



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 34 OF 2019

JOHN OSORO OMBESE.....PLAINTIFF/APPLICANT

VERSUS

JOHN KUMENDA.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION.

1. What is before me is the Plaintiff's application dated 27th May 2020 brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules seeking a stay of execution pending appeal.
2. The Application is premised on the grounds stated on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on the 27th day of May 2020. The gravamen of the application is that the Applicant has appealed against this court's ruling and order dated 23rd April 2020 dismissing his application for injunction and if a stay of execution is not granted, his appeal will be rendered nugatory. He fears that the Respondent may start developing the suit property which may result in the Applicant suffering substantial loss. He avers that he has filed the application timeously and that he is willing to abide by any terms or conditions that the court may in its discretion impose.
3. The application is opposed by the Respondent through his Replying Affidavit sworn on the 6th July 2020. It is his contention that the instant application is res judicata as the orders sought are a replica of the ones sought in the Notice of Motion dated 29th October 2019 between the same parties where the Applicant sought prohibitory orders restraining the Respondent from carrying out any activities on land parcel No. KISII MUNICIPALITY/ BLOCK 1/350. He avers that the orders issued on 23rd April 2020 in respect of the application dated 29th October 2019 are negative in nature and incapable of execution and there is therefore nothing to stay. He contends that the Applicant seeks to have this court sit on appeal on its own orders which is unacceptable. He is of the view that the application is ill-advised, incompetent and an abuse of the process of the court and the same ought to be dismissed *ex debito justitiae*.
4. In response to the Replying Affidavit, the Applicant filed a Further affidavit sworn on 13th August 2020 in which he clarified that the application is in response to the court's ruling dated 23rd April 2020 and is therefore not res judicata nor is it intended to revive the Notice of Motion dated 29th October 2019. He reiterates that the Respondent is likely to start developing the suit property while the appeal is pending.
5. The application was canvassed by way of written submissions and the Applicant filed his submissions on 8th September 2020 while the Respondent filed his List of Authorities on 8th July 2020.

ISSUES FOR DETERMINATION

6. This being an application for stay pending appeal, the issues for determination are threefold:
 1. Whether the application is res judicata
 2. Whether the order issued on 23rd April 2020 is capable of being stayed.
 3. Whether the Applicant has met the conditions for stay pending appeal.
7. On the first issue, the court is called upon to determine whether this application is res judicata

The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act CAP 21. This section provides as follows:-

“Section 7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

8. The Respondent has alleged that this application is res judicata as the orders sought are similar to the ones sought in the Applicant’s Notice of Motion dated 29th October 2019. The current application seeks an order of stay pending appeal, whereas the application dated 29th October 2019 seeks an order of injunction to restrain the Respondent from interfering with Land Parcel number KISII MUNICIPALITY/ BLOCK 1/350. It is clear that the orders sought in the two applications are different and therefore this application is not res judicata. Perhaps what the Applicant means is that granting the application for stay would be tantamount to granting injunctive orders against the Applicant.

9. I will now proceed to consider whether the order dated 23rd April 2020 against which the Applicant has appealed is capable of being stayed. By the said order, this court dismissed the Applicant’s application for injunction dated 29th October 2019. The Respondent’s contention is that the order dismissing the application for injunction is a negative order which is incapable of execution.

10. While considering a similar application in **Milcah Jeruto T/A Milcah Faith Enterprises v Fina Bank Limited & Another** the court relied on **Ndungu Kinyanjui vs Kibicho Kugeria Services & Another Civil Application No NAI 79 Of 2007 (unreported)** cited in the **Re Sonalux** case where the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

11. The court further observes as follows:

*“To further emphasize the point in the **Re Sonalux** case, the Court of Appeal stated that in the matter that was before it, Kasango J in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money.*

Undoubtedly, the Plaintiff strongly feels that she has an arguable appeal at the Court of Appeal. I am, however, alive to the fact that this court cannot sit on an appeal in a matter that has been handled by a court of similar and competent jurisdiction and give the same orders that such a court had refused to grant and more so when the law does not provide that the same can be granted.

A close scrutiny of the Civil Procedure Rules 2010 does not reveal any provision that would allow this superior court to grant stay orders emanating from the dismissal of an application that had sought injunctive order in the same court. Order 42 Rule 6 of the Civil Procedure Rules 2010 under which the Plaintiff’s application reads as follows:-

“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or an order appealed from... the court appealed from may for sufficient cause order stay of execution of such decree or order...”

12. I fully associate myself with the above decisions and find that the order of 23rd April 2020 is a negative order that is incapable of execution.

13. Be that as it may, even assuming that the said order could be stayed, the Applicant would have to demonstrate that he has met the conditions for stay pending appeal.

14. The principles that guide the court in the exercise of its discretion to grant a stay of execution are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 provides in part 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 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 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.

15. In the case of **M.O.M Amin Transporters Limited & Another v Alexander Ndung’u Mbugua & 2 Others [2017] eKLR** the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

*“13. In the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (Supra)**, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.*

16. Furthermore, in the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** Mutungi J stated as follows:

“It is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal”.

17. In the instant suit the Applicant has mentioned in his affidavit that if a stay of execution is not granted, he will suffer substantial loss without expounding on the nature of loss. Even though the application was filed within a month after the application for injunction was dismissed, the Applicant has not offered any security for costs. In the circumstances he has failed to meet the three conditions in Order 42 Rule 6 of the Civil Procedure Rules.

18. In the premises and particularly because the order sought to be stayed is a negative order that is incapable of execution, I find no merit in the application and I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kisii this 24th day of November, 2020.

J.M ONYANGO

JUDGE