



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC APPEAL CASE NO. 1 OF 2016

MARTHA MARUKO THOMA.....APPELLANT/RESPONDENT

VERSUS

TITUS AYABEL.....RESPONDENT/APPLICANT

RULING

This ruling is in respect of an application dated 17th July 2020 by the Respondent/Applicant seeking for the following orders:

a) Spent

b) That pending the inter-parties hearing and determination of this application this honorable court be pleased to issue interim orders restraining the appellant/respondent by herself or through her agents, servants or employees or any other person acting through her or under her instructions from selling, leasing, wasting, alienating, developing, constructing, parting with possession or in any other interfering with or dealing with the property known as Usin Gishu/Kimumu/2481.

c) That pending the hearing and determination of appeal to the Court of Appeal an injunction do issue restricting the appellant/respondent by herself or through her agents, servants or employees or any other person acting through her or under her instructions from selling, leasing, wasting, alienating, developing, constructing, parting with possession or in any other way interfering with the property known as Uasin Gishu/Kimumu/2481 in a way that will prejudice the respondent/applicant's rights and or the outcome of the said appeal.

d) That this Honourable Court be pleased to issue a conservatory order and/or an order for *status quo ante* to the filing of this appeal in order to preserve, protect, conserve and maintain the subject matter namely Uasin Gishu/Kimumu/2481 in its current state.

e) That costs of this application be provided for.

This application was filed under certificate of urgency whereby counsel agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S SUBMISSIONS

Counsel for the applicant submitted that the applicant being dissatisfied by the judgment delivered on 7th May 2020 has preferred an appeal in the Court of Appeal. Counsel gave the background leading to the appeal and submitted on the principles of grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules.

Mr Kimani submitted that the applicant is likely to suffer substantial loss if the order is not granted as the respondent may dispose off the land yet he is the registered proprietor. Counsel relied on the case of **James Wangalwa & anor v. Agnes Naliaka Cheseto**[2012]eKLR, where it was held that,

“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, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867,

“the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.” This sentiments were cited with approval in **Omar Abdi Issack v. Malebo Hared & anor**[2020]eklr.

On whether the application has been brought without unreasonable delay, counsel submitted that the judgment was delivered on 7th May 2020, filed a notice of appeal on 14th May 2020 and this instant application was filed on 3rd June .2020 which is less than a month since the delivery of the judgment.

On the third issue on whether there is security for due performance of decree, counsel submitted that the security for costs was not the only way to ensure performance of decree and since this was not a money decree and the respondent is the registered title holder further that the applicant undertakes not to dispose off the suit land to a third party or part with possession pending the hearing of the appeal.

Mr. Kimani counsel for the applicant relied on the case of **Omar Abdi Issack v. Malebo Hared &anor(supra)** where it was held that:

“the court finds no need for the security as the subject is not a money decree which is sought to be preserved pending appeal and thus it will be available to the victor party after appeal is determined.”

In addition to the above, counsel submitted that the applicant is servicing a loan that he took and used the suit land as security That the appellant/respondent had not been evicted by the applicant when she was prosecuting the appeal, as the court had ordered her to deposit security in the order issued on 29th September 2016.

Counsel submitted that the applicant has an arguable appeal as he is the registered owner of the suit property and the intended appeal was seeking reliefs granted by the trial court to be reinstated by the Court of Appeal. Counsel cited the case of **Josephine Koki Raymond v Philomena Kanini Maingi (Personal representative of Maingi Musila Mutava (Deceased) & another [2018] eKLR** where the court held that:

“On argueability, we have given due consideration to the complaints the applicant intends to raise on appeal as contained in the draft Memorandum of Appeal and as summarized in her submissions highlighted above. Further that the Judge misdirected and prejudiced himself against her as he only considered the Respondent’s case in the assessment of the evidence before him; that the Judge also did his own surmise, conjecture, proposition and theories as to how the 2nd Respondent was a bona fide purchaser; that the Judge also failed to make a finding of both fact and law that the Applicant parted with the purchase price and was given vacant possession of the suit property by the 1st Respondent, thereby creating a constructive trust in her favour.

We have given due consideration to the above intended complaints. It is our view that they are not frivolous as learned Counsel for the Respondents put it. Instead, and in our view, they raise arguable points, sufficient to invite the Respondents to respond to the matters raised therein, during the determination of the intended appeal...”

Counsel therefore urged the court to allow the application as prayed to preserve the suit land pending the hearing and determination of the appeal.

RESPONDENT’S SUBMISSIONS

Counsel for the respondent submitted that the application is only meant to derail or further delay the appellant’s enjoyment of the fruits of her judgment which she has patiently waited for fourteen years. Counsel relied on the principles for grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules which are:

- a) *Substantial loss to the applicant*
- b) *Application brought without undue delay*
- c) *Security performance of the decree*

Mr. Omboto counsel for the respondent submitted that the applicant had failed to show what substantial loss he was likely to suffer if the orders were not granted and cited the case of **Stephen Wanjohi v. Central Glass Industries Ltd HCC 6726/91**, where the court held that substantial loss had to be established. Having a high chance of success was not enough for the court to grant the said prayers as averred by the applicant.

Counsel further submitted that the applicant had not offered any security in support of the application and neither was there any proposal thus the application should fail. In addition, that the applicant had taken a loan facility while the appeal was pending in court and therefore it was not enough to state that he was servicing the loan with no proof. That in case he defaults and the property is auctioned it’s the appellant who would suffer substantial loss.

Counsel submitted that in the event that the court is inclined to grant the orders, then the applicant should be ordered to clear the loan and deposit the title deed with the court. Counsel however urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION.

The issues for determination in an application for stay of execution pending the hearing an determination of an appeal are well settled. The relevant applicable law in under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 stay 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.

(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 be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

The purpose of the stay of execution pending hearing and determination of an appeal is to preserve the subject matter which is in this case the land. This court has the discretion to either grant or decline the same.

In the case of **Butt v. Khan**[1982]KLR 417 the Court of Appeal gave guidance on how to exercise discretion.

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

It is noted that the applicant filed this instant application and the notice of appeal in timeously hence has met that condition of filing the application without undue delay.

On whether the applicant has demonstrated that he will suffer substantial loss, the applicant argued that he is the registered owner of the subject parcel of land and that the respondent who resides on it could sell it to a third party. The respondent on the other hand stated that the applicant had charged the suit land for a loan of ksh 4.000.000/= and since he had been terminated from employment he could not be able to pay off the loan, exposing the appellant to eviction. This is as per the annexed copy of the search which indicates that the parcel number Uasin Gishu Kimumu/2481 was charged to Elgeyo Marakwet County on 18th September 2017 during the pendency of the appeal.

The court has a duty to ensure that justice is served and no party suffers substantial loss. In the case of **CENTURY OIL TRADING COMPANY LIMITED v KENYA SHELL LIMITED [2008] eKLR** Kimaru J held that

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

In a similar case of **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where Warsame J held as follows:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the

court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

The court is under a duty to balance the rights of both parties in exercising its discretion in the administration of justice. It is not enough for an applicant to merely state that he is likely to suffer substantial loss as was stated in the case of **Daniel Cheptulu Rotich & 2 others vs Emirates Airline Civil Case No. 368/2001**, where Musinga J held that:-

"It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur....." substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum".

The applicant in this case may not suffer substantial loss for the reason that he has the title deed which he has charged for a loan he took. This further shows that the applicant interfered with the substratum of the case while the appeal was pending. I find that the applicant has not met the threshold for grant of the orders of stay sought and is therefore dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 6TH DAY OF October , 2020

DR. M. A. ODENY

JUDGE