



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 63 OF 2000

BETHA NDUMBA M'TWARUCHIU.....PLAINTIFF

VERSUS

WACHIRA WAMBUGU.....DEFENDANT

RULING

1. Judgment herein was delivered on 28.11.2018, thereafter, defendant filed a notice of appeal on 10.12.2018, and on 13.12.2018, he filed an application to stay execution of the judgment pending the hearing and determination of the appeal.

2. Then on 24.1.2019, plaintiff /respondent filed a notice of Preliminary Objection.

3. On 30.1.2019 directions were given for the Preliminary Objection and the application for stay of the judgment to be canvassed by way of written submissions at the same time.

4. I have not seen any submissions of defendant/ applicant.

Notice of Preliminary Objection dated 24.1.2019

5. The grounds raised in respect of the Preliminary Objection are;

- (i) That in view of the provisions of the Appellate jurisdiction Act Cap 9 Laws of Kenya and the court of appeal Rules, this court has no jurisdiction to hear and determine this application.
- (ii) The application is bad in law as order 51, 22 of Civil Procedure Rules, sections 1A, 1B, 3 and 3A of CPA do not give or donate jurisdiction to this court upon issuance of Notice of Appeal.
- (iii) The application is in utter disregard of order 9 rule 9 of Civil Procedure Rules and therefore incompetent.

6. The respondent has argued that the court has no jurisdiction to hear the matter. In his submissions, he argued that once notice of appeal has been given in accordance with rule 75 of the Court of Appeal Rules the High Court has no jurisdiction to order stay of execution, an injunction or stay of any further proceedings pending hearing of the appeal by the court of appeal. He stated that rule 5(2) of the court of appeal rules is clear on the issue where it is provided that;

“5 (2) subject to rule (1) the institution of an Appeal shall not operate to suspend any sentence or to stay execution, but the court may;

a.

b. In any Civil Proceedings where a notice of Appeal has been lodged in accordance with rule 75, Order of stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just”.

7. The plaintiff through his counsel averred that the court is defined as the Court of Appeal. He further avers that the appellate jurisdiction Act cap 9 of the Laws of Kenya allows the High court to extend time to give notice of Appeal. The plaintiff also submitted that the court of appeal when dealing with the application for stay of execution applies two principles. The first is whether the appeal is arguable. This cannot be decided by the high court which has already rendered its judgment and the second hurdle that an applicant is required to surmount is whether the intended appeal will be rendered nugatory if the court does not grant stay. The two limbs must be satisfied together.

8. In support of her arguments, the plaintiff has availed the following documents;

- **“Rule 5 (2) of the court of Appeal Rules**
- **Rule 75 of the court of Appeal rules**
- **Section 7 of the Appellate Jurisdiction Act cap 9 Laws of Kenya**
- **Civil Application No. 62 of 2016- CFC Stanbic LTD vs Kiungu Kiarie & Another.**
- **Civil application no. 138 of 2017 (Nyeri).**
- **Order 9 rule 9 of the civil Procedure Rules**
- **Mbogo vs Asikoyo and 3 others (2004) 1 697”.**

9. I find that rule 5 (2) of the court of Appeal Rules applies when the application for stay is made in that court, (Court of Appeal)

10. In the case of **Magnate Ventures vs Simon Mutua Muatha & Another; Nairobi Civil Appeal no. 634 of 2017**, the court stated that;

“It is important to point out right at the outset that the conditions for a stay of execution pending appeal in the court of appeal and the high court are different. In the Court of Appeal, the court will only grant a stay of execution pending appeal if the following two (2) conditions are met:-

1) The applicant should have demonstrated that his appeal or intended appeal is arguable;

2) The applicant should have demonstrated that unless a stay or injunction is granted, his appeal or intended appeal, if successful will be rendered nugatory.

As the application for stay of execution is presently before the High Court, the relevant provision of law to consider herein is Order 42 Rule 6(2) of the Civil Procedure Rules”.

11. Order 42 Rule 6 (2) of the Civil Procedure rules provide that;

“No order for stay of execution shall be made under sub-rule (1) unless 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 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”.

12. **Order 42 rule 6 (4) of the Civil Procedure Rules** provide that;

“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”.

13. It is therefore apparent that the Appeal referred to under order 42 is recognized once the notice of Appeal has been filed. Otherwise if there is no notice of appeal, then there is no appeal and it would rather be difficult to seek a stay. A stay pending what?.

14. On the issue that the application was filed contrary to order 9 rule 9, I find that a consent was filed dated 20.1.2019 pursuant to the aforementioned rules of procedure.

15. In the circumstances, I find that the Preliminary Objection has no merits.

Application dated 13.12.2018

16. In the application dated 13.12.2018, defendant/applicant seeks the following orders;

- (i) Spent.
- (ii) That the court be pleased to stay execution herein pending the hearing and determination of the application.
- (iii) That the court be pleased to stay execution herein pending hearing and determination of the appeal so lodged.
- (iv) That the costs be provided for.

17. The grounds in support of the application are that;

- (i) The defendant/applicant has filed an arguable appeal herein.
- (ii) That unless stay is granted the applicant's appeal stands to be rendered nugatory.
- (iii) That the applicant is ready and willing to furnish a suitable security as may be ordered by the court.

18. Applicant has also filed a supporting affidavit where he avers that the appeal will be rendered nugatory if the stay is not granted. He also states that he will suffer irreparable harm and he will be rendered homeless.

19. Respondent avers that this court having delivered its judgment cannot say whether applicant has an arguable appeal or not.

20. I have perused the application dated 13.12.2018 again and again and I do not see any reference to order **42 rule 6** which is the applicable law in an application of this nature.

21. As rightly submitted by the respondent, this court cannot consider whether the applicant has an arguable appeal or not or whether the appeal will be rendered nugatory as these are criteria that are considered by the Court of Appeal. Applicant has stated that he will be rendered homeless if the application is not allowed. The Judgment of 28.11.2018 however did not render the applicant homeless. He was only to remove a fence.

22. All in all, I do not find any merits in this application. The same is hereby dismissed.

23. Each party is to bear their own costs of the application and the Preliminary Objection.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF APRIL, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Karanja holding brief for Mwiti for applicant

Defendant

Munga for respondent

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE