



**REPUBLIC OF KENYA**

**IN ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 120 OF 2016**

**BEATRICE MGHAMBA ONYONKA.....PLAINTIFF**

**VERSUS**

**SAMWEL ONSARIGO OOGA.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. What is before me is a Notice of Motion dated 1st November 2019. The said application is brought pursuant to Sections 1A and 1B of the Civil Procedure Act and Order 42 Rule 6(1) (20, (3) & (4) of the Civil Procedure Rules 2010. The Applicant seeks the following orders from this Court:

1. Spent
2. That this honourable court be pleased to grant a stay of execution of this court's ruling dated 5<sup>th</sup> April 2019 pending the hearing and determination of the intended appeal to the Court of Appeal.
3. That the costs of this application abide the intended appeal.

2. The application is premised on the grounds stated on the face of the Notice of Motion and the applicant's supporting affidavit sworn on the 1st November 2019. The applicant contends that he is the allottee of plot 37 Nyakoe Market within Kisii County. He avers that the Respondent is claiming ownership of the said plot. Owing to the competing claims over the same plot the court directed the Land Registrar and District Surveyor to visit the suit property and establish who was in occupation thereof. The said officers visited suit property and filed their report in court.

3. In the meantime one Damaris Manyange applied to be enjoined in the suit as a co-defendant in order to vindicate her rights over L.R NO. WEST BOGEKA/3681 which she claims she bought from the Defendant. On 19.12.2018, the court rendered its ruling in respect of the said application where the court dismissed the application and dealt with the entire suit against the Defendant. The applicant then filed a Notice of Appeal against the ruling of the court. At the same time Damaris Manayange also filed a Notice of Appeal against the court's refusal to have her enjoined in the suit. The applicant depones that he is aged 73 years and the suit property is the only place he knows as his home and if his application is not granted, he will suffer substantial loss. He states that he is willing to furnish security for costs.

4. The application is contested by the Respondent through her Replying Affidavit sworn on the 5th November 2019. She depones that by its ruling dated the 5th April 2019, the court adopted the report of the Land Registrar and County Surveyor dated 29.6.2018 in effect holding that the defendant/applicant was in unlawful occupation of plot no. 37 Nyakoe market and orderd him to vacate the same within 30 days failing which an order of eviction would issue upon application by the plaintiff/respondent.

5. Following the delivery of the ruling, the applicant filed a Notice of Appeal on 17th April 2019 but did not apply for a certified copy of the proceedings, order and decree as provided by rule 81 of the Court of Appeal rules. She contends that the net effect of the applicant's inaction, is that the time for filing the appeal has since lapsed and the applicant has not filed any application for enlargement of time as envisaged by rule 4 of the Court of Appeal rules. She depones that the applicant has not annexed any Memorandum of Appeal to his application.

6. She further depones that the applicant has not demonstrated that he will suffer substantial loss if the application for stay is not granted.

She contends that the application for stay is an afterthought and an abuse of the process of the court process as the applicant initially filed an application for review which he subsequently withdrew on 5.11.2019. She states that this application has been made after inordinate delay which has not been explained and the same is based on a non-existent appeal as no leave has been granted to extend time for filing the appeal out of time. She states that the applicant occupies a different plot from that owned by the respondent. She therefore argues that the application

lacks merit and ought to be dismissed.

The application was argued orally and both parties presented their submissions.

## ISSUES FOR DETERMINATION

7. Having considered the application, rival affidavits and submissions, the following issues arise for determination:-

- (a) Whether the Applicant has met the threshold for grant of stay of execution pending Appeal and
- (b) Who should bear the costs of the Application

## ANALYSIS AND DETERMINATION

### Whether the Applicant has met the threshold for grant of stay of execution pending Appeal

8. The principles guiding the courts while considering such an application are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 provides in part as follows: -

*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.*

*(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

In the case of **Kiplangat Kotut v Rose Jebor Kipngok (2015) eKLR** the Court observed as follows:

***Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. “***

9. Having set out the conditions for grant of stay, I shall proceed to consider whether the three conditions have been satisfied by the applicant.

### Whether the Application has been brought without undue delay

The ruling which disposed off the suit was delivered on 5th April 2019 while the application for stay of execution was filed on 1st November 2019, after a lapse of more than 7 months. Apart from the fact that the applicant filed a Notice of Appeal on 17.4.2019, no explanation has been given for the delay in applying for stay of execution. This is a bit unusual since rule empowers the court to issue an order for stay before the filing of a formal application. The failure to make the application for stay is thus inexcusable. It is therefore my finding that the application was not filed without undue delay.

### 10. Whether the Applicant has demonstrated that he will suffer substantial loss if the Orders sought are not granted

On whether the applicant has demonstrated that he will suffer substantial loss, I am guided by the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** where the court considered the question of what constitutes substantial loss. Mativo J stated as follows:-

***“The cornerstone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto where it was held inter alia 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 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the 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 substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**. .....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”*

11. In the present application, the applicant has stated that he has been in occupation of the suit property for 19 years and that is where he carries out his business. It is interesting to note that even though he has attached a plot card relating to plot no. 37 Nyakoe market, in his defence dated 14th July 2014 he stated that he bought a portion of land parcel number WEST KITUTU/BOGEKA/3681 which is now known as WEST KITUTU/BOGEKA/4137 . The report by the Land Registrar and County Surveyor who visited the disputed parcels of land indicates that the two plots to wit plot no. 37 Nyakoe Market and parcel no. WEST KITUTU/BOGEKA/3681 are in different locations and plot no 37 is registered in the respondent’s name. Indeed, the plot card annexed to the applicant’s affidavit as annexure SOO 001 (b) clearly indicates the location as Bogetaorio 2 while the respondent’s card, annexure SOO OO2 indicates that her plot is at Nyakoe location.

12. The court relied on the findings of the Land Registrar and county surveyor and held that the applicant was wrongfully occupying the respondent’s land and ordered that he vacates the same within 30 days failing which he would be evicted. He did not vacate the suit property and only filed this application when the respondent applied for an eviction order. The applicant is therefore not in lawful occupation of the suit property as alleged. Additionally, counsel submitted that the applicant is an old man aged 73 years who is suffering from old age diseases and he is likely to suffer mentally if he is evicted from the suit property. Even though I sympathize with the applicant’s predicament, he cannot use his advanced age to gain advantage over the the respondent. In the circumstances the applicant has failed to demonstrate that he would suffer substantial loss if the order of stay is not granted.

#### **Whether the applicant has furnished security for costs**

13. Counsel for the Applicant submitted that the Applicant is willing and ready to furnish such security as the court may direct. The applicant who claims to be carrying on business on the suit property had not explained what business he does and what his monthly income is to enable the court arrive at a figure for security for costs. Even though I do not doubt the applicant’s ability to raise security for costs, he ought to have done more to convince the court that he is indeed capable of furnishing security for costs.

#### **Whether the applicant has an arguable appeal.**

14. In the case of **Bashir Godana v Fatuma Godana Tupi (2018) eKLR** the court held that if the execution of the decree will render the appeal nugatory, the court will be inclined to grant a stay on terms. In the instant case no material has been placed before the court to demonstrate that the appeal is arguable and that as such it would be rendered nugatory if a stay is not granted. Apart from the Notice of Appeal which is annexed to the supporting affidavit, there is no Memorandum of Appeal or indeed anything to show that the applicant applied for a certified copy of the judgment and proceedings to enable him prepare the record of appeal. If the applicant was convinced that he had an arguable appeal, he ought not to have applied for review as he did, after filing a Notice of Appeal. It would appear that the applicant was quite uncertain about his chances of succeeding on appeal.

15. It is trite law that a successful party is entitled to the fruits of their judgment and the court cannot disregard this fact and continue flirting with the unsuccessful party. The court in the case of **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** stated as follows:

*“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”.*

17. In view of the foregoing, it is clear that the applicant has not satisfied all the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules. I have therefore come to the conclusion that the application lacks merit and it is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Kisii this 19th day of November, 2019.**

**J.M ONYANGO**

**JUDGE**