant or intending appellant in total disregard of 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 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 Court, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.**

I agree with the above decision. There is absolutely no reasons given by the applicant to satisfy the grant of the orders sought. The applicant has not shown to the satisfaction of this Court that he will suffer substantial loss unless the orders sought are granted. He has not also given security for the due performance of the decree that will ultimately be binding on him. In short, the application has failed the threshold given under **Order 42 Rule 6 CPR**.

**Disposition**

For the above reasons, I find the Notice of Motion dated 14<sup>th</sup> July 2020 lacking merit and the same is hereby dismissed. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 16<sup>th</sup> day of October, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Kiragu holding brief for Mrs. Makworo – present
2. Plaintiff/Advocate – absent
3. Mbogo – Court clerk – present