



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 199 OF 2017

ESTHER NYAMBURA KARIUKI.....RESPONDENT/PLAINTIFF

VERSUS

SIMON MUTHUKU MUNJUGA.....APPLICANT/DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 18th May 2018 brought under *Order 42 Rule 6(1) and Order 51(1) the Civil Procedure Rules*, where the Applicant seeks:

i. Spent

ii. Spent

iii. That pending the hearing and determination of the intended Appeal, there be stay of execution of the judgment of the Honorable Justice M.C Oundo given herein on the 28/1/2016(sic)

iv. That cost of this application do abide the results of the said intended appeal.

2. The said application is premised on the grounds on the face of it as well as the sworn affidavit of Simon Muthuku Munjuga sworn on the 21st May 2018.

3. It is worth noting that on the 28th January 2016, the Hon Justice M.C Oundo never delivered any Judgment in this matter. This notwithstanding and going by the provisions of Article 159 (2)(d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act and looking at the pleadings herein I note that the Applicant is referring to a judgment delivered by this court on the 25th April 2018.

4. By consent, Counsel for the parties agreed to have the present application disposed of by way of written submissions wherein the Applicant filed their submissions on the 14th November 2018, while the Respondent filed theirs on the 21st November 2018.

The Applicant's Submission.

5. While relying on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the Applicant submitted that the law of granting stay of executive is self-explanatory.

6. Further submissions were to the effect that if the orders of stay were not granted, the Applicant stood to suffer loss, loss which the Respondent would not be in a pecuniary position to reimburse him should the Appeal herein succeed in its entirety. Further that the 4 acres of land, the subject suit herein, is of a high agricultural economic value which the Applicant intends to cultivate and develop and should the court fail to issue the said orders for stay of execution, the Applicant would stand to suffer substantial loss. Reliance was place on the decided case in **Florence Hare Mkaha vs Pwani Tawakal Mini Coach & Another [2014] eKLR**

7. It was further the Applicant's submission that the application was brought without undue delay, judgment having been delivered on the 25th April 2018, and the application filed on the 22nd May 2018 about 2 days before the lapse of the 30 days period for execution.

8. While relaying on the decided case of **Focin Motorcycle Co. Ltd vs Ann Wambui Wangui & Another [2018] eKLR**, the Applicant's further submission was to the effect that the appeal had a high chance of success and further that he was willing to abide by the court's conditions if any, that will be provided for to secure his intended appeal even if it meant depositing the decretal amount in a joint interest earning account of both counsel until the determination of the Appeal herein. He prayed for the Application to be allowed.

Respondent's Submission.

9. The application was opposed by the Respondent whose submission was to the effect that pursuant to the delivery of the judgment dismissing the Plaintiff/Respondent's suit and the Defendant/Respondent's counter claim, the said Judgment dismissal was a negative order not capable of being stayed and therefore the present Application was misconceived hence the orders granted would be in a vacuum and in vain.

10. That orders for stay of execution were normally granted only in instances where the appeal would be rendered nugatory.

11. The only positive order granted was that the Plaintiff refunds the Defendant the purchase price of Ksh 84,000/= for the 4 acres which order the Applicant has not demonstrated how prejudicial it is to him. The Applicant was not ordered to do anything, to refrain from doing anything or to pay any sum. No positive enforcement order was made against the Applicant which could be the subject matter for stay of execution. The Respondent relied on the decided case of **James Ndonyu Njogu vs Muriuki Macharia [2017] eKLR** in so submitting and prayed that the Application herein be dismissed as it was extraneous to the orders made by the court.

12. I have considered the submissions by Counsel to the respective parties in respect to the application by way of a Notice of Motion dated 18th May 2018 wherein the Applicant sought for orders of stay of execution of the Judgment delivered on the 25th April 2018 pending the hearing and determination of his intended Appeal.

13. I have also considered, the supporting affidavit and the replying affidavit as well as the written submissions made by Counsel to the parties

14. I find two 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.

15. On the issue of whether the applicant is deserving of the orders of stay of execution of decree pending the hearing and determination of the appeal herein, the law applicable is 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 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.

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

a) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

b) The application is brought without undue delay and

c) 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.

17. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **"and"** which connotes that all three (3) conditions must be met simultaneously.

18. Having said so, and having regard to the Application before me, I note that the orders issued vide the judgment delivered on the 25th April 2018 were to the following effect:

i. *'The Plaintiff's suit commenced through a plaint dated on the 13th April 2015 and filed in court on the on the 14th April 2015 is unenforceable and is hereby struck out.'*

ii. *'I also find that the counter claim dated the 19th June 2015 and filed on the same day is herein dismissed'.*

iii. 'The Plaintiff herein to refund to the Defendant the purchase price of 4 acres of Ksh. 84 ,000/= forthwith'

iv. 'Both parties to bear their own costs'.

19. These orders, were in my humble opinion and in agreement with the Respondent's submission, negative orders.

20. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** the court had held that an order for stay cannot be granted where a negative order had been issued.

21. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

*any person in whose favour a decree has been passed or **an order capable of execution** has been made...*"

22. It therefore obtains that there are orders that are capable of execution while others are not.

23. In the present judgment, the court did not order the Applicant to do anything or to abstain from doing anything or to pay any sum of money.

24. In the case of **Western college of Arts and Applied Sciences vs. Oronga (1976) KLR 63** at p. 66 Law V P said:-

"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs ... In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay, to enforce or to restrain by injunction."

25. In the decided case of **Sonalux Limited & Another v Barclays Bank of Kenya Limited & 2 others [2008] eKLR** the court of Appeal held:

'As regards the matter before us all we can say is that the ruling of the superior court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.'

26. For the foregoing reasons, the upshot of this court's Ruling is that the Applicant's Notice of Motion Application dated the 18th May 2018 and filed on 22nd May 2018 is not merited and the same is hereby dismissed with costs to the Respondent.

Dated and delivered at Nyahururu this 21st day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE