



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT AT KISII

E.L.C APPEAL NO. 23 OF 2019

KIRAITA ABUTA.....APPELLANT/APPLICANT

VERSUS

RICHARD NYANDIKA NYANGOYA.....RESPONDENT

RULING

INTRODUCTION

1. What is before me is a Notice of Motion dated 26th August 2019. The said application is brought pursuant to Order 42 Rule 6(1) & (4) and Order 51 rule (1) of the Civil Procedure Rules 2010. The Applicant seeks the following orders from this Court:

(a) Spent

(b) Spent

(c) That Pending inter partes hearing of this application filed herein, the honourable court be pleased to grant a stay of execution against the Applicant.

(d) That pending the hearing and determination of this application, there be a stay of execution against the Applicant.

(e) Pending the hearing and determination of the appeal filed herein, the honourable court do grant a stay of execution of the judgment and orders made on 20th August 2019 in CMCC No 814 of 1999

(f) That the costs of this application be provided for.

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 26th August 2019. The applicant contends that he is aged 97 years and has a large family of one wife and ten children which would be rendered destitute if execution is not stayed, hence he stands to suffer substantial loss. Secondly he depones that he has an arguable appeal and lastly, that he is willing to deposit an amount of Kshs. 12500 as security for costs .

3. The application is opposed by the Respondent through his Replying Affidavit sworn on the 10th September 2019 in which he refutes the applicant's claim that he is in occupation of the suit property as he states that neither the applicant nor the respondent are in occupation of the suit property as the applicant and his large family are in occupation of a different parcel of land. He has annexed photographs of the suit land which show that it is indeed vacant.

4. In response to the applicant's assertion that he has an arguable appeal, the respondent contends that the applicant has not attached the proceedings of the lower court and the court would therefore not be in a position to establish whether he has an arguable appeal.

5. On the issue of security for costs, the respondent states that the amount of Kshs.12,500 offered as security for costs which was the value of the suit property in 1979 is insufficient as the value of the land has appreciated.

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

ISSUES FOR DETERMINATION

6. 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

7. The principles that guide the courts while considering such an application are now well settled. The substantive provisions 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 if a notice of appeal has been given.

8. 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 & Company 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”.

9. The Court of Appeal in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** was cautious of the need to balance between the rights of the parties as well as interfere in instances where an appeal would be rendered nugatory. The Court stated as follows: -

“16. In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruits of judgment in their favour and their rights are safeguarded.

10. The court in the case of **Migotio Plantations Limited v Paul Wanyama Wafula [2015] eKLR** stated as follows in considering a similar issue:-

The powers of the court to grant stay of execution of the decree are discretionary. The ultimate goal of the court is to preserve the appeal and ensure that the rights of the Appellant are not defeated pending its determination. (Butt v Rent Restriction Tribunal [1962] KLR 417)

Therefore, whether the Appellant stands to suffer substantial loss is the cornerstone of the application of stay. However, the court must also consider special circumstances and unique requirements of the case. (See Butt V Rent Restriction Tribunal supra pages 419-420). At this point, there is a valid judgment in force and the court must weigh the Appellant’s right to appeal against the equally weighty right of the successful party to enjoy the fruits of his judgment. Redland Enterprises Limited v Premier Savings & Finance Limited [2002] 2 KLR 139

11. The Learned Kamau J in the case of **M.O.M Amin Transporters Limited & another v Alexander Ndung'u Mbugua & 2 others [2017] eKLR** was of the opinion that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

“13. In the cases of Kiplagat Kotut vs Rose JeborKipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

14. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. Substantial loss may result to the applicant unless the order was made;

2. The application was made without unreasonable delay; and

3. 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.

15. 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. “

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

13. Whether the Application has been brought without undue delay

Counsel for the Applicant submitted that the judgment was delivered on 20th August 2019 and that the application was filed on 27th August 2019. In the circumstances, it is his submission that the application was made without any delay. On this point I agree with the submission of the applicant's counsel that there was no delay in filing the application.

14. Whether the applicant has an arguable appeal.

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.

15. 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 corner stone 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”

16. In **Elena D.Korir vs Kenyatta University Justice Nziokiwa Makau** had this to say:-

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely :- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan GuyoWakalo vs Straman EA Ltd(2013) as follows:-

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

17. In the instant application, the applicant has not demonstrated that he will suffer substantial loss. The applicant has not established that he lives on the suit property with his family of ten children. In his replying affidavit, the respondent has stated that none of the parties is currently residing on the suit property and he has annexed photos of the suit property. The applicant did not rebut this assertion.

18. Whether the applicant has furnished security for costs

Counsel for the Applicant submitted that the Applicant is willing to deposit Kshs. 12,500/= being the value of the suit property in 1979. Counsel for the plaintiff has argued that this amount is inadequate as the value of land has appreciated. The court takes judicial notice of the fact that land prices are continuously rising and to peg security for costs at the price of land 40 years ago is unreasonable.

19. In the final analysis, the court must be satisfied that all the conditions set out in Order 42 rule 6 of the Civil Procedure Rules have been met. As stated by Mutungi J. In the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** it is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal. The court in that case stated as follows:-

“ The pre-amble to sub-rule (2) of Rule 4 of Order 41 is couched in very clear language and words: “No order for stay of execution shall be made under sub-rule (1) unless.....” then follows the requirements, above, which have not been met by the applicant herein.

Let me conclude by stressing that all the four, not one or some, must be met before this court can grant an order of stay.”
(Emphasis mine)

20. In the circumstances the instant application cannot succeed as the applicant has not satisfied all the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules. Accordingly the application is dismissed with costs to the respondent.

Dated, signed and delivered at Kisii this 15th day of November 2019

J.M ONYANGO

JUDGE