



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 26'A' OF 2020

THE LAIKIPIA COUNTY GOVERNMENT.....APPLICANT/APPELLANT

-VERSUS-

TIRUS KINYUA THUMBLI.....RESPONDENT

RULING

1. Pursuant to a judgment delivered by the Magistrates' Court sitting in Nanyuki in CM ELC No. 169 of 2018 on the 12th August 2020, the Applicant/Appellant has now filed the present Application by way of a Notice of Motion dated 24th August 2020 brought under the provisions of Section 65(1) (b) of the Civil Procedure Act, Order 42 Rule 1& 6(2)(a) of the Civil Procedure Rules and Section 13(4) of the Environment and Land Court Act, and all other enabling provisions of the law where the Applicant seeks for Orders of stay of execution of the judgement and decree pending the hearing and determination of an intended Appeal.
2. The said Application is supported by the grounds set on its face as well as on the Supporting Affidavit of Alexander Muchemi the Applicant's Legal Advisor herein, dated the 24th August 2020.
3. On the 2nd September 2020, pending the hearing of the Application inter-parties, there were interim Orders of stay of execution of the judgment delivered on the 12th August 2020 pending the hearing and determination of the Notice of Motion dated 24th August, 2020.
4. The said Application was opposed vide the Respondent's Replying Affidavit dated the 18th September 2020 in which the Respondent sought for its dismissal with costs for failing to meet the requirements for stay of execution pending the hearing and determination of an Appeal, as provided for under Order 42 Rule (6) (1)(a)(2) and (6) of the Civil Procedure Rules.
5. The Application was disposed of by way of oral submission where the Applicant's Counsel relied on their Application dated 24th August, 2020 and Supporting Affidavit of an equal date, as well as the annexures therein to submit that the Orders they sought were mainly:
 - (i) Stay of execution on the Judgment delivered in the Nanyuki Chief Magistrates Environment and Land Court.
 - (ii) The Order of stay of execution be confirmed in the pendency of the main Appeal.
6. The Applicants' submission was to the effect that their Application was echoed under the provisions of Order 42 Rule 6 of the Civil Procedure Rules to which they had met the requirements for grant of the said Order. That they had established sufficient cause to warrant the said Orders wherein they had demonstrated the loss to be incurred should the Respondent proceed to execute the Judgment.
7. That they had made the Application in good time and without delay which was 12 days after delivery of Judgment and that since the Applicant for all intents and purposes was a Government liability, it needed not provide security as stipulated by the provisions of Order 42 Rule 8 of Civil Procedure Rules.
8. It was further their submission that the decretal amount was a substantial amount of money of Kshs.20,000,000/= which, for it to be furnished in Court, would require not only the approval of the relevant departments of the Applicant but the approval of the County Assembly of Laikipia before incurring it.
9. That in regard to the Respondent's Replying Affidavit in which he had deponed that they had not proved that he was not a man of straw with capability of refunding the decretal amount upon success of the Appeal, it was their submission that the burden of proof as to whether indeed the Respondent was a man of straw or not could not be imposed upon them as they were not privy to his financial capability or status.

10. The Applicants submitted that by incurring monies they held on behalf of the citizens of Laikipia, it would suffer substantial loss should they succeed on Appeal and the Respondent is unable to refund the same. That the Respondent should not merely claim the ability to refund the decretal amount, but should have provided evidence of the ability to do so.

11. The Applicant also relied on their annexures 5(a), (b) to wit, letters to Nanyuki law Courts seeking for proceedings to enable them prepare their Appeal to which they had now obtained the certified copy of the Judgment and were awaiting certified proceedings. That in effect therefore it showed their seriousness to pursue the Appeal so as not to deny the Respondent herein the opportunity to enjoy the fruits of his Judgment should they not succeed in their Appeal.

12. That an expedited hearing of the Appeal would better serve the interest of both parties and therefore their prayer for stay of execution pending the hearing of the Appeal and its final determination.

13. The Application was opposed by the Respondent who relied on his Replying Affidavit sworn on the 18th September, 2020 and filed on 21st September, 2020.

14. That as deponed at paragraph 4 of their Replying Affidavit, and pursuant to the provisions of Section 107 of the Evidence Act, since the Applicant had alleged that he was a man of straw, it had been their duty to prove that he, (Respondent) was indeed a man of straw and could not refund the decretal sum should they succeed in their Appeal.

15. The Respondent also referred to paragraph 5 of his Replying Affidavit to submit that the Order for stay pending Appeal was a discretionary Order which would be granted after the Court has balanced the interest of both the Applicant and the Respondent.

16. That this was a money decree which had arisen pursuant to the demolition of his building to which he had already suffered a substantial loss. That in the circumstance, the Applicant was not entitled to the Orders sought as a matter of right.

17. The Respondent submitted that the jurisprudence regarding this kind of matter was that the decretal sum must either be deposited in the joint account of the two advocates pending Appeal or be paid to the Respondent or part of the decretal sum be paid to the Respondent. Reference was made to the decided case in **Superior Hommes Kenya Limited -vs- Musango Kithome (2018) eKLR** and **Haulieus Limited -vs- Abdulnasir Abubakar Hassan (2017) eKLR** which were persuasive authorities and to which the Respondent sought that the Court be guided by them and be persuaded accordingly.

18. Their submission on the issue that the Applicant was a Government and needed not deposit any security was that since both parties were before a Court of competent jurisdiction, that they were therefore bound by the rules of the Court and jurisprudence developed by the superior Court from time to time. The Respondent prayed for the dismissal of the Application.

19. In response and in rejoinder, the Applicant submitted that it was not in contention that the powers of the Court were discretionary but reiterated that an expedited hearing of the Appeal would best serve the interest of both the Applicant and the Respondent.

Determination.

20. I have considered the Applicant's Application for stay of execution of the Judgement in Nanyuki CM ELC No. 169 of 2010 pending the hearing and determination of its intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said Application.

21. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or Order Appealed from except 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.

(2) 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 1st 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 1st Applicant.

22. There are three conditions for granting of stay Order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which :

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is Ordered;
- ii. The Application is brought without undue 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.

23. However since the Applicant is Government, Order 42 Rule 8 of the Civil Procedure Rules provides as follows:

No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

24. I therefore find issues for determination arising therein namely:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What Orders this Court should make

25. The purpose of stay of execution is to preserve the substratum of the case as was held in the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, where the Court stated as follows:-

“The purpose of the Application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

26. What is the status quo on the suit land? It has not been denied that the Applicant herein had already demolished the Respondent’s building that had been constructed on the suit land which act had led to the granting of the impugned decretal sum of Ksh 20,000,000/= being the value of the property. To this effect therefore there is no substratum/property to be preserved.

27. The Applicant however contends that they would suffer substantial loss if stay is not granted, because by them being compelled to pay to the Respondent the colossal sum of Ksh 20,000,000/=-, should the decree be executed and eventually the Appeal succeeds, it would be impossible to retrieve the decretal amount from the Decree Holder (Respondent) as they were not privy to his financial capability or status.

28. What amounts to reasonable grounds for believing that the Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the Respondent was a person of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success.

29. In the case of **Justus Kyalo Musyoka v John Kivungo [2019] eKLR** it was held that:

Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgment. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court

30. Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income. The property a man has is a matter so peculiar within his knowledge that an Applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then, in those circumstances, where the Applicant has reasonable grounds to believe that the Respondent will not be in a position to refund the decretal sum if the Appeal succeeds, shift to the Respondent to show that he would be in a position to refund the decretal sum.

31. In Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua [2001] eKLR the Court of Appeal held as follows:

‘There is also the possibility that it may be affirmed in whole or in part. Whatever the position will be this Court has a duty to guard against the Corporation’s success in its intended appeal being rendered nugatory. The respondent has not fully answered the Corporation’s assertion that he has no known assets. The decree in his favour is for a whopping kshs.53, million odd. That by ordinary standards is a very large sum of money and it was incumbent upon the respondent to satisfactorily counter the Corporation’s assertion that he had no known assets by showing the basic assets he has which if need would arise, he would depend on to repay the decretal sum. Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so. An undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient.

32. The Respondent herein has not discharged the said evidential burden. Furthermore, the Applicant’s Appeal risks being rendered nugatory and pointless if the subject matter of the Appeal being inter alia cash damages awarded to the Respondent is allowed to be had and utilized by the Respondent, whilst the Applicant ventilates its yet to be exhausted right to be heard at Appeal. In my humble view the appellant who is the Government is highly likely to raise Ksh.20,000,000/= while the Respondent may find it very hard to raise the said amount should he be allowed to access the fruits of his decree and judgment in the lower Court pending the Appeal before this Court.

33. I also find that should this Court disallow the Applicants' prayers on stay of execution, it is invariable that should their Appeal succeed before this Court the same can be most likely be rendered nugatory as the subject of the Appeal would have already been awarded. With that said, the Applicant in my view has succeeded to prove the issue of substantial loss should the decree of the lower Court be released to the Respondent.

34. On the second condition, as to whether the Application was brought without undue delay, I find that there is no dispute that the impugned judgment was delivered on the 12th August 2020 wherein the Applicant sought for stay of execution vide their Application dated the 24th August 2020 which was 12 days later. I find that the said Application is brought without undue delay.

35. On the third condition herein the Court finds that Order 42 Rule 8 of the Civil Procedure Rules is applicable and self-explanatory in the present circumstance. This issue rests at that.

36. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how discretion of the Court should be exercised to wit:

1. "The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an Appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an Appeal may not be rendered nugatory should that Appeal Court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant [or] refuse an Application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of Appeal.

5. The Court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can Order security upon Application by either party or on its own motion. Failure to put security for costs as Ordered will cause the Order for stay of execution to lapse."

37. In the end that Court finds in favour of the Applicant.

i. There shall be stay of execution of the judgment issued by the subordinate Court in Nanyuki CMC ELC No. 169 of 2018 on 12th August 2020 pending the hearing and determination of the Appeal

ii. The Applicants shall prepare, file and serve their record of Appeal within 30 days from this date.

iii. Costs in the cause.

Dated and delivered at Nakuru this 11th day of December 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE