



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 6898 OF 1991

KAMUTHI FARMERS CO-OPERATIVE SOCIETY LTD.....PLAINTIFF/APPLICANT

AND

NAIROBI CITY COUNTY.....DEFENDANT/RESPONDENT

AND

SARA WAITHERA NJUGUNA & 18 OTHERS.....INTERESTED PARTIES

RULING

1. This is the notice of motion dated 19th June 2020 brought under order 42 rule 6, and order 50 rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) Spent.

(3) That there be a stay of execution of the judgment and decree issued by this honourable court on 4th June 2020 and any other consequential orders issued pursuant thereto, pending hearing and final determination of the defendant's/ applicant's appeal.

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

3. The grounds are on the face of the application and are set out in paragraphs (1) to (9).

4. The application is supported by the affidavit of Eliud Perminus Njoroge, the secretary to the plaintiff/applicant sworn on the 19th June 2020 and a further affidavit sworn on the 27th July 2020.

5. The application is opposed. There is replying affidavit sworn by Lydia Kwamboka, the County Attorney of the defendant sworn on the 22nd July 2020 and a further replying affidavit sworn on 6th August 2020.

6. On the 9th July 2020, the court with the consent of parties directed that parties do file and exchange written submissions in respect of the application.

7. It is the plaintiff's/applicant's submissions that the defendant has been and continuous to be in possession of the suit premises and has constructed a housing estate on the 154.5 acres and a sewerage plant on the 21.23 acres. That the plaintiff on the other hand has legal title to the suit properties, that the court has now ordered transfer to the defendant.

8. It further submits that the principles governing the grant of stay of execution are provided for in order 42 rule 6(1) of the Civil Procedure Rules. It has put forward the cases of **Vishram Ravji Halai vs Thornton & Turpin, Civil Application No. Nai. 15 of 1990 [1990] KLR 365; Antoine Ndiaye vs African Virtual University [2015] Eklr; Socfinac Company Ltd vs Nelphat Kimotho Muturi [2013] eKLR.**

9. The said judgment was delivered on 4th June 2020 and the instant application seeking stay of execution herein was filed on 22nd June

2020, the same was duly stamped with the court stamp on 25th June 2020. The application was filed without any delay.

10. On the issue of substantial loss, the subject matter in the suit is land. The defendant has been and continues to be in possession of the disputed land. The plaintiff/applicant on the other hand has the legal title to the suit property and has challenged the legality of the sale. The plaintiff/applicant will suffer substantial loss if compelled to transfer the legal title to the defendant/respondent as the defendant/respondent will transfer to the interested parties. The subject will be put out of reach and or render the appeal nugatory. He has put forward the cases of **Felix Kipchoge Limo Langat vs Robinson Kiplagat Tuwei [2018] eKLR; Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR.**

11. The security offered by an applicant only needs to be adequate and not necessarily the value of the subject matter. It has put forward the case of **Stephen M'Itanga vs M'Nkumbuku M'Kirigia [2019] eKLR.**

12. The court is not at this stage required to go into the merits of the appeal. It has put forward the case of **Vishram Ravji Halai vs Thornton & Turpin [1990] KLR 365.**

13. The plaintiff/applicant has filed this appeal as of legal right and cannot of itself be evidence of bad faith. It prays that the application be allowed.

14. It is the defendant's/applicant's submissions that the plaintiff has not demonstrated that it has an arguable appeal with chances of success. The plaintiff/applicant has also not demonstrated how its appeal will be rendered nugatory as no substantial loss has been demonstrated. It has put forward the case of **Machira t/a Machira & Co. Advocates vs East Africa Standard [2002] 2 KLR 63.**

15. The plaintiff/applicant has brought this application in bad faith and aimed at delaying the defendant/respondent from enjoying the fruits of its judgment. The matter has been in court for 29 years. It has put forward the case of **Joel Nderitu Ndiang'ui vs Ann Kabura Chomba [2020] eKLR.** It prays that the application be dismissed with costs.

16. I have considered the notice of motion, the affidavit in support and the affidavits in response. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the plaintiff's/applicant's application meets the threshold for grant of orders of stay of execution pending appeal.

(ii) Who should bear costs?

17. The principle guiding the grant of stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil Procedure Rules, provides that:-

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 be binding on him has been given by the applicant.

18. It is clear from the above provision that for the order for stay of execution pending appeal to be granted, specific conditions must be met by the applicant.

19. The principle that guide a court in exercising discretion in an application for stay of execution pending appeal are now well settled.

(i) That the application has been brought without undue delay.

(ii) That unless stay is granted the applicant shall suffer substantial loss.

(iii) That the applicant has offered security for the due performance of the decree that may ultimately be found to be binding on him.

20. I have considered the notice of motion herein. I find that it has been brought without unreasonable delay.

21. It is the plaintiff's/applicant's case that it will suffer substantial loss if these orders are not granted: That it has the legal title to the suit properties and has challenged the legality of the sale. Further that the defendant/respondent is likely to put or deal with the subject matter and put it out of reach thereby rendering the appeal nugatory. The defendant/applicant on the other hand contend that the plaintiff/applicant has not furnished sufficient evidence to show the kind of loss it is likely to suffer.

22. It is not in doubt that the defendant/applicant has been and continues to be in possession of the suit properties. In one of the suit properties there are tenant purchasers who have been waiting to be issued with title documents by the defendant/applicant all these years. In the case of **Feisal Amin Jan Mohammed t/a Dunvia Forwarders vs Shami Trading Co. Ltd [2014] eKLR, Kasango J** stated as follows:-

“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated a

substantial loss that may result to him unless the order is made, that the application is made without unreasonable delay and that the applicant has offered proper security.”

23. I have considered the plaintiff's/applicant's application in its entirety. In my view it has not demonstrated that it will suffer substantial loss if these orders are not granted. As stated earlier the defendant/respondent has been in possession of the suit properties. The status quo ought to be maintained.

24. In the case of **Machira t/a Machira & Co. Advocates vs East Africa Standard [2000] KLR 63** it was held that:-

“It is not enough merely to state that substantial loss will result or that the appeal will be rendered nugatory. That will not do. If the applicant cites as a ground, substantial loss, the kind of loss likely to be sustained must be specific, details given, or particulars thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order before disposal of the applicant's business e.g appeal or intended appeal”.

I am guided by the above authority.

25. The other condition to be satisfied by the applicant is that he must provide such security as may be ultimately binding on him. The same is set in a mandatory term. I find that the plaintiff/applicant has not stated whether it intends to furnish or has already furnished security for due performance of the decree.

26. In conclusion, I find that the plaintiff/applicant has failed to satisfy the requirements set out in order 42 rule 6 (2) of the Civil Procedure Rules. I find no merit in this application and the same is dismissed with costs to the defendant/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 15th day of October 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Ochwo for the plaintiff/applicant

Ms Muthoni for Mrs. Maina for Defendant/Respondent

Kajuju - Court Assistant