



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 269 OF 2017

FRANCIS KAMAU NJOROGE (Legal representative of the Estate of

ESTHER WANJIRU NJOROGE).....1ST RESPONDENT/PLAINTIFF

FRANCIS KAMAU NJOROGE Alias FRANCIS

KAMAU IRUNGU.....2ND RESPONDENT/PLAINTIFF

MUTARI NJOROGE.....3RD RESPONDENT/PLAINTIFF

VERSUS

WILLIE MWANGI NDEGWA.....APPLICANT /DEFENDANT

RULING

1. The Applicant /Defendant filed the Notice of Motion dated 18/12/2018 seeking orders for stay of execution of the Court's judgment pending the hearing and determination of an intended appeal as well as provision for costs of the application.
2. The application is based on the grounds annexed thereto and the Supporting Affidavit of J N Kirubi, Advocate, sworn on the 18/12/18. In it, he deponed that the Applicant is aggrieved by the decision of the honourable Court delivered on the 8/1/18 and has filed an appeal in the Court of Appeal at Nyeri vide CA No 6 of 2019. Further, he added that the Applicant may execute the judgment before the said appeal is heard and determined thus rendering the appeal nugatory, an act he claims will prejudice the Applicant and cause him irreparable loss and damage which cannot be compensated. That the Applicant is ready and willing to furnish the Court with any such security as may be binding on him for the due performance including deposit of the title deed in Court.
3. In opposing the application, the Respondents through the Replying affidavit sworn by Francis Kamau Njoroge deponed that in the event that the judgment is executed the Defendant will not suffer any loss or irreparable damage that cannot be remedied in the event of a successful appeal in that the suit land can always be retransferred back. That the title should therefore be registered in the names of the Respondents for the duration of the appeal who should not part with possession or otherwise deal with it until the determination of the appeal or further orders of the Court. He sought security from the Applicant in the sum of Kshs 300,000/- for the due performance of the decree and costs.
4. In a further supplementary affidavit dated the 24/1/19, Mr. J N Kirubi Advocate, on behalf of the Applicant, deponed that status quo should be maintained in the matter pending the appeal as follows; the Respondents to continue in occupation and utilization of the suit land without any interference from the Applicant pending the hearing and determination of the appeal; secondly that the Applicant to continue holding title as the current registered owner with no powers to transfer charge or deal with the land in any adverse manner that may change the said registration of ownership pending the hearing of the appeal. He resisted the claim for security for the due performance of Kshs 300,000/- as being baseless considering that the Applicant has deposited Kshs 6000/- in the Court of Appeal as mandated in law.
5. Parties filed Written Submissions which I have read and considered. Both parties have reiterated their positions as pleaded in the affidavits accompanying the application and the Replying affidavits.
6. 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 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 .

(3) Notwithstanding anything contained in sub-rule (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 be 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 sub-rule (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.”

7. 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.

9. Going by the record the judgment appealed of was delivered on the 8/11/2018. The application for stay was filed on 19/12/18. The application was filed 41 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.

10. 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)**, which inter-alia quoted the case of **Silverstein vs. Chesoni [2002] KLR 867** where the Court observed that 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.”

11. 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.”

12. 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 rights focuses on their reconciliation which is not a question of discrimination.”

13. In this case the Respondents are in occupation and have been for long. The Applicant is holding the title of the suit land. The Applicant has not shown the Court how the Respondent in the circumstances will dispose of the land or limit or diminish its value pending the hearing and disposal of the appeal. He has not demonstrated any substantial loss that he may suffer in the event the orders are not granted. The onus is upon him to bring forth to the Court the evidence of that substantial loss instead of leaving it for implication by the Court. Regrettably, he has not discharged that onus.

14. On the other hand, the Respondents have argued that the land should be transferred to them and they will undertake to hold it pending the hearing and determination of the suit. The Court does not agree with this proposition as it entails costs that are unnecessary in transferring and retransferring the land whichever way the outcome of the appeal goes.

15. Having said that the Court in balancing the interest of the parties herein that is the right to appeal which includes the prospects that the appeal will not be rendered nugatory and the right of the Respondent which includes the right to enjoy the full benefits of the decree, the

Court is mindful that the ends of justice are met and that the legal process ahead is not frustrated.

16. In that search of balance, I rely on the case of **In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, where the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the and that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties." (emphasis is mine)

17. This being a land matter, it would be appropriate to proceed on the premise that the subject matter ought to be preserved to enable the Defendant pursue his appeal to its finality. I believe substantial loss lies in the failure to preserve the property. The balance of convenience therefore tilts in preserving the subject matter to enable the Defendant exercise his right of appeal.

18. On the issue of 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 Respondent has sought the sum of Kshs 300,000/- which the Applicant considers too high considering the Kshs 6000/- already deposited by the Applicant in the Court of appeal as required by law. The Respondents did not substantiate the amounts either. I have held before that the security for the due performance of costs is not the value of the subject matter but 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. 60,000/- is sufficient security.

19. The Applicant has proposed a status quo in terms that; the Respondents be allowed to occupy and utilize the land while the Applicant continues to hold the title subject to an undertaking that he will not dispose it. The Respondents have not shown how the status quo prejudices them. In addition, I think an inhibition on the title until the hearing and disposal of the suit land is appropriate in the circumstances.

20. The upshot is that the Notice of Motion dated 14/12/18 has merit and the Court grants conditional stay in the following terms;

a) The Applicant to provide security for the due performance of the decree in the sum of Kshs. 50,000/- (Fifty Thousand only) within 30 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.

b) Status quo be and is hereby ordered in the following terms; the Respondents to occupy and utilize the land while the Applicant continues to hold the title subject to inhibition ordered under c). below.

c) Simultaneously, I order an inhibition to be registered on the title prohibiting any dealings on the land until the hearing and determination of Court Appeal case No. 6 of 2019.

d) Costs of the application in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 4TH APRIL 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Gachomo HB for J Mbuthia for the Plaintiffs/Respondents

Defendant/Applicant: Absent

Kuiyaki and Njeri, Court Assistants