REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 688 OF 2012

TIMOTHY ATAMBA ABOKI.....PLAINTIFF/RESPONDENT

VERSUS

ELIZABETH MBONNE MUSA.....1ST RESPONDENT/APPLICANT

BENSON TOY MMBULIKA.....2ND DEFENDANT/APPLICANT

RULING

BRIEF FACTS

The only application pending before the court in this matter is dated 23rd May 2018 seeking orders that there be a stay of execution on the judgment given on 7th May, 2018 pending the hearing and determination of the appeal. The application is based on the grounds that the defendant being aggrieved with the judgment delivered on 7th May, 2018 has filed a notice of appeal.

The court delivered its judgment that the plaintiff be registered as the proprietor of the portions measuring 1.5 acres in NANDI/KAMOBO/358 and also that the plaintiff be registered as the sole proprietor of 2.0 acres in NANDI/KAMOBO/1058 The order restraining the defendants from interfering in any manner with the plaintiff's occupation of the said portions of land. It is stated that the applicants' appeal has a high chance of success. Moreover, that the applicant stands to suffer irreparable loss and the appeal will be rendered nugatory if the orders sought are not granted. The application has been filed in time.

APPLICANT'S CASE

The applicants filed submissions on 12th February 2019 whose gravamen is that the application is made pursuant to order 42 Rule 6 of the Civil Procedure Rules. The applicant submitted that the balance of convenience in this case lies on preserving the subject matter of the judgment so that if the appeal succeeds the appellant is not left with a paper judgment. He should be able to enjoy the fruits of judgment. In land matters the land needs to be preserved in a state in which a successful appellant will not find that it no longer exists or its character has changed. Critical factors to be taken into consideration include the nature and state of the land, the length of possession by the applicant and whether the applicant can provide security for the loss of use that will be suffered by the respondent when the appeal is pending judgment. Suitable orders would be that the plaintiff make use of the land and remains on the lands and no new user is registered until the appeal is heard.

RESPONDENT'S CASE

The respondent filed submissions on 12th February, 2019. The respondent cited Order 42 Rule 6 and submitted that the conditions therein must be satisfied for an application of this nature to succeed. He also cited the case of Butt v Rent Restriction Tribunal on the considerations for granting an application for stay.

The respondent cited the case of ***James Wangalwa & Anor v Agnes Naliaka Cheseto*** on what constitutes substantial loss. According to the respondents, the applicants have not demonstrated that they will suffer substantial loss.

The respondent states that he has suffered substantial loss since the consent order dated 6/4/2011 to conserve the suit property was breached by the applicant because she sold part of the land evidenced by ***annexure TAA1*** in the replying affidavit dated 30/5/2018 and is also supported by the defendant's application dated 19/6/2018 and its annexures ***SKR 3,4,5 and 6***. Granting orders for stay will enable the applicant a chance to continue wasting the suit land.

The applicants have not come to the court with clean hands. The respondent cited the case of ***Elena D. Korir v Kenyatta University o***n the criteria to be met by the applicants.

The applicant has not filed any appeal to warrant the orders of stay and thus the respondent will be prejudiced as he will not be able to enjoy the fruits of his judgment. They have also not stated what type of security they will offer.

The application was made with unreasonable delay and there is no appeal preferred and filed. Making an application alone is not good enough to make it meritorious. The applicants have not met the requirements of Order 42 rule 6.

The court has considered the application and the affidavits on record and does find that the main issue for determination is whether the applicants have satisfied the requirements of Order 42 Rule 6.

Order 42 Rule 6(2) provides that;

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.**

Substantial Loss

The Applicants are apprehensive that the subject matter of the case may be obliterated if stay is not granted. However, they have not demonstrated how they will suffer substantial loss.

In the case of **Butt v Rent Restriction Tribunal [1979] eKLR,** the court held;

> **It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch. D (1879) 454 at p 459.**

On 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), thus: -**

> **"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, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process…The Applicant must establish other factors which show that the essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni [2002] KLR 867, 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."**

In the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR,*** the court held;

> **"In this kind of applications 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..."**

The respondent contends that the applicant has already began selling part of the suit land. this was evidenced by annexure TAA1 to the respondent's replying affidavit dated 30.05.2018. It is clear that the applicant has not come to the court with clean hands and the respondent stands to suffer irreparable loss if the appeal is unsuccessful as the intended appellant is wasting the subject land.

The question that arises is whether there is an appeal. The applicant annexed a notice of appeal dated 15th May, 2018 to their supporting affidavit. Though the notice of appeal is not conclusive proof that there is an appeal, especially after expiry of 60 days of the time for lodging of the appeal, the same can be extended due to delay of proceeding and a certificate of delay can be made by the Deputy Registrar in such cases.

However, the issue of the sale of the portions of land as evidenced by the respondents' annexures is one of grave concern. In the event the appeal is unsuccessful, the same may be rendered nugatory if the subject matter is destroyed.

Security

In ***Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63,*** it was held that:

> **"…to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle**

> **for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

In **Tassam Logistics Ltd v David Macharia & Another [2018] eKLR,** the court held;

> **"In a bid to balance the two competing interests, the courts usually make an order for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal. This position has been ascertained in Tabro Transporters Ltd –vs- Absalom Dova Lumbasi [2012] eKLR, where the requirement to furnish security was considered as the just thing to do when balancing the two competing interests."**

The applicant submitted that all the conditions in order 42 need to be met but has also not stated what would be provided as security. the applicant deponed that she was willing to abide by any orders of the court regarding security in her supporting. However, given that there is no valuation report of the suit land the court is faced with a mammoth task of determining what amount would be provided as security.

The upshot of above is that the applicant has failed to satisfy the requirements of order 42 rule 6 and cannot be granted stay. Further, she has come to the court with unclean hands as there are proven attempts to sell part of the suit land. The casual manner with which the issue of security is mentioned despite it being a very crucial part of determining orders for stay is a factor which the court has taken into account and I do find that the applicant has failed to satisfy the requirements for the court to exercise discretion in its favour. The application is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 30th day of July, 2019.

A. OMBWAYO

JUDGE