



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

LAND APPEAL NO. 44 OF 2019

EMILY CHESANG.....APPELLANT

VERSUS

BARBARA CHEBET MOI.....RESPONDENT

DISTRICT LAND REGISTRAR KOIBATEK.....INTERESTED PARTY

RULING

This ruling is in respect of an application dated 11th March 2020 by the Appellant/applicant seeking for the following orders:

- a) Spent
- b) Spent
- c) That at the hearing and determination of this application inter partes, this Honourable court be pleased to stay the execution of the judgment, decree and orders that were made in respect of the judgment entered on December 2019 by the Principal Magistrates Court at Eldama Ravine in ELC No. 5 of 2019 and any other order that may be issued pursuant thereto pending the hearing and determination of the application herein
- d) That this Honourable Court be pleased to stay the execution of the decree and Orders that were issued in respect of the judgment entered on 10th day of December 2019 by the Principal Magistrate Court at Eldama Ravine in ELC No. 5 of 2019 and any other order that may be issued pursuant thereto, pending the hearing and determination of the Appeal herein.
- e) That the costs of this application be provided for.

Counsel agreed to canvas the application by way of written submissions which were duly filed. The appellant had applied for stay of execution in the lower court and the same was declined on the ground that the applicant had not shown the substantial loss that she would suffer.

APPLICANT'S CASE

Counsel for the applicant relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules which governs the applications for stay of execution. Order 42 Rule 6 () provides:

"No order for stay of execution shall be made under (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 order for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.

On whether the applicant has met the threshold for grant of orders of stay of execution, counsel relied on the case of **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR** where the Court of Appeal held that;

"The High Court discretion to order for stay of execution of its order or Decree is fettered by three conditions namely sufficient cause, substantial loss would ensure them a refusal to grant stay the Applicant must furnish security, the application must be made

without unreasonable delay.”

Counsel further submitted that the Applicant must also demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in **Hassan Guvo wakelo-vsStraman EALTd(2013)** as follows:

‘In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then shall have been rendered nugatory’

On the issue whether the applicant has established substantial loss that she will suffer if the order of stay is not granted, counsel submitted in the affirmative as the Respondent has sought for orders of eviction as against the Applicant which orders were granted by the court. Further that the Applicant was and is in possession of the suit land and that the appeal will be rendered nugatory if she is evicted from the suit land. Counsel also submitted that the applicant has lived on the suit land for over 27 years hence she will suffer loss if she is evicted.

Counsel also relied on the case of **Kenya Shell Ltd —vs- Benjamin Karuqu Kibiru & Another (1996)eKLR** where the Court of Appeal observed that substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay of this has to prevented to avoid defeating the very purpose of an appeal. Counsel further cited the case of **Silverstein —vs- Chesoni (2002) 1 KLR 867** where the court stated what substantial loss would entail and it stated that;

‘Issue of substantial loss is the cornerstone of both jurisdictions substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory’

On the issue of unreasonable delay, counsel submitted that there was no inordinate delay on the part of the Applicant as she filed an application for stay in the lower court on 23rd December 2019 which application was determined on 10th March 2020 and dismissed.

Finally, on the issue of furnishing security for due performance of the decree, counsel submitted that the Applicant is ready to provide security as will be ordered by the court of which the court has discretion to order. Counsel relied on the case of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014 eKLR]** where Gikonyo J. stated that;

“The purpose of security needed under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the applicant, It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debtor hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 ru/e 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

Counsel therefore urged the court to allow the application as prayed as the applicant has met the conditions for grant of stay of execution.

RESPONDENTS’SUBMISSIONS

Counsel submitted that the respondent herein filed a plaint dated 7th July 2017 seeking for the orders to be declared the owner of the property Lembus/Mumberes/2244 measuring 4 hectares and that she is entitled to exclusive and unimpeded right of possession and occupation. She further prayed that the defendant be evicted from the suit land and a permanent injunction against the defendant plus costs of the suit.

Counsel submitted that judgment was entered in favour of the respondent where the applicant was given three months to vacate the suit premises. That the applicant being dissatisfied with the Judgment of the honorable court, moved the trial court vide an Application of 23rd December, 2019 seeking orders of stay of execution pending appeal which application was heard and dismissed

Counsel relied on the case o **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** where the court stated that-

“whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted.”

Counsel further relied on the case of **Chris Munga N. Bichage & 2 others v I.E.B.C & 2 others [2017]** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated

Further in the case of **Mohamed Salim TIA Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, the court stated that:-

“That right of appeal must be balanced against an equally weight right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

On the issue that the applicant will suffer substantial loss in the event that the orders for stay pending appeal are not granted, counsel submitted that the applicant has failed to demonstrate the loss that she stands to suffer. That it is the respondent who will suffer loss if the orders of stay are granted as she has been denied peaceful use of her land by the applicant.

Counsel submitted that the applicant's ground that she is apprehensive that her house may be demolished and evicted from the suit land cannot hold water as was held by Kullow J. in the case of **John Ratika Koini & 2 others v Samson Kipas ole Koini [2020] eKLR** that

"Mere apprehension without concrete evidence is not ground for the grant for Injunction"

It was counsel's submission that no matter how strong the Applicant's apprehension concerning the Respondent's intention is, in the absence of any evidence to the effect that the Respondent has taken any steps to try and evict her, or dispose off or destroy the suit property; there exists no sufficient ground for the court to grant the orders sought by the applicant who is currently in contempt of the orders of the trial court which directed her to vacate the suit property within 90 days from 10th December, 2019.

Counsel relied on the case of **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63** as was referred in the case of **Patrick Nganga v Gerishon Ngurë Mangara; John Muchiri Gachihi (Third Party) [2020] eKLR**, the Court stated:-

"In this kind of application 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."

