



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

HC MISC. CIVIL APPEAL No. 143 OF 2018

JADGIT SINGH SAUND.....APPLICANT

VERSUS

JESVIR SING REHAL.....1ST RESPONDENT

JOHN MUTHEE NGUNJIRI.....2ND RESPONDENT

RULING

1. The applicant commenced these proceedings by Notice of Motion dated 31st May 2018 which was filed in the High Court as a “Miscellaneous Civil Appeal”. The applicant seeks stay of execution of the judgment and order made on 22nd September 2017 by Hon. J. Omido (Principal Magistrate) in **Nakuru CMCC No. 413 of 2014 Jadgit Singh Saund vs Jesvir Sing Rehal & another** pending hearing and determination of the applicant’s appeal, being Nakuru HCCA No. 136 of 2017. The application is supported by an affidavit sworn by the applicant and opposed by an affidavit sworn by the 1st respondent. Parties also filed and exchanged submissions.

2. The application initially went before my sister J. Mulwa J who transferred it to this court owing to jurisdictional concerns. It is not clear why the application was filed as a miscellaneous cause when the relevant appeal appears to have been filed by the time the application was being filed. Nevertheless, it is the duty of the court to hear parties with a view to rendering substantive justice without undue focus on procedural requirements.

3. I have considered the application, the affidavits filed and the submissions. The applicant seeks stay of execution of the judgment and order made on 22nd September 2017 by Hon. J. Omido (Principal Magistrate) in **Nakuru CMCC No. 413 of 2014 Jadgit Singh Saund vs Jesvir Sing Rehal & another** pending hearing and determination of the applicant’s appeal, being Nakuru HCCA No. 136 of 2017. From the material on record, it is apparent that the appeal was filed separately on 17th October 2017. I have perused the appeal file and I note that it is still pending in the High Court. No step appears to have been taken in the file other than the filing of the appeal. Parties may need to appropriately move the court for transfer owing to similar jurisdictional concerns as those that led to the transfer of the present application to this court.

4. **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** provides:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 by the applicant.

5. It is incumbent upon a litigant who seeks stay pending appeal to satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. In **Kenya Shell Limited v Benjamin Karuga Kibiru &**

another [1986] eKLR, Platt Ag JA (as he then was) stated:

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 corner stone 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.

6. I note that the appellant initially filed an application dated 19th October 2017 seeking stay from the subordinate court. The application was heard inter partes and was dismissed in a ruling delivered on 25th May 2018. Prior to the filing of the said application, the subordinate court had granted 30 days stay pending filing of a formal application for stay. Needless to state this court can consider this new application for stay under **Order 42 rule 6** of the **civil Procedure Rules**. In the circumstances, I am satisfied that an appeal exists and that the application has been brought without unreasonable delay.

7. The applicant must satisfy the court that substantial loss may result to him unless the order is made. The applicant contends that if stay is not granted, execution of the decree will proceed, he may be evicted and the suit property may be disposed of thus causing him substantial loss. Execution of a lawful decree does not *per se* amount to substantial loss. After all, the respondents are successful litigants and the natural consequence of such success is that they be able to enforce the judgment. The judgment itself required the applicant to pay to the 1st respondent rent of KShs 10,000 per month with effect from January 2012. The applicant has not tendered any evidence to show payment or even deposit in court. Equally, the applicant has not demonstrated that he is unable to pay the rent. In the circumstances, I am not persuaded that substantial loss will result to the applicant unless stay is granted. That alone is sufficient ground for dismissing the application.

8. As previously noted, no step appears to have been taken in the appeal file other than the filing of the appeal. On 13th December 2018, I gave the applicant 14 days to file a supplementary affidavit to confirm if record of appeal had been filed. The applicant did not file the supplementary affidavit.

9. In view of the foregoing discussion, I am not persuaded that this is a fit and proper case in which to grant stay of execution pending appeal. The 2nd respondent neither responded to the application nor participated in its hearing. It is for that reason that I will not award him any costs.

10. Notice of Motion dated 31st May 2018 is dismissed with costs to the 1st respondent.

Dated, signed and delivered in open court at Nakuru this 17th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the applicant

Mr Terer holding brief for Mr Mwangi for the respondents

Court Assistants: Beatrice & Lotkomoi