



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO 44 OF 2010

RAILWAY HOUSING CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

1. BALU MUNGA

2. SAMUEL BAYA

3. LUCKY CHARO

4. JOSEPH CHARO

5. JOHN CHANGAWA

6. DANSON MWAHENGO

7. TEMBO JEFWA

8. MUNGA BALU

9. KAINGU BALU

10. KAINGU RUA

11. CHIBO CHISHENGA.....DEFENDANTS

RULING

1. By this Notice of Motion dated and filed herein on 19th November 2019, the 1st Defendants urge this Court to be pleased to stay execution of the Judgment entered herein on 20th September 2019 pending the hearing and determination of an intended Appeal,

2. The Application which is supported by an affidavit sworn by Kaingu Balu, the 9th Defendant/Applicant is premised on the grounds:

a) That the Defendants wish to appeal against the said Judgment and have in fact already lodged a Notice of Appeal and request for proceedings;

b) That the Intended Appeal has a high chance of success and if the orders sought herein are not granted the same will be rendered nugatory;

c) That this Court has inherent power to grant the orders sought and the application has been made without unreasonable delay; and

d) That it is in the interest of justice that the orders sought be granted.

3. The Plaintiffs-Railway Housing Cooperative Society Ltd is opposed to the stay application. In Replying Affidavit sworn by its Secretary

Aggrey Ogutu, they aver that this Court having delivered its Judgment on 20th September 2019 is now functus officio and has no jurisdiction to entertain any further applications herein. They further asserts that the application is intended to delay, obstruct and/or defeat the due process of the Court.

4. The Plaintiffs further avers that the application does not meet the threshold of stay and assert that in any event, it is the Plaintiffs who stand to suffer irreparable loss as they will continue to be deprived of the use of their property.

5. I have perused and considered the Motion and the response thereto. I have also perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. Order 42 Rule 6(2) of the Civil Procedure Rules prohibits a Court such as this one from making an order of stay of execution unless the following three conditions have been satisfied:

i) The Court is satisfied that substantial loss may result to the applicants unless the order is made;

ii) The application has been made without unreasonable delay; and

iii) 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. The application before me is supported by a short 7-paragraph Affidavit in which the 9th Defendant states at the relevant paragraphs 2 to 6 as follows:

“2. That Judgment in this matter was entered on 20th September 2019 and we were granted a stay of execution for 60 days which have now run out.

3. That we now wish to appeal against the said Judgment and in this regard, we have, through our advocates on record filed a Notice of Appeal and request for proceedings (Annexed hereto and marked KB-1 and KB-2 are copies of the said Notice of Appeal and request for proceedings respectively).

4. That I am advised by my advocates which advise I verily believe to be true that we have strong grounds for appeal and our intended appeal has a high chance of success.

5. That I am advised by my advocates on record which advise I verily belief to be true that should the Judgment be executed, we shall suffer a miscarriage of justice.

6. That it is therefore only in the interest of justice that the orders sought herein be granted to enable us pursue the intended Appeal.

8. Clearly the Defendants have not even alluded to the possibility of their suffering any loss, substantial or otherwise in their application. As can be seen from the Provisions of Order 42 Rule 6(2) of the Civil Procedure Rules cited hereinabove, it is trite law that a stay of execution order can only be granted if the Applicants have successfully demonstrated that substantial loss may result to them unless the order is made.

9. Indeed, as was held in *Machira t/a Machira & Company –vs- East African Standard (2002) 2 KLR 63*:

“It is not enough merely to state that substantial loss will result or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground substantial loss, the kind of loss likely to be sustained must be specific, details or particulars thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue, and that if it comes to pass, the applicant is likely to suffer substantial injury by setting the other party to proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant’s business (eg appeal or intended appeal).”

10. As it were, it was not even clear to me if there is a proper Notice of Appeal pursuant to which the stay order is sought. I note from the purported Notice of Appeal annexed at paragraph 3 thereof, that the Notice of Appeal is dated and was filed herein on 14th November 2019. That was almost two months after the impugned Judgment was delivered and some five days before this application was filed.

11. Such a Notice of Appeal ought under Rules 74 and 75 of the Court of Appeal Rules to have been filed within 14 days of delivery of the Judgment. I did not think that this Court can grant an order of stay of execution pending appeal where it was obvious to it that there is no valid Notice of Appeal on record.

12. In the result, I am not persuaded that there is any merit in the Defendants’ application dated and filed on 19th November 2019. The same is incompetent and is hereby dismissed with costs to the Respondent/Plaintiff.

Dated, signed and delivered at Malindi this 5th day of November, 2020.

J.O. OLOLA

JUDGE