



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC NO. 348 2014 CONSOLIDATED WITH ELC SUIT NO.398 OF 2017 (OS)**

**JARED KIPROTICH BIWOTT.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**STEPHEN CHERUIYOT.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JONATHAN KIBE.....DEFENDANT/APPLICANT**

**RULING**

This ruling is in respect of an application dated 18<sup>th</sup> August, 2020 by the defendant/applicant seeking for the following reliefs: -

- a) Spent.
- b) That pending the hearing and determination of this application inter-partes there be stay of implementation and execution of the judgment of this Honourable Court delivered on 5<sup>th</sup> August, 2020 and thereafter pending the hearing and determination of this application.
- c) That pending the hearing and determination of the intended appeal there be stay of implementation and execution of the judgment of this Honorable Court delivered on 5<sup>th</sup> August, 2020.
- d) That costs of this application be provided for.

**APPLICANT'S SUBMISSIONS**

Counsel for the applicant relied on the grounds on the face of the application and the supporting affidavit of JONATHAN KIBE sworn on 18<sup>th</sup> August, 2020 and all the annexures attached thereto.

It was counsel's submission that the applicant being dissatisfied with the decision and judgement of the Honourable Court delivered on 5<sup>th</sup> August, 2020 filed a Notice of Appeal against the said judgment on 10<sup>th</sup> August, 2020 and further requested and paid for the typed proceedings as demonstrated by the applicant's annexure "JK 1, 2 and 3" respectively.

Mr. Kibii listed three issues for determination by the court as per Order 42 Rule6(2) of the Civil Procedure Rules;

- a) Whether the application has been made without unreasonable delay;
- b) Whether the applicant will suffer substantial loss if the order is not granted;
- c) Whether the applicant is willing to give such security as the court orders for the due performance of the decree.

Counsel cited the case of **Safaricom Sacco Limited v Stephen Chorio Kiai another [2019] eKLR** where the court held;

*18. Lastly, the applicant has claimed that its appeal has high chances of success. Whether or not the appeal has high chances of success is immaterial in the instant application. It is not one of the conditions which the High Court considers when deciding how to exercise its discretion in deciding whether or not to grant stay. The requirement to prove that an appeal has high chances of success or is not frivolous is only applicable to second appeals to the Court of Appeal under Rule 5 (2) (b) of the Appellate Jurisdiction*

Act.”

Mr. Kibii further relied on the case of **Regional Institute of Business Management v Lucas Ondong' Otieno [2020] eKLR** where the court similarly observed as follows;

*“The court looked at the respective parties' arguments and noted that they had delved deeply into the merits or otherwise of the Appeal herein. This was not an issue that could be dealt with at this juncture because analyzing the merits or otherwise of same as it had the potential of embarrassing the court that would be dealing with the appeal at the appropriate time. The concern of this court at this point was to establish whether or not the Appellant's application was merited or not”.*

On the first issue as to whether the application has been made without unreasonable delay, counsel submitted that the judgment was delivered on 5<sup>th</sup> August, 2020 whereas the current application was filed on 18<sup>th</sup> August, 2020, a record of 13 days from the date of delivery of the impugned judgment, hence it should be deemed as expeditiously filed.

On the second issue as to whether failure to grant the order will subject the applicant to substantial loss, Counsel submitted that the applicant is exposed to imminent execution proceedings which has the effect of the applicant being evicted from the suit land. That the applicant is currently residing on the suit parcel as demonstrated by annexure "JK 4" being the valuation report and has been on the suit land since 1969. Counsel also submitted that the applicant's eviction will defeat the purpose of the Appeal.

Counsel relied on the case of **Consolidated Marine... Vs... Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, where the Court held that: -

*"The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".*

Mr Kibii also cite the case of **Beth Kaari & another v M'nyeri M'rimunya [2013]** held that;

*"On the nugatory aspect, we agree with the learned trial Judge in her ruling on the application for stay that this is a family land. The said applicant had lived there since 1948 when she was married. In her affidavit she deponed that she was living there with her daughter the first applicant. That is not disputed but rather is supported by the very fact that the respondent applied for their eviction from the suit land. We cannot turn our back to the fact that she must have developed sentimental attachment to the suit land. If evicted she would be out in the cold with her family. The respondent is already registered proprietor and may very well sell the land even if stay is granted but no injunction is granted. We have also considered the objective of the courts as stated above. In our view the success of that appeal after they are evicted from the land and the land is sold to a third person or even merely ordering stay which will still leave the respondent at liberty to sell the land to a third party and thus land the applicants to further problems which will not be justice. What we are saying is that if we refuse both prayers sought, the intended appeal will be rendered nugatory.*  
"

Counsel also cited the case of **FELIX KIPCHOGE LIMO LANGAT V ROBINSON KIPLAGAT TUWEL [2018]eKLR**, where this Honourable court while quoting the case of **Kenya Shell Limited vs Benjamin Karuga Kigibu & Another (1982-1988) 1 KAR 1018** held that;

*It is usually a good rule to see if order 42 Rule 4 of the Civil Procedure Rules can be substantiated if there is no evidence of substantial loss for the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms (emphasis) is the cornerstone of both jurisdictions for granting stay. "*

The court further held that;

*"The requirement of proof of substantial loss does not only mean monetary terms but also the inconvenience of having to subdivide and transfer part of the suit land to a third party and later to retransfer in case the applicant is successful. We should always look at the bigger picture and what the implementation of the decree entails and the agencies involved*

Counsel therefore submitted that the applicant will suffer substantial loss and the appeal will be rendered nugatory.

On the third issue on security for due performance of the decree, counsel submitted that it is not in dispute that the applicant has been in actual and physical possession of the suit property and that the title of the suit property is with the respondents. Counsel also submitted that the applicant is ready and willing to abide by such reasonable conditions and terms that the Honourable Court may impose.

Mr. Kibii relied on the case of **KIPLAGAT KOTUT V ROSE JEBOR KIPNGOK [2015]eKLR** while quoting other cases the court held that; **Anne Njeri Mwanqi v Muzaffer Musafee Essaiee & another, supra, the learned judge Havelock J. rendered himself as follows;**

*As regards Rule 6(2)(b) in relation to security for costs, the Court in Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR Mabeya, J held as follows;*

*"As I stated in the case of KENYA COMMERCIAL BANK LIMITED vs SUN CITY PROPERTIES LIMITED 5 OTHERS 120121 eKLR "in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be*

balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case. "(Emphasis)

Counsel urged the court to allow the application as prayed.

### **RESPONDENTS' SUBMISSIONS.**

Counsel submitted that the Applicant did not file Memorandum of Appeal to demonstrate an actual intention to appeal and one does not have arguable appeal in the absence of Memorandum of Appeal. Counsel further submitted that the applicant has not offered any security for due performance of the decree.

Ms Tum further submitted that the application is brought in bad faith to deny the respondent the fruits of the judgment, That the applicant has not demonstrated the substantial loss that he will suffer if the orders are not granted. Further that the Applicant must satisfy the court that the Appeal or the intended appeal is an arguable one, that is not a frivolous appeal, a mere fact that there are strong grounds of appeal would not in itself justify an order for stay.

Counsel relied on the case of **Charles Wahome Gethi v Angela Wairimu Gethi (2008) eKLR** where the Court of Appeal held the following view on the issue of substantial loss:

*"The Applicant does not claim that the Respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the Appeal is determined in the circumstances of this case the Applicant would suffer substantial loss rendering the Appeal, if successful the appeal will be rendered nugatory only if the suit land is disposed of before the appeal is determined. The Applicant does not claim that the suit land would be disposed of. The Applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the Appeal, if successful would be rendered nugatory. "*

Further in the case of **James Wangalwa & another v Agnes Naliaka Cheseto (2012) eKLR** the court held that: -

*"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process."*

Ms Tum therefore urge the court to dismiss the application with costs to the respondent.

### **ANALYSIS AND DETERMINATION**

The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

*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.*

The court, in **RWW vs. EKW [2019] eKLR**, addressed the purpose of a stay of execution order pending appeal, in the following words:

*"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.*

*9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."*

It is well settled that the purpose of stay of execution is to preserve the substratum of the case pending the hearing and determination of an appeal. A successful litigant has a right and expectation to enjoy the fruits of his or her judgment, but a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the judgment of the court.

In the case of **Regional Institute of Business Management v Lucas Ondong' Otieno [2020] eKLR** the High Court observed as follows;

*20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and*

*prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.*

The court must balance these rights to ensure that justice is served.

Further in the case of **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** the court held;

*“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be always be balanced.*

On the issue whether the application was filed timeously, it is on record and not disputed that the application was filed immediately after the judgment was rendered. I find that the applicant has met this threshold.

With regard to security for costs, the court in **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, stated:

*“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”*

The applicant has submitted that he is ready and willing to abide by reasonable terms and conditions for security for due performance of the decree. The grant of stay of execution is discretionary and the court will exercise this discretion on case by case basis depending on the circumstances of the case.

The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough. The applicant has stated that he has lived on the suit land since 1948 and if he is evicted he will suffer loss. The applicant further did a valuation report to show the developments that he has carried out of the suit land. This may not be an indicator for substantial loss due to the fact that the court has outlawed his occupation in the judgment that he is appealing against. The fact that a party is in occupation does not guarantee him or her continued occupation as such occupation might be in furtherance of trespass.

The issue of substantial loss was aptly discussed in the case of **Silverstein vs. Chesoni (2002)1 KLR 867** where the court observed that substantial loss is the cornerstone of both jurisdictions and is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

I have considered the application, the submissions by counsel and come to the conclusion that it would be in the interest of justice to order a stay of execution with a condition that the applicant deposits Kshs. 300,000/= in a joint interest earning account of the advocates on record within the next 30 days failure to which the stay order lapses.

**DATED and DELIVERED at ELDORET this 18<sup>TH</sup> DAY OF NOVEMBER, 2020**

**M. A. ODENY**

**JUDGE**