



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

E.L.C. APPEAL NO. 15 OF 2020

CHRISTOPHER MURAGE WAHOME.....APPELLANT

VERSUS

CECILIA NJOKI NGUNJIRI.....RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 22nd September, 2020 brought under **Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (the Rules) and all other enabling provisions of the law**, the Appellant sought a stay of execution of the judgment and decree of the *Hon. S. N. Mwangi* dated 28th August, 2020 in Nyahururu CM ELC Case No. 214 of 2018 pending the hearing and determination of the appeal before this court.

B. THE APPELLANT'S CASE

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit and supplementary affidavit sworn by the Appellant on 22nd September, 2020 and 16th November, 2020 respectively and the annexures thereto. The Appellant contended that unless a stay of execution was granted he might suffer substantial loss in the sense that he might be evicted from the suit property and that his pending appeal might be rendered nugatory.

3. The Appellant contended that he and his family have been in possession of the suit property since 1995 and that he had developed it by constructing houses and cultivating crops thereon hence he would be rendered homeless were he to be evicted and his houses demolished during the pendency of the appeal.

C. THE RESPONDENT'S RESPONSE

4. The Respondent filed a replying affidavit sworn on 2nd October, 2020 in opposition to the said application. The Respondent contended that the application was bad in law, misconceived and otherwise an abuse of the court process. It was contended that the Appellant did not have exclusive and uninterrupted possession of the suit property and that the structures thereon were merely temporary in nature.

5. The Respondent contended that the Appellant had failed to demonstrate the element of substantial loss since he had other properties to which he could relocate. It was further contended that the Appellant had not demonstrated what substantial loss would result from the payment of general damages and costs awarded by the Magistrates' court to warrant a stay with respect thereto. The Respondent further contended that no sufficient security had been offered for due performance of the decree should the pending appeal ultimately fail.

D. DIRECTIONS ON SUBMISSIONS

6. The record shows that when the said application was listed for directions on 6th October, 2020. It was directed that the same shall be canvassed through written submissions. Each party was granted 14 days to file written submissions. The record further shows that the Appellant filed his submissions on 17th November, 2020 whereby the Respondent filed hers on 26th November, 2020.

E. THE ISSUES FOR DETERMINATION

7. The court has considered the Appellant's notice of motion dated 22nd September, 2020 the Respondent's replying affidavit in opposition thereto, the Appellant's supplementary affidavit as well as the submissions on record. The court is of the opinion that the main question for

determination herein is whether the Appellant has made out a case for the grant of a stay of execution pending the hearing and determination of the appeal.

F. ANALYSIS AND DETERMINATION

8. The said application was predicated upon **Order 42 Rule 6 (2) of the Rules** which stipulates as follows:

“1. 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 orders 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 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.”

9. The term ‘substantial loss’ is not defined in the **Civil Procedure Act (Cap 21) or the Rules**. It is also not defined in the **Interpretation and General Provisions Act (Cap 2)**. The **Concise Oxford English Dictionary (12th Edition)** defines the term ‘substantial’ in at least three ways, Viz;

a. Of considerable importance, size or worth,

b. Concerning the essentials of something,

c. Real and tangible rather than imaginary.

10. On the other hand, **Black’s Law Dictionary (10th Edition)** defines the term ‘substantial’ in at least nine (9) different ways and the material ones state as follows;

a. Of, relating to, or involving substance; material.

b. Real and not imaginary; having actual, not fictitious existence.

c. Important, essential and material; of real worth and importance.

d. Considerable in amount or value; large in volume or number.

e. Containing the essence of a thing; conveying the right idea even if not the exact details.

11. The material on record indicates that the Appellant has been residing on the suit property and that he has some dwelling houses thereon. There was really no dispute that the Appellant was residing on the suit property. What the Respondent contended was that the Appellant’s structures were temporary and not of a permanent nature. The Respondent also claimed that the Appellant could relocate to another property without providing particulars of such property.

12. The court is of the opinion that the requirement of *substantial loss* is to distinguish it from merely nominal or cosmetic loss which an Appellant may suffer should the decree be executed during the pendency of an appeal. The court is satisfied from the material on record that the loss which the Appellant may suffer as a result of eviction and removal of his houses is real and not imaginary. The court is satisfied that such loss would be material and of real worth and importance. It would be loss of considerable importance, size or worth hence the same may constitute substantial loss within the meaning of **Order 42 Rule 6 (2) of the Rules**.

13. There is no doubt that the instant application was filed without reasonable delay. The judgment of the trial court was delivered on 28/08/2020 whereas the instant application was filed on 23rd September, 2020 within a period of less than one month from the date of delivery of the judgment. It is noteworthy that the Respondent did not contend in her replying affidavit that the application was not filed expeditiously. Consequently, the court finds that the instant application was filed without unreasonable delay as required by law.

14. The final aspect for consideration on stay is whether the Appellant has provided security for due performance of the decree should his appeal ultimately fail. The Appellant offered a motorbike as security. However, there was no indication as to the value of the motorbike. On the other hand, the respondent contended that there was no sufficient security provided by the Appellant.

15. The court is of the opinion that the court has a discretion to direct the provision of such security as it may deem fit for the due performance of the decree should the appeal ultimately fail. The court is further of the opinion that no security is required with respect to an eviction

order since the Respondent shall be at liberty to enforce the decree through court bailiffs should be appeal be unsuccessful. The court is, however, inclined to direct that the Appellant shall deposit the sum of Kshs.150,000/- awarded to the Respondent into court within 30 days from the date hereof as security.

G. CONCLUSION AND DISPOSAL ORDER

16. The upshot of the foregoing is that the court finds merit in the Appellant's application for stay of execution pending appeal. Accordingly, the Appellant's notice of motion dated 22nd September, 2020 is hereby allowed in the followings terms:

a. There shall be a stay of execution of the judgment and decree of the Hon. S. N. Mwangi (SRM) dated 28th August, 2020 in Nyahururu CM ELC Case No. 214 of 2018 pending the hearing and determination of the pending appeal.

b. The Appellant shall deposit in court the damages of Kshs.150,000/- awarded to the Respondent within 30 days from the date hereof in default of which the stay shall lapse without further order.

c. Costs of the application shall be costs in the appeal.

It is so ordered.

RULING DATED and SIGNED at NYAHURURU and DELIVERED via Microsoft Teams Platform this 8th of December, 2020.

In the presence of:

Ms. Ndegwa for the Appellant

Ms. Wanjiru Muriithi for the Respondent

Court Assistant: Carol

Y.M. ANGIMA

JUDGE

08/12/2020