



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC APPEAL NO. 25 OF 2019**

**MUINDE MUTAVA.....APPELLANT/APPLICANT**

**VERSUS**

**NZYOKA MUKUMBU.....RESPONDENT**

**RULING**

1. What is before Court for ruling is the Appellant's/Applicant's notice of motion application dated 07<sup>th</sup> November, 2019 and filed in court on 12<sup>th</sup> November, 2019. It is expressed to be brought under Order 50 Rule 6, Order 51 of the Civil Procedure Rules, section 1A, 3A and 79G of the Civil Procedure Act and all enabling provisions of the law for orders: -

**1) Spent.**

**2) Spent.**

**3) That, this Honourable court be pleased to grant stay of execution of the judgement and all consequential orders delivered by the trial court on the 16<sup>th</sup> day of October, 2019 pending the hearing and determination of the appeal.**

**4) The costs of the application be in cause.**

2. The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of Muinde Mutava, the Appellant/Applicant herein, sworn at Machakos on 07<sup>th</sup> November, 2019 and 16<sup>th</sup> January, 2020 respectively.

3. Nzyoka Mukumbu, the Respondent herein, has opposed the application vide his replying affidavit sworn at Machakos on 29<sup>th</sup> November, 2019 and filed in court on even date.

4. The application was disposed off by way of written submissions.

5. The Appellant/Applicant has deposed in paragraphs 2, 3, 6, 13 and 16 of his supporting affidavit that he was the Defendant in Makueni Principal Magistrate Court civil case No.98 of 2012 and judgment was entered in favour of the Respondent herein on 16/10/2019 as against himself, that pursuant to the said judgement, the trial court found out that the Respondent's case herein was merited and issued a permanent injunction against himself (Appellant/Applicant), further awarded general damages for trespass at Kshs. 50,000/=, special damages in the sum of Kshs. 14,030/= and costs and interest of the suit. That notwithstanding thereto, the court further issued 30 day stay of execution which was to commence from the period of the judgement, that he is advised by his advocates on record and which advise he verily believes to be correct that at this point he is intended to demonstrate to this court that he has an arguable appeal with chances of success, that he wishes to inform this court that at the time of the alleged incident, he was not residing in Makueni but in Machakos with his father who testified and confirmed the same to the trial court during evidence, that there is no prejudice which will be suffered by the Respondents if the orders sought are granted but instead, he is the one who will suffer if the orders are denied because he will have no recourse if he is executed upon (sic), that he has been advised by his advocates on record which advise he verily believes to be correct that even equity would come to his aid as having noted that judgement was delivered on the 16<sup>th</sup> day of October, 2019, he has rushed to this court seeking stay of the execution of the judgement of the trial court even before the time lapses and more so that equity aids the vigilant and not the indolent.

6. In his replying affidavit, the Respondent has deposed in paragraphs 5, 6, 7 and 8 that the intended appeal does not raise any triable grounds and thus its chances of success is minimal, that he is advised by his advocates on record which advise he verily believes that the said judgement was delivered by a competent court and that for an order of stay of execution pending appeal to be issued the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 have to be satisfied, that it is evident that the Applicant has not satisfied the said conditions and that this court ought to dismiss this instant application, that he is further advised by his advocates on record, which advice he

verily believes to be true that the right of appeal ought to be balanced with the right to decree-holder to enjoy the fruits of judgement.

7. In rejoinder, the Appellant/Applicant has deposed in paragraphs 5, 6 and 7 that, indeed the appeal herein raises triable issues and thus has high chances of success and if the application herein is not allowed, if the court allowed the appeal, the appeal would be rendered nugatory, that he is ready and willing to abide by any condition which this court will state for the grant of the stay of execution orders pending the hearing and determination of this appeal, that however in considering the conditions which will be imposed on him by this court, he has been informed by his advocates on record and which information he verily believes to be correct that this court ought to consider the competing rights of the litigants hereto and as such the conditions have to ensure that they don't defeat the line of justice in this matter.

8. The Counsel on record for the parties herein are in agreement that the legal framework on stay of execution is as provided in **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** which provides that: -

*“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.”*

9. In his submissions, the Counsel for the Appellant/Applicant did not frame issues for determination but proceeded to submit on the three principles set out under **Order 42 rule 6(2) (a)(b)** while the Respondent's Counsel submitted on the following issues;

**a) Whether the Applicant stands to suffer substantial loss if the orders sought are not granted?**

**b) Whether the Applicant has furnished security as required by the Law?**

10. Regarding the issue of the Court being satisfied that substantial loss may result to the Applicant unless the order is made, the Counsel for the Appellant/Applicant submitted that if the orders sought are not issued, the Respondent will proceed to execute for the sum of Kshs. 50,000/= plus special damages of Kshs. 14,030/= as well as costs and interest of the suit. The Counsel added that if the appeal were to become successful, the same would be rendered nugatory since the Respondent herein would have already executed against the Appellant/Applicant. The Counsel went on to submit that this would cause great prejudice and substantial injustice upon the Applicant as he would have been condemned without hearing his appeal. In support of his submissions, the Counsel relied on the case of **Tassam Logistics Ltd. vs. David Macharia & Another [2018] eKLR**.

