



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO. 67 OF 2015

SIMON MBOCHA KINYATI.....1ST APPELLANT

ELIZABETH NJANGO.....2ND APPELLANT

=VERSUS=

PHOEBE NJERI KAMAU.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

RULING

1. This is the Notice of Motion dated 2nd December 2015 brought under order 42 rule 6 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act.
2. It seeks orders
 - (1) *Spent*
 - (2) *Spent*
 - (3) *That there be a stay of execution of the Decree issued in Milimani CMCC No. 7352 of 2008 on 6th August 2015 pending the hearing and determination of the Appeal.*
 - (4) *That costs of this application abide the outcome of the Appeal.*
3. The grounds are on the face of the application and are set out in paragraph a to j.
4. The application is supported by the affidavit of Simon Mbocha Kinyati the 1st appellant/applicant sworn on the 3rd December 2015.
5. The application is opposed. There is a replying affidavit sworn by Phoebe Njeri Kamau, the 1st respondent sworn on the 9th March 2016 and the grounds of opposition dated 9th March 2016.
6. On the 19th May 2017 the court directed that the Notice of Motion be canvassed by way of written submissions.
7. It is the appellants' submissions that the dispute between the parties herein is on ownership of Plot Number 66 in LR No. 209/7260. Given the judgment the 1st respondent can now do anything on the property including taking action that will remove the subject matter from the orders of the Appeal Court in the event that the Appeal is successful. It is important for the subject matter to be preserved so that the Appeal is not rendered nugatory. They have relied on the cases of **Bungoma HC Misc App. No 42 of 2001 James Wangalwa & Another vs Agnes Naliaka Cheseto** and **Eldoret ELC 1 of 2012 Peter Samoei vs Isaac Ruto**.
8. This application has been brought without undue delay. They have relied on the case of **Milton K. Njuki vs Edward Ileri Mugo [2005] eKLR**. The requirement to provide security is not a mandatory requirement. This rule leaves the court with a wide latitude on the issue of security which is to be applied depending on the circumstances of the case. They have relied on the cases of **Kalonde Mbusya vs Martin Kimwele Kikoi CA Civil Application No. 35 of 2005; Mary Sote vs Samson Barnwach HCCC no 114 of 2012** and **Charles Nguyo vs**

It is the appellants' submissions that there is no necessity for security as this is not a monetary decree and in addition the subject matter is land which is a fixed asset. The appeal has merit. They urge the court to unconditionally grant stay of execution of the decree pending appeal.

9. It appears the 1st respondent did not file any written submissions. I will therefore rely on the grounds of opposition and the replying affidavit of the 1st respondent.

10. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the grounds of opposition and the replying affidavit. I have also considered the written submissions of counsel. The issue for determination is whether this application is merited.

11. Order 42 rule 6 (2) of the Civil Procedure rules provides that:-

“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”.

It is clear from the above provision that it requires specific conditions to be met by the applicant in order for orders of stay to be granted.

12. The principles that guide a court in exercising discretion in an application for stay pending appeal are now well settled:-

(1) That the application has been brought without undue delay.

(2) That unless stay is granted the applicant shall suffer substantial loss.

(3) That the applicant has offered security for the due performance of the decree that may ultimately be found to be binding upon him.

In the case of **Peter Odande t/a Spredwitt Chemist vs Josephine Wangari Karuya [2006] eKLR L. Kimaru J** states as follows:-

“The issue for determination by the court is whether the applicant has established a case to enable the court to grant stay of execution sought for the court to grant stay of execution it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding on him”

13. In the case of **Feissal Amin Janmohammed t/a Dunvia Forwarders vs Shami Trading Co Ltd Mombasa HC Civil Appeal No 65 of 2013 [2014] Eklr Kasango J** stated as follows:-

“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security”.

14. I have considered the notice of motion herein. I find that it has been brought without undue delay. It is the appellants' case that the subject matter ought to be preserved so that the appeal is not rendered nugatory. In paragraph 8 of the affidavit in support Simon Mbocha Kinyati, the 1st appellant deposes;

“That initially the property in question was housing sewerage tanks and I had excavated it for more than one year and spent millions of shillings in laying foundation in readiness for construction.”

In paragraph 9, he deposes:-

“That I have therefore invested heavily in the said premises and I am apprehensive that the plaintiff shall continue to conduct adverse developments or may dispose of the same to a third party or otherwise deal in such a way that the same shall not be recoverable”.

The 1st appellant/applicant has not annexed any document in support of the above averments. In my view this is not a demonstration that he will suffer substantial loss if these orders are not granted. I find that he has failed to demonstrate that he will suffer substantial loss if these orders are not granted.

15. The other condition to be satisfied by the appellant is that he must provide such security as may ultimately be binding on him. The same is set in mandatory terms. I disagree with the appellants' submissions that the requirement to provide security is not a mandatory requirement. I also disagree with their submissions that the court has a wide latitude on the issue of security. Order 42 rule 6 of the Civil Procedure Rules requires specific conditions to be met by an applicant of which the appellant/applicant herein has not satisfied. I find that the appellant/applicant herein have not stated whether they intend to furnish or have already furnished security for due performance of the decree.

16. I have also gone through the application herein and I find that the appellant have failed to attach the decree and/or order that is being appealed against.

17. All in all I find that the appellants/applicants have failed to satisfy the requirements set out under order 42 rule 6 (2) of the civil procedure rules. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered in Nairobi on this 31st day of January 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Appellants

.....Advocate for the Respondents

.....Court Assistant