REPUBLIC OF KENYA

IN THE ENVORONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 671 OF 2012

DAVID KIPKOSKEI KIMELI.....PLAINTIFF/APPLICANT

VERSUS

TITUS BARMASAI.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 7th June 2019 by the plaintiff/applicant seeking for stay of execution pending the hearing and determination of an intended appeal.

Counsel for the applicant gave a brief background to the application and submitted that the applicant herein had filed an originating summons for an order of declaration that he had acquired parcel of land known as Uasin-Gishu Kipkabus Settlement Scheme /47 Measuring Approx. 4.3ha by way of adverse possession. The suit had been previously registered at the High court but was subsequently transferred to ELC and heard and Judgment delivered on 13th May 2019 dismissing the plaintiff's suit.

Counsel submitted that the applicant was aggrieved by the judgement and has preferred an appeal by filing a notice of appeal. Counsel submitted that the issues for determination are as to whether the applicant is entitled to the prayers sought and he stated that the applicant has fully complied with the prerequisites for grant of the prayers sought . That under Order 42 Rule 6 (2) of the CPR 2010, the law provides that;

> "....no order of stay of execution shall be issued under sub rule (1) unless, 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. Such security as the court may order for the due performance of such decree or such orders as may ultimate be binding on him has been given by the applicant..." Counsel further submitted that the application has been brought without undue delay as judgment was delivered on 13th May 2019 and the application was filed on 7th June2019..."

On the issue of substantial loss counsel submitted that the applicant will suffer substantial loss and cited the case of **Emmy Keino (suing through her Attorney Stephen Mbogo Nyaga) -VS- Board of Trustees Teleposta Pension Scheme NBI HCCA 587 of (2017)** where the court cited the case of **James Wangalwa & Anr -Vs- Agnes Naliaka Misc. Application No 42 of 2011(2012) eklr** where Gikonyo J. stated that,

> "...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 4 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what the substantial loss would entail, a question that was aptly discussed in the case of, **Silverstein -vs- Chesoni (2002)1KLR 867 and in the case of Mukuma -vs Abuoga.**

Counsel submitted that 5(2)(b) of the Court of Appeal Rules respectively emphasized the centrality of the substantial loss thus;

> "...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....."

Counsel also submitted that the plaintiff is in possession of the suit land and therefore he will suffer substantial loss and that the defendant has never been in occupation. Counsel cited the case of Felix Kipchoge Limo Langat -Vs- Robinson Kiplagat Tuwei (2018) Eklr, where the court while quoting the case of Kenya shell ltd-vs- Benjamin Karuga Kigibal & Anr (1982-1988)1klr1018 held that,

"..lt is usually a good rule to see if order 41 Rule 4 of the CPR can be substantiated if there is no evidence of substantial loss for 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 cornerstone of both jurisdiction for granting stay "

Counsel further submitted that the circumstances of the instant case are quite similar that the process of execution and eviction if allowed to go on unstopped will alter the status quo on the ground.

On the Security for the due performance of the decree, Counsel submitted that the Applicant has deponed that he is ready and willing to abide by the conditions that may be set out by this honorable court. That the court should exercise its discretion in favour of the applicant on terms that are not punitive in nature which might impede access to justice. Further that the amount of security should not be pegged on the value of the suit land as suggested by the respondent. Counsel further cited the case of **Felix Kipchoge Limo Langat -Vs-Robinson Kiplagat Tuwei Eldoret ElC 215 of 2017 eKLR,** where the court held as follows;

"....on the issue of security for the performance for the decree, Counsel for the applicant submitted that they are ready and willing to offer security for the performance of the decree as the court may order, this is a case involving land where the defendant has title to the suit land. In the interest of justice I will order a stay of execution of the decree with a condition that the defendant deposits the title to the suit land in court within 30days and not to interfere with the character of the land until the appeal is heard and determined...."

Counsel further submitted that whereas the applicant does not have the title deed it is safer that the same is in the hands of the respondent and it would be sufficient to order that the applicant does not dispose of or interfere with the character of the suit land until the appeal is heard and determined. Counsel also submitted that the applicant has an arguable appeal and therefore the application should be allowed as prayed as the applicant has met the threshold for grant of the application..

DEFENDANT'S WRITTEN SUBMISSIONS

Counsel for the defendant/Respondent opposed the application and submitted that the applicant has not met the threshold for grant of orders sought. Counsel cited the case of

Antoine Ndiaye vs. African Virtual University [20151eKLR, where Gikonyo J. opined as follows;

"The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; 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".

Counsel also relied on the case of Prilscot Company Limited v Monica Heho [2015] eKLR, H.C at Nairobi, Civil Appeal No. 482 OF 2014 where the learned Judge Sergon while relying on the case of Halai & Anor v. Thornton Turpin (1963) Ltd (1990) KLR 365) opined that Order 42 Rule 6 (2) of the Civil Procedure Rules lay down the conditions which must be satisfied by an applicant to grant the orders for stay of execution pending an appeal.

On the issue whether the application has been filed without undue delay, Counsel submitted that the present application was filed in court almost 20 days after judgment was delivered in favour of the Respondent thus the application has been brought after unreasonable delay.

Counsel submitted that it is trite law that a litigant must enjoy the fruits of his/her judgment and relied on the case **of Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [20021 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"

On the issue of whether the applicant will suffer substantial loss if stay of execution is not granted, Counsel submitted that Applicant in the present case is not the registered owner of the suit parcel of land and has no legal rights on the same. The Applicant occupied the land with permission of the Respondent who is the registered proprietor of the said land as seen in the Replying Affidavit sworn on 21st June 2019

and the annexures thereto. That the Applicant has not demonstrated the kind of loss he will suffer and urged the court to dismiss the application with costs to the defendant.

Analysis and determination

In an application for stay of execution pending appeal, an applicant must satisfy the provisions of order 42 Rule 6 of the CPR. The applicant must have filed the application without undue delay, must establish that he or she will suffer substantial loss and that he or she is ready and willing to abide by such security for the due performance of the decree as may be set by the court to be binding on the applicant.

If this is met then the court is good to go and grant the orders sought. When there is delay in filing the application an explanation must be given for such delay to convince the court on the reason for undue delay. The most important limb of the application for stay of execution is proof of substantial loss and it should be noted that mere mention or alleging that an applicant will suffer substantial loss is not enough.

These rules are put in place to safe guard both the decree holder and the judgment debtor. That a successful litigant is entitled to enjoy the fruits of the judgment and the aggrieved party is also entitled to try his or her luck in the higher court and that is why there are hierarchy of courts. An aggrieved party should not be denied an opportunity to appeal but must follow and adhere to the rules and procedures.

I find that the application was filed timeously as a 20 day period is not inordinate delay. But I also find that the applicant has not established what kind of substantial loss he will suffer if the stay order is not granted. The court should also not sanction continued trespass. The fact that a party is in occupation and such occupation has been found to be illegal does not mean that is a ground to claim that there will be substantial loss suffered. A party must go a step further and establish the loss that they will suffer.

In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2)(2002) KLR 63**, it was held as follows;

> "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..."

In Peter Rugu Gikanga & another v Weston Gitonga & 10 others [20141 eKLR, the learned

Judge Enyara Emukule reiterated as follows;

> *" It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution. In CHARLES WAHOME GETH/ VS. ANGELA WA/R/MU GETH/ (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), the Court of Appeal held -*
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> *... it is not enough for the applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them. "*

I find that the applicant has not met the threshold for grant of the orders of stay of execution but in the interest of justice I order that the applicant deposits Kshs. 300,000/ for due performance of the decree with the Advocate for the respondent within 30 days failure of which the stay lapses.

DATED and DELIVERED at ELDORET this 21ST DAY OF NOVEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Miss. Kipseii for applicant and in the absence of Mr.Kamau for the Respondent.

Mr. Mwelem – Court Assistant