



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 36 OF 2017

(FORMERLY NAKURU HCCC 216 OF 2012)

VIRGNIA WANGUI NJENGA.....PLAINTIFF/RESPONDENT

VERSUS

RUTH WAITHERA MWANGI (sued as the legal Representative of the Estate of the late

MWANGI WAIREGI THUKU).....1st DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated the 1st July 2019 brought under Order 42 Rule 6 (1) of the Civil Procedure Rules where the Applicant seeks for orders of stay of execution of the Judgement delivered on the 28th May, 2019.
2. The said application is supported by the grounds set on its face as well as on the supporting affidavit of Joseph Karanja Mbugua, Advocate for the Applicant herein, sworn on the 1st July 2019.
3. By consent, parties agreed to dispose of the application by way of written submissions.
4. By the time I write this ruling, none of the parties have complied with the orders of the court to file their submissions. I have however considered the Applicant's application herein as well as the supporting affidavit herein sworn on the 1st July 2019 where counsel for the Applicant deponed that following the delivery of the Court's Judgment on the 28th May 2019, they promptly exercised their right of Appeal and have filed the same to the Court of appeal.
5. That Any expectation of the judgment against the Applicant would render the Appeal nugatory as well as reduce it to academic exercise not worth pursuing and therefore the only way to safe guard and guarantee the Applicant's Constitutional right of appeal and judicial process was to stay the execution of the terms of the judgment pending the outcome of the Appeal.
6. That the stay of execution would not prejudice the Respondent herein as she could still execute the terms of the judgment in case the Appeal was not successful.
7. I have also considered the replying affidavit herein filed by the Respondent on the 18th July 2019 to the effect that the application had already been overtaken by events, the terms of the judgment having been effected/implemented by the land Registrar-Nyandarua.

Determination.

8. I have considered the application, the affidavit on record, and submissions by counsel as well as the law concerning stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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.

9. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- a) The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- b) The application is brought without undue delay and
- c) 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.

10. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the Applicant to demonstrate what kind of substantial loss he would suffer if the stay order was not made in his favour.

11. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

“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”.

On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be” In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding” On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

13. In the application before me, the Applicant has pleaded that since they have already deposited the fees for the Appeal, they would suffer substantial loss if they were made to repay or refund the cost of the suit to the Respondent especially owing to the fact that they have appealed against the judgment herein. The onus of proving that substantial loss would occur unless stay is issued rested upon the Applicant and ought to have been discharged accordingly. It was not enough to merely state that loss will be suffered, the Applicant ought to show the substantial loss that it will suffer in the event the orders sought are not given. The Applicant ought to have established that the loss he was likely to suffer was such that the Appeal if successful would be of no consequence and failure to order a stay would have rendered the Appeal nugatory.

14. It therefore follows that even without going to the merit of the Appeal, even if orders sought herein are not granted, there is no evidence that the Applicant/Appellant will suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of his/her Judgment.

15. On the second condition, upon perusal of the court record, this Court finds that the delivery of the Judgment, in the matter being appealed against, was on the 28th May 2019 wherein the Applicant applied for stay of execution vide the present application on the 1st July 2019. I find that the said application was brought without undue delay.

16. On the last condition as to provision of security, the party seeking an order of stay is supposed to provide security. The Applicant has not given security but it is expected that if stay is granted he would abide by any order the Court may issue for him to provide security. It is the Court which exercises discretion as to what kind of security a party should provide based on the circumstances of the case. Security will be ordered where a court grants the prayer for stay of execution.

17. I have considered the replying affidavit of the Respondent and noted from the annexure therein marked as VWN3, which is a copy of official search that terms of the judgment have already been effected/implemented by the land Registrar-Nyandarua to the effect that the suit land had already been registered back to the Settlement Fund Trustee. This in my opinion is another way to reserve the subject suit herein and would not prejudice either of the parties. The *Order* of stay of execution would not serve any purpose herein as the same has been overtaken by events.

18. Section 3A of the Civil Procedure Act provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

19. Having found as herein above, this court is not inclined to grant the order of stay of execution so sought.

i. In the circumstance, the Appellant/Applicants' Notice of Motion dated 1st July 2019 is hereby denied and dismissed with costs to the Respondents.

ii. The Appellant/Applicant shall lodge his Appeal against the Judgment of this Court within 14 days from this date.

iii. That upon filing of the Memorandum of Appeal in (ii) above, the Applicant shall prepare, file and serve his record of appeal within 45 days.

Dated and delivered at Nyahururu this 29th day of October 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE