



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 100 OF 2017

MIRIAM MUGURE WAMITI.....RESPONDENT/PLAINTIFF

VERSUS

DAVIS NDERI NG' ANG'A.....APPLICANT/DEFENDANT

RULING

1. The Defendant filed the Notice of Motion dated 11/5/2018 seeking orders for stay of execution of the decree pending hearing and determination of an intended appeal as well as provision for costs of the application.
2. The Respondent opposed the application and through her Replying affidavit dated 8/10/18 and filed in Court on even date deponed that as a decree holder she is entitled to execution and enjoyment of the fruits of the judgment. She contended that the Applicant does not stand to suffer any loss. The judgement was in favour of the Plaintiff who established that the suit property had already been sold to the estate of the late Henry Wamiti. She opined the offer for security of costs made by the Applicant in the sum of Kshs 100,000/- is understated in view of the current value of the property which she gave as Kshs 2.5 million. She concluded that the Applicant in bringing this application is trying to frustrate the execution of the judgement in her favour. She further termed the application an afterthought on account of laches, brought in bad faith and aimed at preventing justice in her favour.
3. The Applicant submitted that in respect to substantial loss if stay is not granted, he stands to suffer as he is the registered owner of the suit land. If the Respondent succeeds in levying execution, he will lose his proprietorship of the land. That the land may be subdivided and transferred to other third parties hence rendering his appeal nugatory. The Applicant further submitted that the application was filed on the 7/9/18, 8 days after the delivery of the judgement thus timeously.
4. The Applicant further submitted that he has made an offer of Kshs 100,000/- being security for costs. That the Respondents averment that the suit property is worth Kshs. 2.5 million is contrary to the value declared in the transfer documents which were submitted the Applicant to execute. That in any event the Respondent is cultivating the land and stands to gain more during the pendency of the appeal.
5. The Applicant relied on the case of James **Wangalwa & Anor Vs Agnes Naliaka Cheseto (2012) EKLR** which case I have read and considered.
6. Citing the case of **Masisi Mwita Vs Damaris Wanjiku Njeri CA 107 of 2015** the Applicant stated that the application is intended to delay justice and prevent her from enjoying the fruits of the judgment in her favour. She argued therefore that the application for stay of execution is not warranted. She further submitted that the Respondent Applicant will not suffer any substantial loss as it has been ascertained by the Court that he indeed sold the suit land to the Plaintiff and has frustrated attempts to cause the suit land transferred to the Respondent. Further, that in any event the Respondent has been on the land since 1997 to date. She relied on the case of **Henry C Langat Vs Naivas Company Limited ELCR No 231 of 2013** to support this point.
7. In respect to the security for costs, the Respondent submitted that the sum of Kshs 100,000/- offered by the Applicant is inadequate as the current value of the land is Kshs 2.5 million and urged the Court to order the provision of Kshs 2.5 million as security for costs in the suit. Finally, she urged the Court to dismiss the application with costs.
8. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) 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.

(2) No order for stay of execution shall be made under subrule (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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

9. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

a) The application was brought without delay;

b) Substantial loss may result to the Applicant unless the stay is granted; and

c) Security for the due performance of the order or decree has been provided.

10. Going by the record the judgment complained of was delivered on the 30/8/18. The application for stay was filed on 7/9/18. The application was filed 8 days after the judgment. The Court finds and holds that there is no delay in bringing this application. It was filed timeously. Ground No a) succeeds.

11. Regarding the issue of substantial loss that is likely to be suffered by the Applicant, the Court pronounced itself in the case of **James Wangalwa & Anor. Vs Agnes Naliaka Cheseto 2012 (eKLR)**, thus:-

“No doubt , in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process...The Applicant must establish other factors which show that the essential core of the Application as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni [2002] KLR 867** the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

13. The case of **Absalom Dora vs. Turbo Transporters 2013 eKLR** the Court hold as follows:-

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.”

