



REPUBLIC OF KENYA
IN ENVIRONMENT AND LAND COURT
AT ELDORET
ELC APPEAL NO. 14 OF 2020

MARY MUHONJA LUBANGA.....APPELLANT /APPLICANT

-VERSUS -

HUDSON KA AGALO.....RESPONDENT

RULING

This ruling is in respect of two applications dated 11th June 2020 and 22nd June 2020 seeking for the following orders:

- a. Spent
- b. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant a stay of execution of the judgment delivered on the 14th May 2020 in Kapsabet SPMC ELC NO. 31 OF 2018 pending the hearing of this Application inter partes.
- c. There be a stay of execution on the judgment delivered on the 14th of May 2020 in Kapsabet SPMC ELC NO. 31 of 2018 pending the hearing and determination of the appeal filed herein.
- d. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an order of Injunction restraining the Respondent, his employees, servants, assigns and/or agents from entering into the suit property being LR. NO. NANDI/KOIBARAK 'B'/768 fencing off a portion of thereof and conducting any and all construction on the suit property, depositing building materials on the suit property, curbing the use of the suit property by the Appellant and her family, employees and assigns; and/or destroying the Appellant/Applicant 's crops and fences pending the hearing of this application inter partes.
- e. Pending the hearing and determination of the Appeal, the Honourable Court be pleased to grant an order of Injunction restraining the Respondent, his employees, servants, assigns and/or agents from entering into the suit property being LR. NO NANDI/KOIBARAK 'B'/768 fencing off a portion of thereof and conducting any and all construction on the suit property, depositing building materials on the suit property, curbing the use of the suit property by the Appellant and her family, employees and assigns; and/or destroying the Appellant/Applicant s crops until the appeal is determined.
- f. The costs of this application do abide the outcome of the appeal.

The court gave an order that the status quo be maintained and that the respondent upon being served entered the suit land and took possession necessitating the filing of the application dated 22nd June 2020 and sought for the following orders:

- a. Spent
- b. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to issue an order for the removal of the Respondent, his family, assigns and property from the suit premises, which order is to be implemented by the Officer Commanding Station Kobujoi; in order to maintain the status quo as ordered by this Court on the 15th of June 2020.
- c. The Honourable Court be pleased to issue an order for the removal of the Respondent, his family, assigns and property from the suit premises, which order is to be implemented by the Officer Commanding Station Kobujoi; pending the conclusion of the Appeal.
- d. That the Honourable Court do penalize the Respondent as provided for under Order 40 rule 3 of the Civil Procedure Rules or alternatively impose any other appropriate penalty that will purge the contempt by the Respondent.

e. The costs of this application be met by the Respondent immediately.

Counsel agreed to canvas the two applications by way of written submissions which were duly filed.

APPLICANT'S CASE

Counsel submitted that the judgment by the trial court was delivered in the absence of both parties and stay of execution was not granted, thus the respondent was in the process of destroying the applicant's fence and crops.

Counsel relied on the supporting affidavit by the applicant and submitted that the judgment of the court was incapable of being executed since grant of letters of administration had not been granted yet the applicant was required to execute transfer forms. That the appeal has high chances of success and if stay order is not granted the applicant will she will be deprived of her property.

Ms. Opondo relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules 2010, which state as follows:

“ 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.”

Counsel submitted that the court has jurisdiction to grant orders of stay of execution. Further that the court should be guided by the case of **Giella Versus Cassman Brown** on grant of injunctions. Counsel also relied on the case of **Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR** where Honourable W. Korir, J, while referring to the case of **BUTT V RENT RESTRICTION TRIBUNAL [1982] KLR 417**, confirmed that discretion ought to be exercised in a manner that would not prevent an appeal. That the purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the applicant as the appeal would be rendered nugatory if there is no stay.

Ms. Opondo submitted that the Respondent and through his Advocate, have confirmed that at the time of filing the appeal and the application for stay of execution, the Respondent was not living on the suit property. His immediate occupation which was predicated by being served with the Notice of Appeal indicates that he is intending on carrying out actions which would render the appeal nugatory. Further that from the respondent's Replying Affidavit he states that there is no need for a stay of execution given that he is already in possession.

On the issue whether the Appeal has an overwhelming chance of success, counsel submitted that one needs only to refer to ingredients of a judgment which are the issues and the finding on the issues. That the finding in the judgment ought to be final and clear, and where a judgment is neither final nor clear in its intent then that constitutes an appealable judgment.

Counsel cited the cases of **Mareco Limited v Future Limited & another [2017] eKLR**, **Nairobi City Council vs. Thabiti Enterprises**

Limited

[1997] eKLR and Kisii Central Farmers limited vs. Jeremiah Mayaka Ombui & 4 others [2014] eKLR. where the court held that the issues for determination ought to flow from the pleadings. Counsel stated that one of the issues in contention is that the Magistrate misdirected herself by arriving at a determination that did not flow from the pleadings hence the appeal has high chances of success.