11. On the other hand, the Counsel for the Respondent submitted that an Applicant who approaches the court for an order of stay must show by evidence that he will suffer substantial loss. The Counsel went on to add that it is not enough for the Applicant to merely state that he will suffer substantial loss without demonstrating how (sic) and that substantial loss is not a mere allegation but a fact that must be shown to occur if the stay orders is not granted. The Counsel cited the case of **Kenya Shell Ltd. vs. Kabiru & another [1986] KLR 410** where Gachuhi Ag. JA held that: -

*“In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding” On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.”*

12. Still on the same authority, the Counsel cited page 416 where Platt Ag. JA (as he then was) expressed himself as follows: -

*“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to 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, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”*

13. Arising from the above, the Counsel submitted that the Applicant admits that the orders issued by the Court include an order for permanent injunction, an order for general and special damages. The Counsel pointed out that the Applicant has failed to place before court sufficient evidence to show that he stands to suffer substantial loss should this Court fail to grant an order of stay. The Counsel further submitted that no decree has been availed before court in support of the Applicant's allegation that there is indeed threat of execution.

14. On the issue of the application having been made without unreasonable delay, the Appellant's/Applicant's Counsel submitted that the court ought to take judicial notice of the fact that the judgement appealed against was delivered on 16<sup>th</sup> October, 2019 while the instant application was filed on 12<sup>th</sup> November, 2019, the appeal having been filed on the 28<sup>th</sup> October, 2019. The Counsel added that the Appellant/Applicant has been quite vigilant in pursuing the application and the appeal thus even if the Appellant/Applicant were to rely on equity, equity would come to his aid as equity aids the vigilant and not the indolent. The Counsel urged the court to find that the Appellant/Applicant has acted with vigilance in filing this application for stay of execution and proceed to allow it as prayed.

15. The counsel for the Respondent did not make any submissions on the issue of whether or not the instant application was made without unreasonable delay.

16. As for the issue of such security as the court orders for the due performance of the decree has been given by the Applicant, the Counsel for the Appellant/Applicant did not make any submissions on the same. The Respondent submitted that he was awarded Kshs. 50,000/=

being general damages for trespass, Kshs. 14,030/= plus costs and interest.

17. The Respondent's Counsel went on to submit that in total disregard of the provision of security, the Applicant failed to disclose the same as is required. The Counsel pointed out that this is an indication that the application is meant to deny the Respondent the fruits of his judgement.

18. Having read the application together with its supporting and further affidavit as well as the replying affidavit and having considered the rival submissions, I wish to reiterate that in order for the court to grant the orders sought it must be satisfied that substantial loss may result to the Applicant unless the order of stay of execution is made and that the application has been made without unreasonable delay.

19. Secondly, the Applicant has to give such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him. Essentially what the Appellant/Applicant is seeking to stay is execution of money decree. I say so because the issue is raised in ground 2 upon which the application is predicated upon. The Applicant herein has not shown that the Respondent is a man of straw and will, therefore, be unable to refund the sum of Kshs. 64,030/= plus costs and interests in case he is paid the decretal sum should the intended appeal succeed. I would agree with the Counsel for the Respondent that it is not enough for the Appellant/Applicant to state that he will suffer substantial loss without proffering evidence.

20. The other issue to consider is whether or not the instant application was filed without undue delay, the judgement by the learned Senior Principal Magistrate in PMCC No. 98 of 2012 that the Appellant/ Applicant seeks to impugn was delivered on 16<sup>th</sup> October, 2019 while the instant application was filed on the 12<sup>th</sup> November, 2019. The difference between the two dates is 29 days. That is within the 30 days window provided for appeal. In my view, the application was filed without undue delay. However, for the reasons earlier on given, the Appellant/Applicant has not shown that he will suffer substantial loss. As for security for the due performance of such decree or order as may ultimately be binding upon the Appellant/Applicant, I would also agree with the Counsel for the Respondent that the Appellant/Applicant has offered none. The Appellant/Applicant chose to dwell on the issue of whether or not the appeal has merit and high chances of success instead which this Court should not be concerned with at this juncture in an application for stay.

21. The upshot of the foregoing is that the application lacks merit and same is dismissed with costs to the Respondent.

Signed, dated and delivered at Makueni via email this 10<sup>th</sup> day of **November, 2020**.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Ms. C. Nzioka