



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELCORET**

**CIVIL APPEAL NO. 8 OF 2014**

**JOSEPH NDAYALA MUYESU.....APPELLANT**

**VERSUS**

**THOMAS KIMUTAI BOIT.....1<sup>ST</sup> RESPONDENT**

**JOSIAH KIMBUR KIBIAS.....2<sup>ND</sup> RESPONDENT**

**RULING**

This ruling is in respect of an application dated 20<sup>th</sup> September 2018 brought by way of notice of motion by 1<sup>st</sup> and 2<sup>nd</sup> respondents for the following orders:

- a) Spent
- b) That the court be pleased to grant a stay of execution of the Judgment delivered on 11<sup>th</sup> July 2018 pending the hearing and determination of this application and the subsequent appeal against the Judgment delivered on 11<sup>th</sup> July 2018 by the Hon Lady Justice M. Odeny.
- c) That costs of this application be provided for

Counsel agreed to canvass the application by way of written submissions which were duly filed.

**1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' WRITTEN SUBMISSIONS**

Counsel for the applicants submitted that the issues for determination in an application for stay of execution of judgment and decree are whether the threshold for grant of such an order has been met and who is to bear the costs. Counsel cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides:

*(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.*

Mr. Tororei relied on the case of Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR, where Aburili J. at paragraph 24 stated that the court considers various factors in exercising its discretion when considering granting stay of execution orders pending appeal under Order 42 Rule 6. It stated as follows:

*It is not in doubt that the relief of stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules is discretionary; except, the discretion of the court should be exercised judicially. See Shah vs. Mbogo. I see the Order uses the phraseology, i.e. 'may for sufficient cause order stay of execution of such decree or order' which is quite wide in scope; I believe the wide scope allows the court to follow after the constitutional prescription under Article 159 and the Overriding Objective in the administration of justice in matters falling under Order 42 Rule 6 of the Civil Procedure Rules. But as the court takes the preferred wider approach on the application for stay pending appeal, the same law goes ahead to set out certain major considerations in making the decision on whether or not to order a stay; I repeat, this is all to ensure the ever cardinal adage that exercise of discretion of court must be upon defined principles of law; not capriciously; not whimsically. Some of the major prerequisites to*

ordering a stay of execution are that:

- a) The Applicant has filed an appeal;
- b) The court is satisfied that substantial loss may result to the Applicant unless the order is made; and
- c) That the application has been made without unreasonable delay; and
- d) 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.

Counsel therefore submitted that the applicants have met the above criteria for grant of stay of execution of decree pending appeal. Counsel submitted that a party needs to show on the required standard is that substantial loss will occur unless stay is granted. He cited the case of Jason Ngumba [2014] eKLR where the court stated that:

*“...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process....”*

It was Counsel’s submission that the applicants will suffer substantial loss as they risk being forcefully evicted from the suit property which they have since developed which has not been disputed by the respondent. Further that the respondent might proceed with the execution of the decree which has been extracted and a bill of costs drawn.

Counsel submitted that the applicants have filed an Appeal being Eldoret Court of Appeal Civil Appeal No. 36 of 2018 which may be rendered nugatory should the orders of stay not be granted

Finally Counsel also submitted that the application was brought without unreasonable delay as required. That Judgment was read and delivered on the 11<sup>th</sup> day of July 2018 and a notice of appeal was filed on 13/7/2018, 2 days after delivery of judgment and the current application was filed soon thereafter.

On the issue of security for performance of the decree, the applicant stated that they are willing to deposit security as ordered by the court. Counsel therefore urged the court to exercise its discretion and grants the orders as prayed.

### **Respondent’s Submissions**

The appellant/respondent filed a replying affidavit in opposition to the application for stay of execution stating that it is an abuse of court process meant to derail the enjoyment of the fruits of the judgment.

Counsel submitted that the applicant has not met the threshold under order 42 for grant of stay orders. Counsel cited the case of Equity Bank Ltd —vs- Taiga Adams Company Ltd (2006) eKLR where it was stated that ‘. . .let me conclude by stressing that...not one or some must be met before this court can grant an order of’ stay...’

It was further Counsel’s submission that an application for stay is purely discretionary and the party seeking to benefit from the same must sufficiently demonstrate to the court that he has met the criteria for grant of the orders sought that:

- a) Substantial loss may result to the Respondents/applicants if the order are not granted
- b) The application has been brought without unreasonable delay
- c) Security for performance of the decree has been given by the Applicant
- d) Whether the Appeal has merit

Counsel submitted that an order of stay can only be granted if the court is satisfied that indeed the applicant has demonstrated that substantial loss may result if the orders sought are not granted. The applicant has not demonstrated any substantial loss that they will suffer if the orders are not granted.

Counsel relied on the case of Stephen Wanjohi —vs- Central Glass Industries Ltd I-ICC 6726/91 where the court held that substantial loss must be established. That the filing of a bill of costs is not sufficient reason to warrant an order of stay of execution. Further in the case of Pamela Malutu =vs= Jimmy Nandwa & Another; Eldoret Civil Appeal No. 24 of 2018 Achode J stated that;

*‘. . . it is not for this court at this stage to venture into the demerits and/or merits of the filed appeal as that would prejudice the appeal itself.’*

Finally on the issue of furnishing security pending the appeal, Counsel submitted that the respondents have not offered any security or demonstrated commitment on furnishing security. For the due performance of the decree. Counsel therefore urged the court to dismiss the application with costs.

## **Analysis and determination**

This is an application for stay of execution of decree pending appeal. The principles governing such applications are well settled and governed by the provisions of order 42 rule 6 which states as follows:

(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.

For an application for stay to succeed an applicant must satisfy the above conditions and noting that the court has the discretion to grant or decline to grant the orders sought. When exercising the discretion the same must be done judiciously. Each case must be decided on its own merits and circumstances.

It is also incumbent upon the applicant to demonstrate to the court that he/she will suffer substantial loss if the order is not granted. How does an applicant show this. Is it just a mere statement that he will suffer loss or must go further to explain the loss?

On the issue of security for the performance of the decree I will rely on the case of **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** where Justice Gikonyo stated that:

*“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”*

What security would be appropriate for the performance of the decree? Is it monetary in nature or any other security that can be furnished by a party? In performance of decrees there is always a monetary aspect involved especially where a successful litigant has been granted costs of the suit. It would be appropriate to grant terms which are monetary in nature since titles to properties might not be easy to come by or people might not be willing to stand surety with their properties.

The applicants have stated that they are ready and willing to abide by the terms and conditions of the court on the issue of furnishing security for the performance of the decree. It is not for the applicant to suggest what type of security to furnish but the courts discretion to do so.

I find that the applicants have met the criteria for grant of stay of execution as the application was filed in a timely fashion without undue delay. I will not go into the merits of the appeal as that is for the next court to determine.

I have considered the application, the submissions of both Counsel, the authorities cited and find that the same has met the threshold for granting the order of stay. I will therefore allow the application and order that there be stay of execution pending the hearing and determination of the appeal. The applicants will provide security by depositing Kshs. 150,000/ in an interest earning account in the joint names of the Counsel on record for appellant and the respondent. The amount to be deposited within twenty one days from the date hereof. Costs shall be in the cause.

**DATED and delivered at Eldoret this 3<sup>rd</sup> day of April, 2019**

**M.A. ODENY**

**JUDGE**

Read in open court in the presence of Mrs.Kibichy for the Appellant/Respondent and in the absence of Mr.Tororei for the Applicant.

Mr. Koech – Court Assistant.