Counsel submitted that the respondent having disobeyed the court order, it is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. That the court ought not condone deliberate disobedience of its orders and should not shy away from its responsibility to deal firmly with proved contemnors.

Counsel relied on the case of **HADKINSON v. HADKINSON (1952) 2 All E.R. 567**, where the court held that:

It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

This conclusion was also drawn in **Salome Munubi & 3 others v Muhammad Swazuri & 2 others; Emmanuel Busera (Interested Party); Kabale Tache Arero (Contemnor) [2019] eKLR.**

Ms Opondo further submitted that the applicant has proved that she has a prima facie case with a probability of success and that she will suffer irreparably if an order of injunction is not granted pending appeal. Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

Counsel submitted that the respondent is in occupation of 1 acre which was delivered to him by the applicant which he had paid for.

Mr Choge relied on the case of **Kenya Electricity Transmission Company Limited v Kibotu Limited [2019] eKLR** where this Court cited **Shepherd Homes Ltd vs Sadhan (1971) ICH 34** where **McGarry J.** stated that:

“...but the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can I think the case has to be unusually strong and clear before a mandatory injunction will be granted”

Counsel submitted that the purpose of the interlocutory injunction is to improve the chance of the court being able to do justice as was held in **Kenya Electricity Transmission Company Ltd v. Kiboto Ltd (2019) eKLR** (supra)

The court was further urged to be guided by the Court of Appeal decision in **Butt v. Rent Restriction Tribunal (1982) KLR 417** whereby the court needs to exercise its discretion to grant stay of execution and to consider the special circumstances in this case that the respondent had settled on the suit land thus the order would amount to an eviction. That the applicant has nothing to lose in case the application for stay of execution is not granted.

Mr. Choge further relied on the case of **National Industrial Credit Bank Ltd vs Aguina/ Francis Wasike & Another (UR) cited in Stanley Karania Wainaina & Another vs Ridon Anvanzo Mukttbwa (2016) eKLR** held that:-

"The Court has said before and it would bear repeating that it is the duty of the Applicant to prove that an Appeal would be rendered nugatory

Counsel therefore submitted that the applicant has not proved that she is entitled to the orders sought for injunction and stay of execution and hence the application should be dismissed with costs to the respondent

ANALYSIS AND DETERMINATION

This is a twin application for injunction and stay of execution. The issues for determination are as to whether the applicant has met the ingredients for grant of stay of execution as per the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and for injunction as per the principles of **Giella Casman Brown Case**.

The applicant filed this application for stay of execution of the judgment pending appeal and the court gave an order of maintenance of status quo which was served upon the respondent. It was the applicant's case that upon service of the order the respondent moved into the suit premises to defeat the course of justice.

Before dealing with the issue of stay of execution and injunction, the court will deal with the issue on how the court should treat a respondent who does the opposite of what the court order directs. Such a person cannot benefit from the discretion of the court to issue any orders in his or her favour.

The applicant has moved to court for an order of stay of execution and therefore must comply with the requirements of Order 42 Rule 6(2) of the Civil Procedure Rules. The applicant has elaborately given the reasons why the application for stay should be allowed.

In the case of **Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR**, where the Court held that:-

“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 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.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in **Hassan Guyo Wakalo Vs...Straman EA Ltd (2013) as follows: -**

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

These twin principles go hand in hand and failure to prove one dislodges the other. The applicant has been able to prove that if the orders sought are not granted then the appeal will be rendered nugatory and she will suffer substantial loss.

In the case of **James Wangalwa & another Vs Agnes Naliaka Cheseto, [2012] eKLR** the Court stated that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail...”

The respondent is also faulted by the court for not obeying the status quo order. If he had obeyed the order of status quo, then we would not be dealing with another application for injunction.

The applicant must also show that she will suffer irreparable harm if the application for injunction is not granted as was held in the case of **Kenleb Cons Ltd v. New Gatitu Service Station Ltd &anor(1990) eKLR,**

“to succeed in an application of injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction”

The applicant has demonstrated that she has a legal and equitable right by stating that she co-owned the suit land with her late husband and another registered owner. This right must be protected.

The purpose of stay of execution is to preserve the substratum of the case pending the hearing and determination of the appeal. The court is called upon to exercise its discretion in such applications in a way that the applicant gets justice and the successful party is not unduly delayed in enjoying the fruits of his or her judgment. There has to be a balancing act. It should also be noted that the court will not grant orders of stay in frivolous applications which have no head or tail by the applicant but only meant to settle scores with the respondent. The application must meet the test set down for stay of execution.

Even though the applicant has not offered any security for the due performance of the decree, the court in under a duty to set any condition to be complied with by the applicant. I order that the applicant do deposit Kshs. 100,000/ in a joint interest earning account of both advocates for the due performance of the decree within 30 days' failure of which the order lapses.

I have considered the application, the submissions by counsel and find that the application has merit and is therefore allowed as prayed.

DATED and DELIVERED at ELDORET this 2nd DAY OF November, 2020

DR. M. A. ODENY

JUDGE