Counsel submitted that the applicant delayed in bringing this application to court which is inexcusable. That the application was filed after a period of 100 days since the judgment was delivered on 10th December 2019. That the applicant had not complied with the court order which ordered her to vacate the suit land within 90 days.

On the issue of furnishing security for due performance of the decree, counsel submitted that the applicant has offered to deposit Kshs, 100,000/ as security of costs as awarded by the court which is not sufficient security for the due performance of the decree. Counsel also submitted that the application is defective as the applicant has failed to annex the decree that she intends to seek orders of stay and relied on the case of **Titus Mulandi Kitonga vs B O (a minor suing through his mother and next of friend S N O [2016] eKLR** where Njuguna J was of the view that:

"...it is now well settled law that a party seeking to review an order has to annex a copy of the order which he seeks to review. The Respondent herein failed to comply with this legal requirement and the omission in my view is fatal. On this issue, the learned magistrate noted that a copy of the proceedings and judgment were exhibited by the Respondent and to him, that is adequate. To me, this is not the current position in law...It is the duty of the party who wishes to appeal against, or apply for a review of a decree or order to move the court to draw up and issue a formal decree or order...In view of the above, the failure by the Respondent to extract a formal decree was fatal to the Application and the same ought to have failed on that account..."

Counsel therefore urged the court to dismiss the application with costs to the respondent as it has not met the threshold for grant of stay of execution orders.

ANALYSIS AND DETERMINATION

I have considered the application, the supporting affidavits, the grounds of opposition together with the submissions by counsel. 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 powers of courts to grant orders of stay of execution pending appeal are unfettered but the same should be guided by the three conditions as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules

The principles that guide the court in the exercise of its discretion to grant an application for stay pending appeal were enunciated in the case of **Elena D. Korir vs Kenyatta University (2014) eKLR** where Justice Nzioki wa Makau stated as follows;

*"the application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & another vs Thornton & Turpin Ltd** where the Court of Appeal (Gicheru JA, Chesoni JA & 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."*

Further in the case of **Butt vs. Rent Restriction Tribunal [1979]**, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his/her opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

The guiding principles are very clear and binding on the court to follow in deciding an application of stay of execution. The court has to use its discretion to either allow or decline to grant an application for stay of execution, but while doing so the court must exercise such discretion judiciously.

On the first limb as to whether the applicant has proved that she will suffer substantial loss if the order is not granted, the applicant claimed that she has been on the land for more than 27 years and that if she is evicted she will suffer substantial loss. She did not go further to prove how she will suffer loss and yet this is an important hurdle that an applicant must be able to establish before the court can exercise its discretion in favour of an applicant.

The reason why it is important to establish substantial loss is because it cuts both ways, for the applicant and the respondent who may also suffer substantial loss in the postponement in realizing the fruits of the judgment. The applicant also stated that she is apprehensive that the respondent might evict her hence she will suffer substantial loss.

In the case of **Emmy Keino (suing through her Attorney Stephen Mbogo Nyaga) -VS- Board of Trustees Teleposta Pension Scheme NBI HCCA 587 of (2017)** where the court cited the case of **James Wangalwa & Anr -Vs- Agnes Naliaka Misc. Application No 42 of 2011(2012) eKLR** where Gikonyo J. stated 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 4 Rule 6 of the CPR. This is so because execution is a lawful process.

The fact that the applicant is apprehensive that the respondent might start the process for her eviction does not automatically amount to substantial loss without proof of such loss. An applicant must go a mile further to establish such loss capable of tilting the discretion in his/her favour.

In the case of **RWW vs. EKW [2019] eKLR**, the court stated the purpose of 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."

On this limb I find that the applicant has failed to demonstrate the loss which she calls substantial loss.

On the issue on the application being made without delay I find that the application was filed timeously. It is on record that the judgment was delivered on 19th December 2019 and the applicant filed an application for stay of execution on 23rd December 2019 and a ruling delivered on 10th March 2020. That this application was filed on 11th March 2020.

On the issue of security for the due performance of the decree, the applicant stated that she is willing to deposit Kshs. 100,000/ as security of costs. It should be noted that the security of costs must not necessarily be monetary in nature and each case must be looked at depending on the circumstances of the case. There are some cases where a deposit of money would be appropriate and others where a deposit of a title deed in court would be sufficient. There are other cases where the court would grant the order without any security.

In the case of **Felix Kipchoge Limo Langat -Vs-Robinson Kiplagat Tuwei Eldoret EIC 215 of 2017 eKLR**, where the court held as follows;

"...on the issue of security for the performance for the decree, Counsel for the applicant submitted that they are ready and willing to offer security for the performance of the decree as the court may order, this is a case involving land where the defendant has title to the suit land. In the interest of justice, I will order a stay of execution of the decree with a condition that the defendant deposits the title to the suit land in court within 30 days and not to interfere with the character of the land until the appeal is heard and determined...."

The applicant must establish sufficient cause for the court to allow the order of stay of execution. In this case it is unfortunate that the applicant has no title to deposit in court as she hinged her claim on the doctrine of adverse possession. This does not mean that if she had the title that would be the appropriate security in this case. Every case has unique features and circumstances that the court must consider.

In the case of **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997**, at Page 4 , the Court held as follows:

- *the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay”*

The court must also balance the rights of both parties, that is the right of the applicant to appeal the judgment and the right of the successful litigant to enjoy the fruits of her/his judgment. In balancing the two the court is guided by principles of natural justice and access to justice.

In the case of **Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63** it was recognized that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

I therefore find that the application lacks merit and is dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 3RD DAY OF November, 2020

DR. M. A. ODENY

JUDGE