14. In this case the Applicant has urged the Court that he is the registered owner of the suit land. He conceded that the suit land is in the possession of the Respondent and according to the Respondent from 1997. He argued that if the stay orders are not granted the land might be subdivided and transferred to third parties by the time the appeal is concluded. In the case of **John Gacunja Njoroge –Vs – Joseph Njoroge Nyeri ELC No. 5/15** the Court noted that substantial loss has to be proved failure which the Applicant will not succeed .This position was also upheld in **Teresiah Wairimu –Vs- Wanjiku Mwangi Thika ELC 9/17** where the Respondent was in possession and the Appellant /Applicant failed to demonstrate that there was substantial loss. In both cases the Applicants did not succeed since the Plaintiff /Respondent was in possession.

15. The Court notes that the existence of an appeal is not an automatic right to stay and the Applicant must satisfy the Court that stay is merited. There is evidence that the Respondent has commenced execution and has forwarded the transfer documents to the Defendant for execution. The Applicant must demonstrate how execution of those documents will render the appeal nugatory and that there is need to preserve the subject matter. In the case of **Hassan Guyo Wakalo –Vs- Shaman EA Ltd ECLR (2013)**, the Court held that if the appeal is successful, the title can always revert back to the Appellant.

16. It is trite that absence of proof of any conditions set out in Order 42 rule 2 will affect the Court's discretion to grant stay. The Applicant herein failed to demonstrate such substantial loss that he stands to suffer which is a key ingredient in this case. However the Court must also balance the two competing rights as noted by Gacheru J. in **John Gacunja Njoroge –Vs – Joseph Njoroge (supra)**. Also see **Kiplagat Kotut v Rose Jebor Kipngok [2015] eCLR** Ombwayo J **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eCLR** Mabeya, J and **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eCLR** where the Court set out thus

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal.

17. As regards security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the applicant. This is to ensure that the discretion bestowed on the Court is not fettered. In this case the Applicant has offered Kshs 100,000/- as security for the due performance of the decree or order. The Respondent has argued that this security is inadequate and urged the Court to order Kshs 2.5 million as security. The security required by the provisions of the rules is not necessarily the value of the subject matter. It is to secure the due performance of the decree such as costs of the suit. This being a decree for the transfer of land and exercising my discretion, I find and hold that the sum of Kshs. 100,000/- is sufficient security.

18. This Court has taken note that the title document to the suit land are still with the Defendant /Applicant who similarly does not have any order preventing him from further dealings. This might also affect execution of judgement at this stage or after the appeal and it is more prudent to ensure that the title is preserved to prevent further dealings by the Applicant himself. The Court will make appropriate orders in the end.

19. In the end this Court is inclined to grant the application and proceeds as such noting that the Applicant has demonstrated willingness and ability to offer security for costs. The Defendant has exercised his right of appeal under Sec 79 G of the Civil Procedure Act which is the cornerstone of the rule of law. It is essential to consider this right by preserving the subject matter and to afford him an opportunity to prosecute his appeal. The Court is legally obligated to balance the rights of both parties in this application.

20. The upshot is that the Notice of Motion dated 7/9/2018 has merit and the Court grants conditional stay on the following terms;

- a. The stay of execution is granted provided that the appeal is filed within 45 days from the date of this ruling.
- b. The Applicant to provide security for the due performance of the decree in the sum of Kshs. 100,000/- (One Hundred Thousand only) within 15 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both advocates of the parties or a bank guarantee of a similar amount.
- c. The Applicant must file a written undertaking within 15 days from the date of this ruling that he shall not sell, lease, charge, mortgage or in any way interfere by himself his servants' employees and any person claiming under him the suit land pending the hearing and determination of the Appeal.
- d. If the Applicant fails to comply with a)-c) the stay lapses and the Application stands dismissed.
- e. Costs of the application in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 24TH JANUARY 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Muthui HB for Ms Kinyanjui for the Plaintiff/Respondent

Opiyo HB Mbue Ndegwa for the Defendant/Applicant.

Irene and Njeri, Court Assistants