



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 35 OF 2020

SAMSON THURANIRA.....APPELLANT

VERSUS

JUSTUS GITUMA MUGUNA.....1ST RESPONDENT

JOSEPH KIMUNYI.....2ND RESPONDENT

SKYLAND CONTRACTORS LTD.....3RD RESPONDENT

COUNTY GOVERNMENT OF MERU.....4TH RESPONDENT

RULING

1. Before me is an application dated 29.6.2020 where the applicant seeks an order of stay of execution of the judgment and decree in Meru CMCC 290 of 2014 pending the hearing and determination of the appeal. He contends that the 1st respondent obtained exparte judgment against him and the 2nd and 3rd respondents in the lower court and he has threatened to execute the said judgment. The applicant made an application before the trial court to set aside the aforementioned judgment, but the application was dismissed vide a ruling delivered on 25.6.2020 which is the subject of this appeal.

2. The 1st respondent has opposed the application vide a replying affidavit dated 23.9.2020 where he contends that the judgment of the lower court is a money decree amounting to Shs.364,178 whereby applicant had offered to satisfy the decree but he later changed his mind. He avers that he shall be greatly prejudiced if the orders of stay are granted.

3. I have considered the arguments raised herein as well as the submissions of the rival parties.

4. **Order 42 rule 6 (2) of the Civil Procedure Rules** provides that:

“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”.

5. To grant or to refuse an application for stay of execution pending appeal is discretionary in that the court when granting a stay, it has to balance the interests of the applicant with those of the respondent. In determining this balance, the court gives due consideration to the three criteria set under order 42 rule 6 (2) of the Civil Procedure Rules, that is to say:

(I) Whether appellant stands to suffer substantial loss,

(II) Whether the application has been brought without delay and

(III) Whether there is security.

6. In the case of **Elena D. Korir vs Kenyatta University (2014) eKLR**, the court had this to say on principles guiding the court in exercise of its discretion to allow an application for stay pending appeal:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton and Turpin Ltd where the court of Appeal (Gicheru JA, Chesoni JA, and Cockar AG JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions namely:- sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay....”.

7. On the issue of substantial loss, it was held in Wangalwa & another vs Agnes Naliaka Cheseto Misc. application no. 42 of 2011 (2012) eKLR that:

“The appellant must establish other state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal”.

8. In the case of Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63, it was held that;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

9. In the present case, the applicant has stated as follows;

“That it is proper that the orders sought be granted to ensure that the 1st respondent does not proceed to execute a default judgment against me as I shall suffer great and substantial loss.

10. Thus the applicant’s claim of loss is anchored on the fact that he did not defend the suit before the trial court. Ogola J in Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331 stated as follows on the issue of substantial loss;

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

11. On this issue of substantial loss, I give the applicant the benefit of doubts, that he stands to suffer substantial loss as he did not defend the suit before the trial court.

12. On the issue of delay, I have no doubts that the application was filed expeditiously. On the issue of security, the applicant is willing to abide by any reasonable conditions set by the court.

13. In conclusion, I hereby proceed to grant a conditional stay in the following terms;

- 1) That the applicant is to deposit the sum of Ksh. 360 000 in court within 30 days failure to which the orders of stay shall lapse.
- 2) The orders of stay of execution given herein shall remain in force for a period of ONE YEAR.
- 3) The applicant is condemned to pay costs of the present application.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF NOVEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 5.10.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE