



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 4 OF 2013

SAMWEL KIPRONO SANG.....PLAINTIFF/APPLICANT

-VERSUS-

ROSEMARY CHEBET KOROS.....1ST DEFENDANT/RESPONDENT

DAVID MUSYOKA NZUKI.....2ND DEFENDANT/RESPONDENT

HOUSING FINANCE

CORPORATION OF KENYA LTD.....3RD DEFENDANT/RESPONDENT

RULING

Background

1. By a Notice of Motion dated 18th October 2018 the Plaintiff/Applicant seeks two main orders;
 - a. Firstly, the firm of Morande and Company Advocates be allowed to come on record on behalf of the Plaintiff/ Applicant and
 - b. Secondly, that there be order of stay of execution of the judgment of this honourable court issued on 26th August 2018 pending appeal.
2. The application is premised on the grounds stated on the face of the Notice of Motion and the Applicant's supporting Affidavit sworn on the 18th October 2018. In the said affidavit the Applicant deposes that he has filed an appeal against the judgment and he believes that it has high chances of success. He also deposes that he has stayed in the suit premises for over thirty years and he fears that he may be evicted from the said premises before the appeal is heard and determined thus rendering his appeal nugatory and occasioning him irreparable loss and damage.
3. The application is opposed by the 1st and 3rd Defendants/Respondents.
4. In her Replying affidavit sworn on the 13th November 2018, the 1st Respondent deposes that the application is only a ploy to delay the 1st Respondent from enjoying the fruits of her judgment. She further deposes that the Applicant has not demonstrated that he stands to suffer substantial loss if the orders sought are not granted.
5. In his Replying affidavit sworn on 13th November 2018 Joseph Lule, the Legal Manager of the 3rd Respondent deposes that the orders sought by the applicant are oppressive and an abuse of the process of the court as the 3rd Respondent is unable to execute for its costs. He further deposes that the applicant does not deserve the orders sought as he has failed to demonstrate that he would suffer substantial loss if the orders sought are not granted.
6. The 2nd Respondent did not oppose the application.
7. The application was canvassed by way of written submissions and the Applicant, 1st and 3rd Defendants filed their submissions which I have considered.

Issues for Determination

8. There are two main issues for determination:

1. Whether the firm of Morande and Company Advocates should be allowed to come on record for the Plaintiff/ Applicant.
2. Whether the Applicant should be granted a stay of execution pending appeal.

Analysis and determination

9. There is no contention on the first issue and I therefore grant leave to the firm of Morande and Company Advocates to come on record for the Plaintiff/ Applicant.

10. With regard to the second issue, Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

- 1. Substantial loss may result to the Applicant unless the order is made;**
- 2. The application was made without unreasonable delay; and**
- 3. 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.**

11. The principles that guide the court in the exercise of its discretion to grant an application for stay pending appeal were enunciated in the case of **Elena D. Korir vs Kenyatta University (2014) eKLR** where Justice Nzioki wa Makau stated as follows;

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni JA & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd[11](2013) as follows:

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

Whether the Applicant has demonstrated that he will suffer substantial loss if the order for stay is not granted.

12. The Applicant has expressed the fear that he will be evicted from the place he has called home for the last 30 years. The court has however held that the process of execution does not amount to substantial loss. This was so held in the case of **James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR** where Gikonyo J observed as follows:

“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, that does not amount to substantial loss under order 42 Rule 6 of the Civil Procedure Rules. This is because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal”

13. The Applicant has stated that he has been staying in the suit premises for the last thirty years and he has no other home. It is not in dispute that the 1st Respondent is the current registered owner of the suit property after she bought it from the 2nd Respondent who in turn bought it from the 3rd Respondent through a public auction in exercise of the 3rd Respondent’s exercise of its power of sale. The applicant lost his right of redemption over the suit property and he cannot cling to it endlessly yet he knows that it has now changed hands.

14. In **Machira T/A Machira & Co Advocates V East African Standard (2002) 2 KLR 63** Kuloba J (as he then was) stated that:

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide 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”

15. Beyond his desire to continue staying in the suit premises, the Applicant has not demonstrated what tangible loss he stands to suffer if the order for stay is not granted. It is therefore my finding that the Applicant has failed to satisfy this condition.

Whether the applicant has been made without undue delay.

16. The application was filed two months after judgment was delivered. It was therefore made without undue delay.

Whether the Applicant has furnished security for costs.

17. In the case of **Exclusive Mines Limited & another v Ministry of Mining & 2 others [2015] eKLR**, the court stated as follows:

“...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred.

18. With regard to security for costs, the applicant has not demonstrated by way of affidavit that he is willing to furnish security for costs which is one of the prerequisites for the grant of an order of stay pending appeal. In her submissions, counsel for the applicant has alluded to the security deposited by the applicant as a condition for leave to amend his defence and file a Counterclaim which is different from the current circumstances.

19. The courts have held that the above conditions set out in Order 42 Rule 6 of the Civil Procedure Rules cannot be severed and must be met in full. See **M.O.M Amin Transporters Limited & another v Alexander Ndung’u Mbugua & 2 others [2017] eKLR and Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR**.

20. Whether or not to grant stay of execution pending appeal is a matter of judicial discretion and the court must balance the interests of both parties. It is trite law that a successful party is entitled to the fruits of his or her judgment and the court cannot disregard this fact.

21. In the instant case the Applicant has not satisfied all the conditions laid down under Order 42 Rule 6 of the Civil Procedure Rules. I am unable to comment on the merits of the appeal as this is an issue for the appellate court.

22. Having given due consideration to the Notice of Motion, rival affidavits, counsel’s submissions and the relevant law I am not persuaded that the application is merited. I therefore decline to exercise my discretion in favour of the applicant and dismiss the application with costs to the Respondents.

Dated, signed and delivered at Kericho this 15th day of February, 2019.

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J. M ONYANGO

JUDGE

In the presence of

1. Mr. Kipkoech for Mrs. Morande for the Plaintiff/Applicant
2. No appearance for the Defendants/ Respondents.
3. Court Assistant: Rotich