



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU

ELC PETITION No. 20 OF 2017

SAMUEL WAIYA GITHUKURIO.....APPLICANT

VERSUS

STEPHEN MUNGAI WAITA.....1st RESPONDENT

LAND REGISTRAR NYANDARUA.....2nd RESPONDENT

DISTRICT LANDS SURVEYOR NYANDARUA.....3rd RESPONDENT

HON ATTORNEY GENERAL.....4th RESPONDENT

RULING

1. The Applicant in the present application dated 14th May 2020 seeks for stay of execution of the taxed costs awarded on 7th May 2020, pending the hearing and determination of Nakuru Court of Appeal Civil Appeal No. 75 of 2019. The application is brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law.

2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Samuel Waiya Githukurio the Applicant herein dated the 14th May 2020.

3. The Application was opposed vide a Replying Affidavit dated the 13th August 2020 and the sworn by one **Naomi Njoki Mungai** as the 1st Respondent seeking that the same to be dismissed for being fatally defective, inept and an abuse of the court process for being res judicata as similar application had been filed on the 11th October 2019 before the Nakuru Court of Appeal in Nakuru Application No. 233 of 2019. That further that the 1st Respondent was a successful farmer and would be in a position to refund the sum of Ksh. 113,405/= the subject matter of the stay should the Applicant/Appellant succeed in his Appeal.

4. That further there had been no Memorandum of Appeal attached to the application or filed before the Court of Appeal to show the existence of an Appeal and that she should be allowed to enjoy the fruits of his judgment in the meantime.

5. And there was no response from the 2nd, 3rd, and 4th Respondents respectively and directions had been issued to the effect that the said application be disposed of by way of written submissions, to which there had been no response from the 2nd, 3rd, and 4th Respondents yet again.

The Applicant submissions.

6. The Applicant submitted that his application before the Court of Appeal dated 2nd October 2019 was one that sort for stay of proceedings and not stay of execution as alleged by the 1st Respondent. That further, he had already filed and served his record of Appeal which contained a Memorandum of Appeal to the parties.

7. The Applicant also took issue with the Replying Affidavit herein sworn on the 15th August 2020 to the effect that it had been sworn by one **Naomi Njoki Mungai** who was a stranger to the proceedings and therefore the application stood unopposed and the same should be allowed.

8. That the application had been filed without undue delay the ruling on the taxation having been delivered on 7th May 2020 and the current application having been filed on the 15th May 2020.

9. That he would suffer irreparable loss and damage as was evident from the proceedings where he had approached the court seeking for

remedy. That he was willing to abide by any terms that maybe given by the court although he did not have the means to pay the said costs.

Determination.

10. I have considered the fact that the Applicant's application was opposed by one Naomi Njoki Mungai through her Replying affidavit dated 13th August 2020 and her written submissions of 16th September 2020. It is well noted that at the time of filing the Replying affidavit and written submissions, the said Naomi Njoki Mungai had not been joined as a party to the suit and was therefore a stranger and had no *locus standi* to oppose the application. Her replying affidavit and written submissions are hereby struck out.

11. I have thus considered the Applicant's Application for stay of execution of the taxed costs awarded on 7th May 2020 pending the hearing and determination of his intended Appeal as unopposed.

12. It is clear to me that taxation of costs is part of the execution process, complete with its provisions for stay of execution, under the Civil Procedure Rules. 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.

13. A court will in granting stay of execution pending hearing and determination of an Appeal, on the taxed costs as in this case, be guided by presence of three conditions to wit that:

- i. The Court is satisfied that substantial loss may result to the 1st 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 Applicants.

14. I find the issues for determination arising therein being:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of costs pending Appeal.
- ii. What orders this Court should make

15. On the first condition of proving that substantial loss may result unless stay order is made, I find that it was incumbent upon the Applicant to demonstrate the kind of substantial loss he would suffer if the stay order was not made in his favour and not merely stating that he would suffer loss if the order of stay of execution was not issued.

16. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma v Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

17. The Applicant, in an application of this nature, ought to have shown the damages he would suffer if the order for stay is not granted since by granting stay it would mean that the status quo should remain as it were before thus denying a successful litigant of the fruits of his judgment. I thus find that the Applicant has not given the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410** and therefore the Application on this ground must fail.

18. On the second condition, I find that it is not contested that the Application was brought 7 days after the bill of costs was taxed. I find that this was not undue delay.

19. On the last condition as to provision of security, I find that the Respondent has intimated his willingness to avail security for due performance of the decree. In the case of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 Others [2014]**

eKLR the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the 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 debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 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.”

20. I find that although the first condition under Order 42 Rule 6 of the Civil Procedure Rules has not been met by the Applicant herein, however there has been no evidence adduced to the effect that there would be any prejudice suffered by the Respondents if stay is granted. To this effect and in the best interest of justice I order that;

- i. That there shall be stay of execution of the taxed costs awarded on 7th May 2020 pending the hearing and determination of the Appeal herein on condition that the Applicant shall within 30 days from the date of this ruling deposit Kshs.100,000/=(one hundred thousand shillings) in a joint earning interest account.
- ii. That the Applicant shall lodge an Appeal against the taxed costs within 14 days of this date.
- iii. That the Applicant shall further, within 30 days from this date compile, file and serve upon the Respondents a complete record of Appeal.
- iv. In default, of any of the clauses (i) (ii) and (iii) above the stay herein granted shall automatically lapse.
- v. Cost to abide as per the outcome of the Appeal.

It is so ordered.

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

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE