REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL CASE NO. 12 OF 2020

(formally Bungoma H.C.C.A No. 52 of 2020)

1. FLORENCE NAMACHITU..... 1ST APPELLANT

2. RONALD KERRE..... 2ND APPELLANT

VERSUS

DORIS WANYAMA ..... RESPONDENT

R U L I N G

Although there are two applications herein one dated 14th August 2020 and the other dated 10th September 2020, what calls for my determination herein is the Notice of Motion dated 14th August 2020. The application dated 10th September 2020 only sought the main order that the application dated 14th August 2020 be certified as urgent and heard during the vacation Rules.

The application dated 14th August 2020 was first placed before **MUSYOKA J** on 19th August 2020 who however declined to handle it citing want of jurisdiction as the matter is a land dispute. It was placed before me on 30th September 2020 where directions were made that it be determined on the basis of the rival affidavits.

The Notice of Motion dated 14th August 2020 is anchored under the provisions of **Order 40 Rule 6(1) and (2) of the Civil Procedure Rules** and seeks the following orders: -

1. **Spent**

2. **Spent**

3. **That there be a stay of execution of the Decree in BUNGOMA CMCC No 85 of 2018 pending the hearing and determination of Civil Appeal No 52 of 2020.**

4. **Costs of the application be in the cause.**

The application is founded on the grounds set out therein and is supported by the affidavit of **FLORENCE NAMACHITU** the 1st Appellant herein.

The gravamen of the application is that the trial Court declined to grant an oral application for stay on 12th August 2020 during a ruling on assessment of costs. That there was a sinister motive behind that refusal and unless the order for stay is granted, the appeal which has high chances of success may be rendered nugatory.

DORIS N. WANYAMA the Respondent herein opposed the application by her replying affidavit dated 29th September 2020 in which she deponed, inter alia, that the application is scandalous, frivolous, bad in law and raised the same issues as in a previous application which was abandoned. That the application has been overtaken by events as the land Registrar Bungoma has already removed the caution lodged by the Appellants on the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/8863** which is registered in the names of the Respondent and her children. That the Judgment appealed was delivered on 15th May 2020 and the bill of costs taxed at Kshs. 83,835/=. That the Appellants have not made any conditional provision on security to perform the decree herein in the event that their appeal is dismissed. The Appellants have also not shown what damage they may suffer if execution proceeds. That the appeal has no chances of success and is an academic gesture to delay the implementation of the Judgment. That litigation must come to an end and this application should be dismissed with costs.

I have considered the application and the rival affidavits.

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows: -

> ***6 (1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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"***
>
> ***6(2) "No order for stay of execution shall be made under subrule (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 to be binding on him has been given by the applicant."*** Emphasis mine.

From the above, it is clear that for a party to benefit from the provisions of **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules**, he must show that: -

1. **If the order sought is declined, he might suffer substantial loss.**
2. **He has moved to the Court without unreasonable delay.**
3. **He must offer security for the due performance of any decree that may be binding upon him.**

In **KENYA SHELL LTD .V. BENJAMIN KIBIRU 1982 – 88 1 KAR 1018 (1986 KLR 410) PLATT Ag J.A** (as he then was) while discussing the issue of substantial loss put it 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 it's various forms is the corner stone 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 **MACHIRA T/A MACHIRA & CO ADVOCATES .V. EAST AFRICAN STANDARD (NO 2) 2002 KLR 63**, it was stated that:

> ***"In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars ……. Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay."***

Other than pleading that the appeal will be rendered nugatory if they are evicted from the land which they purchased and have developed, the Appellants have not provided any specific details of what substantial loss they will suffer. I am nonetheless prepared to find in their favour that being evicted from land which they purchased 30 years ago and have extensively developed as averred in paragraph 6 of the supporting affidavit would amount to substantial loss.

I am however not persuaded that they Appellants moved to Court without un – reasonable delay. The Judgment sought to be appealed was delivered on 15th May 2020 and although the appeal was filed timeously on 22nd May 2020, this application was filed on 17th August 2020 some 3 months later. No explanation has been offered for the delay in filing this application. From the supporting affidavit of **FLORENCE NAMACHITU** dated 14th August 2020, it is clear from paragraph 2 thereof that the only application for stay was made on 12th August 2020 before the Magistrate following a ruling on assessment of costs. This is how she has pleaded: -

> ***"That when the case from which this appeal arose came before the trial Magistrate on 12.8.2020 for ruling on assessment of costs, our Counsel requested for a temporary stay of execution for 30 days pending hearing of a formal application which we had already filed. The request was abrasively and roundly refused"***

It is clear from the above averment that the Appellants only sought a stay following a ruling on assessment of costs. There is nothing to show that any stay of execution was sought on 15th May 2020 when the Judgment sought to be appealed was delivered. There is also no suggestion that the Appellants were not aware about the delivery of the Judgment on 15th May 2020 and only came to learn about it later. At least there is no such averment in the affidavit of **FLORENCE NAMCHITU**. Whether or not a delay is unreasonable depends on the circumstances of each case. It has been held that even one day can amount to unreasonable delay. As no explanation has been offered by the Appellants as to why this application was filed on 17th August 2020, 3 months after the Judgment sought to be appealed, I am of the view that the delay which has not been explained is unreasonable and therefore disentitles the Appellants to the remedy sought.

Finally, the Appellants were required to furnish security. In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN (1963) LTD C.A CIVIL APPEAL No 15 of 1990 [1990 KLR 365]**, the Court of Appeal stated as follows: -

> ***"The High Court's discretion to order a stay of execution of it's order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay."***

The offer for security must come from the Applicant for the due performance of any decree that may be binding on him ultimately. No such offer has been made by the Appellants herein. It must be remembered that a party seeking the exercise of the Court's discretion for a remedy of stay must satisfy all the conditions set out under **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules**. The Appellants have been unable to meet the requirements of approaching the Court without un – reasonable time and also offering security.

Ultimately, therefore, the Notice of Motion dated 14th August 2020 is devoid of merit. It is dismissed with costs.

Boaz N. Olao.

J U D G E

15th October 2020.

Ruling dated, signed and delivered at **BUNGOMA** this 15th day of October 2020 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

15th October 2020.