



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 97 OF 2005.

JULIUS WEPUKHULU SARATUKI.....PLAINTIFF

VERSUS

KAMUSINDE FARMERS CO-OPERATIVE SOCIETY.....DEFENDANT

R U L I N G

On 28th February 2018, **MUKUNYA J** delivered a Judgment in this case ordering the defendant to vacate any area that it is occupying on land parcel **NO KIMILILI/KAMUKUYWA/409** belonging to the plaintiff. The record shows that the Judgment was delivered in the presence of **MR OCHARO** holding brief for **MR IKAPEL** who was then on record for the plaintiff and **MS MUMALASI** holding brief for **MR MURUNGA** for the defendant.

On 4th December 2018, the defendant moved to this Court vide it's Notice of Motion premised under the provisions of **Section 3A of the Civil Procedure Act** and **Order 42 Rule 6 of the Civil Procedure Rules** seeking the following reliefs:-

1. Spent
2. Spent
3. **That pending the hearing and determination of the appeal, there be a stay of execution of the decree herein.**

The application is based on the grounds set at therein and is also supported by the affidavit of **FRANCIS WAFULA** the Secretary/Manager of the defendant.

The gravamen of the application which is the subject of this ruling is that the defendant being dissatisfied with the said Judgment has filed an appeal being Appeal **NO 54 OF 2018** at the Court of Appeal at Kisumu. Meanwhile, the plaintiff wants to execute against the defendant as per the attached proclamation and if the execution proceeds, the defendant will suffer substantial loss and the appeal will be rendered nugatory. That the defendant is willing to deposit any security and the plaintiff will not suffer any prejudice. The defendant further states that there has been no in-ordinate delay in filing this application.

The application is contested and the plaintiff has filed grounds of opposition dated 4th March 2019 stating the following:-

- (a) **That the application does not meet the threshold set out in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rule 2010.**
- (b) **The Applicant has not demonstrated the loss that it will suffer if execution proceeds.**
- (c) **The Applicant has not offered security for the due performance of the decree.**
- (d) **The Applicant is guilty of laches/inordinate delay.**
- (e) **The appeal is a cropper.**
- (f) **The application is an abuse of the Court process.**

With the consent of the parties, the application was canvassed by way of written submissions which having been filed both by **MR A. W.**

KITUYI ADVOCATE for the defendant and J. O. MAKALI ADVOCATE for the plaintiff.

I have considered the application, the Supporting Affidavit, the Grounds of Opposition and the submissions by Counsel.

Order 42 Rule 6(1) and (2) upon which this application is premised is worded as follows:-

6(1) “No appeal or second appeal shall operate as a stay of execution or proceeding 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.” Emphasis added

Therefore, before orders of stay pending an appeal are granted, the Applicant must establish the following:-

1. **Sufficient cause**
2. **That there is no un-reasonable delay in filing the application.**
3. **That if the orders of stay are not granted, he will suffer substantial loss.**
4. **The Applicant should also give such security as the Court may order.**

The Judgment herein was delivered on 18th February 2018 in the presence of Counsel for both parties. This application was filed on 4th December 2018 ten (10) months later. That delay is certainly unreasonable taking into account the fact that the Judgment sought to be appealed was delivered in the presence of Counsel for both parties. That delay has not even been explained and clearly, the defendant only moved to Court when the execution process commenced. In **TERESIA MABUTI NJAGARA .V. UJAGARA NGURE 2016 eKLR**, I found a delay of eleven (11) months to be in-ordinate. In **HASSAN .V. NATIONAL BANK OF KENYA LTD H.C.C.C NO 446 OF 2001 (KISUMU) ONYANGO – OTIENO J** held that a delay of three (3) months was un-reasonable. I am not persuaded that the plaintiff herein has moved the Court *“without unreasonable delay.”* MR KITUYI has submitted in support of the application as follows:-

“That the application was brought timely without inordinate delay only that the honourable Court was previously engaged in other matters hence our application could not be heard in time.”

The reasonable delay referred to under **Order 46 Rule 6(2) of the Civil Procedure Rules** is the delay between the time the order sought to be appealed is made and the time the application for stay is filed. It is not the delay in the hearing of the application once it is filed. In this case, the application, as I have already said, was filed ten (10) months after the Judgment was delivered and that is unreasonable in the circumstances of this case where the defendant knew about the Judgment on the same day it was delivered because their advocate was present. On that ground alone, this application is for dismissal.

But that is not all. The defendant was also required to demonstrate that unless the order of stay is granted, it will suffer substantial loss.

In **KENYA SHELL LTD .V. BENJAMIN KARUGA & ANOTHER 1982 – 88 1 KAR 1018, PLATT Ag J.A** (as he then was) stated thus:-

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”
Emphasis added

It is not enough simply to allege substantial loss. The defendant was also required to demonstrate the loss that it would suffer. Other than pleading that it will suffer substantial loss if the execution proceeds and the appeal succeeds, the defendant has not told the Court the nature of that loss. Counsel for the plaintiff has submitted that what is being executed against the defendant are the costs which have been taxed. That is clear from the proclamation which is part of the defendant’s documents. And as Counsel for the plaintiff has submitted, citing **FRANCIS KABAA .V. NANCY WAMBUI & JANE NJERI C.A CIVIL APPEAL NO 298 OF 1996 (1996 eKLR)**, a stay cannot be granted in respect of costs. Indeed the decree herein is now essentially a monetary decree and it is not normal in such decrees for the appeal to be rendered nugatory. The defendant has not demonstrated the impecuniness of the plaintiff that if the costs are paid out and the appeal succeeds, then he will not be able to refund the money.

The up-shot of the above is that the defendant's Notice of Motion dated 4th December 2018 is devoid of merit. It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

27th June 2019.

Ruling dated, delivered and signed in Open Court this 27th day of June 2019 at Bungoma

Mr Murunga for plaintiff present

Ms Mutunda for Mr Kituyi for the defendant present

Joy – Court Assistant

Boaz N. Olao.

J U D G E

27th June 2019.