



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 3 OF 2019

OL KALAOU WEST FARMERS

CO-OPERATIVE SOCIETIES LTD.....APPLICANT/APPELLANT

VERSUS

DAVID KIBUE KINYANJUI.....RESPONDENT

RULING

1. Judgment in this matter was delivered on the 13th February 2019 dismissing the Appeal herein. By a Notice of Motion dated 30th April 2019, the Appellant sought for an order of stay of execution of the terms of the said judgment and its subsequent Decree pending the hearing and determination of their Appeal in the Court of Appeal.

2. The Respondent filed a Replying Affidavit to the application on the 12th June 2019 wherein the Applicant filed their response on the 8th July 2019.

3. By consent, parties agreed to dispose of the application by way of written submissions where the Applicant filed their written submissions on the 21st August 2019 and as I write my ruling, the Respondent is yet to file their written submissions.

4. The Applicant's Submission and while relying on the provisions of Rule 32(1) of the Procedure Rules (Sic) was to the effect that a person who was aggrieved by a Decree or Order of the court could apply for a review of the said judgment or ruling.

5. The Applicant further submitted that the application had been brought under Order 42 Rule 6 and from the said application and supporting affidavit, they had clearly demonstrated and given full details on the substantial loss that would result if the orders sought were not granted. That further they had filed the application without unreasonable delay hence on the basis of the above provisions of the law, the court had the discretion to issue orders for stay of execution but that the said discretion was to be exercised judiciously.

6. They relied on the case of **Nairobi HCCC No. 6726 of 1991 Stephen Wanjohi vs Central Glass Industries** and **Voi Civil Appeal No.83 of 2016 GN Muema P/A (sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another**, to submit that for a court to grant an order of stay of execution, there ought to be:

- i. sufficient cause
- ii. substantial loss
- iii. no unreasonable delay
- iv. Security and grant of stay is discretionary.

7. That when determining the application, they urged the court to take into account that it was not the practice of courts to deprive successful litigants the fruits of his/her litigation. Further, that the court takes into account that the purpose of stay of execution pending appeal was to preserve the subject matter as was held in the cases of

i. **Nairobi HCCC No. 93 of 1989 Consolidated Marine vs Nampija & Another.**

ii. **Eldoret Civil application No 833 of 206 Pauline Yebei & Another vs Estate of Kiprotich arap Letting represented by Andrew Kiprotich Kiprono**

8. Although the Respondent did not file his written submissions, yet in his replying affidavit to the Applicants' Notice of Motion, he had deponed that the Applicant had not demonstrated any valid grounds to have an order of status quo ante judgment maintained and remain in force and an order of stay of execution of the terms of the judgment delivered on the 13th February 2019 or the subsequent decree.

9. That the Applicant in his application had demonstrated that it was misusing the court process to delay execution of judgment both in the lower court and in this Court and therefore delaying enjoyment of the fruits of the judgment.

10. That the Applicant had leased out a portion of the subject suit where it continues to enjoy yearly rent from the tenant. That the Applicant had also continued to destroy the trees planted on the suit land hence wasting the said subject matter and occasioning the Respondent loss and damage.

11. That the Applicant had not demonstrated that it stood to suffer substantial loss and therefore the application had not met the settled principles of granting an order for stay of execution under the Civil Procedure Rules.

12. The Applicant had further not offered any security for the due performance of such an order as may ultimately be binding on it. In the alternative the respondent sought that the court makes an order that the Applicant deposits a sum Ksh 5,000,000/-(five million shillings) or such other deposit as the court may deem fit, before making an order of stay of execution.

13. That the Respondent had not deponed that he had intended to sale, dispose of or alienate the subject matter and therefore in the event that Applicant succeeded in the intended Appeal, the land would still be available.

14. That the application was bad in law incompetent, an abuse of the court process, and a waste of the judicial time and should be dismissed with costs.

Analyses and Determination.

15. 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.

16. 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.

17. 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 it will suffer if the stay order was not made in its favour.

18. 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.”

19. In the application before me, the Applicant has not pleaded that it would suffer any substantial loss and neither has it provided any evidence on the kind of irreparable loss it would suffer if the order of stay was not granted. Further, no evidence has been adduced that the Respondent is desirous of disposing off the subject suit.

20. 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 13th February 2019 wherein the Applicant applied for stay of execution on the 30th April 2019. I find that the said

application is brought without undue delay.

21. On the last condition as to provision of security, I find that the Respondent has rightly deponed that submitted that the Applicant in the present application has not furnished and/or offered any security for a grant of the order for stay which was a mandatory legal requirement pursuant to the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules.

22. Section 3A. 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.

23. Having found that two conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Appellant/Applicant, this court is not inclined to grant the order of stay of execution so sought.

24. In the circumstance, the Appellant/Applicants' Notice of Motion dated 30th April 2019 is hereby denied and dismissed with costs to the Respondent.

i. *The Appellant/Applicant shall lodge his Appeal against the decree of the Court within 14 days from the date of this ruling.*

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

Dated and delivered at Nyahururu this 22nd day of October 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE