



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO.112 OF 2017

EVERLYNE NYANCHAMA NYASANI.....RESPONDENT PLAINTIFF

VERSUS

EZRA KEMBOI.....1ST APPLICANT/DEFENDANT

ELIUD KIPLAGAT.....2ND APPLICANT/DEFENDANT

EMILY KEROSSEE.....3RD APPLICANT/DEFENDANT

RULING

This ruling is in respect of an application dated 27th May 2019 by the defendant/applicants seeking for the following orders:-

a) Spent.

b) That there be stay of execution of the Judgment of this Honourable court in ELDORET HIGH COURT ENVIRONMENT AND LAND COURT CAUSE NO. 112 OF 2017 delivered on 26th April, 2019 by honourable Judge M. A ODENY and all its consequential orders pending the hearing and determination of the appeal.

c) Costs be in the cause.

Counsel agreed to canvass the application by way of written submissions which were duly filed. Counsel for the applicant relied on the grounds on the face of the application and the supporting affidavit of EMILY KEROSSEE sworn on 27th May, 2019 and all the annexures attached thereto.

It was Counsel's submission that the respondents were dissatisfied with the Judgment delivered by the court and therefore have preferred an appeal by filing a notice of appeal. Counsel further cited the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules which states as hereunder:

(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.

Counsel therefore listed the following issues for determination by the court:

a) Whether the application has been made without unreasonable delay,

b) Whether the applicant will suffer substantial loss if the order is not granted,

c) Whether the applicant is willing to give such security as the court orders for the due performance of the decree.

On the first issue on whether the application has been made without unreasonable delay, Counsel submitted that the applicants have met this requirement as the judgment was delivered on 26th April 2019 with the court granting a 30 day stay and that the application was filed on

27th May 2019.

Counsel submitted that the applicants will suffer substantial loss if the order is not granted as the applicant is the beneficial owner of the suit parcel of land having acquired the said interests from her deceased father. Counsel submitted that even though the Respondent has title to the suit parcel of land the same was acquired illegally and fraudulently and that failure to grant stay of execution orders will render the Applicant destitute since he is currently in occupation with her siblings.

Counsel cited the case of ELDORET ELC NO. 215 OF 2017 FELIX KIPCHOGE LIMO LANGAT V ROBINSON KIPLAGAT TU WEI, [2018] eKLR where the court held that proof of substantial loss is the cornerstone of granting stay of execution.

Counsel also stated that the court held that;

"The requirement of proof of substantial loss does not only mean monetary terms but also the inconvenience of having to subdivide and transfer part of the suit land to a third party and later to retransfer in case the applicant is successful. We should always look at the bigger picture and what the implementation of the decree entails and the agencies involved.

Mr. Melly further submitted on the issue of security for the performance of the decree, and that the applicant is ready and willing to comply with this condition. He submitted that the subject matter being land would not require the deposit of security. Counsel cited the case of Kenya Tanzania Uganda Leasing Co. Ltd v Mukanya Ndunda [2013] eKLR where Mabeya, J held as follows;

"As 1 stated in the case of KENYA COMMERCIAL BANK LIMITED vs SUN CITY PROPERTIES LIMITED 5 OTHERS [2012] eKLR "in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... 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. I do not see, why the same should not be applicable in this case." (Emphasis)

Counsel therefore urged the court to grant the orders as prayed.

RESPONDENT'S SUBMISSIONS.

Counsel for the respondent opposed the application for stay of execution and submitted that the applicants have alluded to a notice of appeal which has not been served on the respondent as per Rule 75(2) of the Court of Appeal Rules; which makes the appeal voidable for want of service.

Counsel submitted that the applicants evicted the Respondent's servants/agents from the land forcefully occasioning them bodily harm and violently took possession without regard to the law of which criminal charges have been preferred against them.

Mr. Angu further submitted that at the time of the commission of the offence the court had issued temporary injunctive orders restraining the Applicants from interfering with the Respondent's peaceful occupation of the land.

Counsel cited the case of Butt V Rent Restriction Tribunal 1980 KLR at page 417 where the court stated the following grounds as the basis of granting stay as the applicant having an arguable appeal, the appeal will be rendered nugatory of which the respondent argues that the applicant does not have any arguable appeal.

Counsel submitted that the appeal will not be rendered nugatory as the respondent intends to use the suit property for farming for her family and has no desire of disposing off any interest in the land. That the court has discretionary powers to grant or refuse to grant orders of stay of execution and such discretion should be exercised in such a way as not to prevent an appeal. Further that a Judge should not refuse a stay if there are good grounds for granting it merely because in his/her opinion, a better remedy may become available to the applicant at the end of the proceedings.

Counsel therefore submitted that no proper grounds have been advanced to show substantial loss and that the appeal will be rendered nugatory if the order of stay is not granted and that the applicants have acted in bad faith by invading the suit land. He urged the court to dismiss the application with costs to the respondent.

Analysis and Determination

The issues for determination in an application for stay of execution are as provided for under order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

(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.

The issues are as to whether the applicant filed the application without unreasonable delay, whether the applicants have satisfied the court that they will suffer substantial loss if the order of stay is not granted and finally an order of security for the due performance of such decree which may be ultimately binding on the applicant.

It should be noted that the grant of stay of execution is discretionary but the same must be exercised judiciously so as not to cause injustice to the parties to the suit. The discretion must also be exercised within the parameters of the law taking into consideration the rights of both parties to the suit. In this case, the party who has the judgment in his favour and the one who is aggrieved by the decision.

I am guided by the principles enunciated in the Court of Appeal case in **Butt v Rent Restriction Tribunal [1982] KLR 417** which gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The following principles capture the issues to be considered in an application for stay of execution.

Going to the issues at stake, the applicants have established that they filed the application for stay of execution timeously as the Judgment was delivered on 26th April 2019 and by 27th May 2019 they had filed the application. The court had granted 30 days stay to the applicant but one issue the court must address is that the applicants took the law unto their hands and allegedly encroached onto the suit land after judgement and assaulted the workers of the respondent thereby leading to criminal charges being preferred against them as per the charge sheets and the affidavits sworn in court. When coming to court, a party must approach the court with clean hands and decorum to enable the court to consider their pleas. Court orders must be obeyed even if you do not agree with them as there are laid down procedures of appeal or challenging the orders either by way of review or setting aside.

On the second limb on establishment of substantial loss, the applicants have not demonstrated that they will suffer any loss if the order of stay is not granted. The applicants are not in occupation and that is why they tried to invade the suit land after the judgement.

The applicants did not address satisfactorily the issue of offering security for the performance of the decree which is an important limb of an application for stay of execution. The court is alive to the fact that it would be in the interest of justice to preserve the substratum of the suit land pending the hearing and determination of the intended appeal.

In the case of **Siegfried Busch vs MCSK [2013]eKLR**, the court held that

“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

The respondent is the registered owner of the suit land and in occupation with interference of the applicants. There is no loss that the applicants will suffer if the court orders that the respondent continues with the occupation without interference by the applicants. The court also orders that the respondent is precluded from transferring the suit land until the appeal is heard and determined. The applicants are warned to maintain peace and restrained from interfering with the respondent’s occupation of the suit land.

Each party to bear their own costs of the application.

DATED and DELIVERED at ELDORET this 19th DAY OF SEPTEMBER, 2019.

M. A. ODENY

JUDGE

RULING READ in open court in the presence of Mr. Too holding brief for Angu Kitigin for the Plaintiff and Mr. Lang'at holding brief for Mr. Melly for Defendants.

Mr. Mwelem – Court Assistant