



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT MOMBASA

ELC NO. 252 OF 2012 (OS)

PATREMY MWAKWEKA MWALUMA.....APPLICANT

VERSUS

DAVID MACHARIA KANG'ETHE.....1ST RESPONDENT

ASHOK KUMAR ANAND.....2ND RESPONDENT

CONSOLIDATED WITH

MOMBASA ELC NO. 70 OF 2015

ASHOK KUMAR ANAND.....PLAINTIFF

VERSUS

PATREMY MWAKWEKA MWALUMA.....DEFENDANT

RULING

(Application for stay pending appeal; application allowed subject to conditions on deposit of security)

1. The application before me is that dated 28 April 2020 filed by Patremy Mwakweka Mwaluma the unsuccessful party in these two consolidated suits. It is an application seeking orders of stay of execution pending appeal. The application is opposed.
2. To put matters into context, the applicant filed an originating summons seeking orders that he has acquired by way of adverse possession, title to the Plot No. 1956/337 CR No. 35001, in Voi Municipality. The registered owner, Mr. Ashok Kumar (the respondent herein) filed his own suit where he sued the applicant for vacant possession, general damages for trespass and a permanent injunction against him. Through a consolidated judgment delivered on 10 March 2020, I dismissed the case of the applicant and allowed the suit by the respondent. In addition to making the order for vacant possession, I entered judgment in favour of the respondent in the sum of KShs. 1,000,000/= as general damages for trespass and also ordered the applicant to pay the costs of both suits. A Notice of Appeal was filed on 16 March 2020 followed by this application.
3. In the application, the applicant has averred that the respondent may move to evict him before the appeal is heard and determined. He has stated that he is ready to abide by any reasonable conditions.
4. The respondent filed Grounds of Opposition and a Replying Affidavit. It is asserted that the applicant is a trespasser. He has stated that he has been deprived of the use and enjoyment of the property and the applicant continues with his acts of trespass. He believes that this application is only aimed at circumventing justice. He has otherwise stated that the rents accruing should be depositing in a joint account to cushion him from loss.
5. I invited counsel to file written submissions which they did. I have taken note of the submissions of Mr. Odhiambo S.E for the applicant and Ms. Waihenya for the respondent. Mr. Odhiambo submitted that his client has an arguable appeal and that it will be rendered nugatory if stay is denied. On her part, Ms. Waihenya inter alia submitted that the applicant does not have an arguable appeal and that no memorandum of appeal has been annexed to demonstrate the arguability of the appeal. She also submitted that there is no demonstration of any loss. In the alternative, she submitted that the full decretal sum inclusive of costs be deposited to this court or in a joint account.

6. I have considered the application. This being an application for stay pending appeal, the provisions of Order 42 Rule 6 (2) apply. That law provides as follows :-

(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 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.

7. Although counsel went at length in arguing whether or not the applicant has presented an arguable appeal, that is not a consideration at this stage of the proceedings before this court. I will thus restrict myself to what is set out in Order 42 Rule 6(2) above.

8. On the issue of delay, I have not seen argument raised by the respondent that the application has been filed after unreasonable delay and I assume that the respondent does not consider that the application was delayed. I will thus only need to assess two issues, that is, if the applicant stands to suffer substantial loss and if there is security for the due performance of the decree.

9. The applicant avers that he stands to be evicted. I have looked at his affidavits filed earlier in the suit and he deposes that he uses the premises partly as his residence and partly for rental. I do not know how much he gets as rent and if this was disclosed it would have helped greatly in letting me know the amount of security. Be that as it may, I am prepared to hold that he stands to suffer substantial loss if he is evicted. This brings me to security. There is already a monetary judgment for KShs. 1,000,000/= in favour of the respondent. I think if this money is deposited in a joint interest earning account, alongside the costs, then the respondent will have been provided with adequate security. He of course stands to suffer some loss of income but I have no indication of what loss this would be. I will place, in my discretion, given that the premises is in Voi town, an estimate of KShs. 250,000/= as further additional security to cover what the respondent may lose for not being in control of the premises. I am aware that I am speculating, but it is the best that I can do in the circumstances.

10. Thus, given the above, I will order the applicant to deposit the sum of KShs. 1,250,000/= within the next 30 days in a joint interest earning account to be held by counsel for the applicant and respondent. I will make a further order that the taxed costs be deposited into this account within 30 days of taxation. If these monies are not deposited as directed above, then the applicant will have to conduct his appeal without the benefit of an order of stay, and the decree may be executed. In addition, and if he abides by the above conditions, the applicant is ordered not to make any additional structures on the land or deal with the land and the current status quo be maintained until the appeal is heard and determined. It follows that if the applicant succeeds on appeal, the money deposited will be released to him, but if he fails on appeal, the money deposited will be forfeited to the respondent.

11. On costs, if the applicant abides by the above conditions, then the costs of the application will be in the appeal. If he does not, then he will pay the costs of this application.

12. Orders accordingly.

DATED AND DELIVERED THIS 15TH DAY OF OCTOBER 2020.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA