



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO.329 OF 2017

JOHNSON GATHANGA MWANIKIRESPONDENT

VS

ESTHER WATHERI MWANIKI.....APPLICANT

SAMUEL GATHIMA MWANIKI.....APPLICANT

ESTHER WATHERI MWANIKI (sued as the administrator or legal Representative
of the estate of CHARLES MBUTHIA MWANIKI)APPLICANT

STEPHEN GITHAIGA MWANIKI.....APPLICANT

RULING

1. What is before me is a motion by the Applicants brought under Order 42 Rule 6 , Order 22 Rule 22, Order 51 Rule 1 of the Civil Procedure Rules, Sections 3 & 3A of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders;

- a. Stay of execution of the judgment delivered on the 22/7/2019 pending the hearing and determination of the Applicants' Appeal.
- b. This Court to grant any other orders as it deems fit
- c. Costs of the application.

2. The grounds on which the motion is premised are summed as; the Applicants are aggrieved with the judgement delivered on the 22/7/19 and are intending to file an Appeal and are awaiting for the typed proceedings to be availed; if stay is not granted Applicants Appeal shall be rendered nugatory and the Applicants shall stand to suffer irreparable damage; the Applicants are willing to abide by any of the conditions set by the Court in respect to the stay orders including any order for security.

3. The motion is supported by the affidavit sworn by the 1st Applicant where she has reiterated the grounds of Appeal and in addition deposed that if stay orders are not granted the Respondent shall dispose off the parcel he will get arising from the judgement before the Appeal is heard and determined and the Applicants will as a result suffer irreparable damage in the case that the Appeal is successful.

4. Further that the Appeal raises weighty issues of law and facts and has a high chance of success. She urged the Court to grant her prayers. She attached a Memorandum of Appeal as well as a Notice of Appeal to the Notice of Motion.

5. The application has been opposed by the Respondent through grounds of opposition as thus; the application is frivolous vexatious and an abuse of the due process of the Court; the Applicants have not demonstrated the substantial loss they are likely to incur if stay is not granted; the Applicants have not satisfied the mandatory provisions of Order 42 Rule 2 of the Civil Procedure Rules.

6. The Applicants submitted that the principles of grant of stay of execution were set in the case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417**. That the purpose of stay pending Appeal is to preserve the subject matter so that the Appeal is not rendered nugatory. That the subject matter in this case is land and the judgment decreed that the new titles in the names of the Applicants be cancelled to allow the allocation of the Plaintiff of a share from the mother title. The Applicants are dissatisfied with the said judgment and hence they have proffered an Appeal.

7. The Applicants relied on the case of **J M Gichange Vs Cooperative Bank of Kenya (2005)** where the Court stated as follows;

“land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach.”

8. It was the submissions of the Applicants that the Respondent had disposed two parcels of land earlier given to him before and they are apprehensive that if he gets a share as directed by the judgment he will also dispose of it occasioning them irreparable damage if the Appeal succeeds. That the substantial loss could occur if the Respondent will have transferred the land to third parties. Conversely the Applicants submitted that the Respondent has not been in possession of the suit lands and therefore he does not stand to suffer any loss or damage.

9. The Respondent submitted that the Applicants have not met the test of proving substantial loss which he reiterates is the corner stone of granting orders of stay of execution. In that regard he relied on the case of **James Wangalwa & Anor Vs Agnes Naliaka Cheseto (2012) EKLK** which quoted the case of **Silverstein Vs Chesoni (2002) KLR 867**.

10. The Respondent argued that according to the decision of the Court in the just rendered judgement he will get his entitlement to the extent of his share as decreed by the succession Court and no more. Therefore, he opines, the Applicants do not stand to suffer any loss at all.

11. Quoting the case of **Machira T A Machira & Co advocates Vs East African Standard (2002) KLR 63**, the Respondent maintains that it is not enough for the Applicant to state that substantial loss will result, he must prove specific details and particulars of such loss.

12. The Respondent urged the Court to dismiss the application for failing to meet the threshold of grant of orders of stay of execution.

13. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except Appeal case of 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 subrule (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 subrule (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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from a subordinate Court or tribunal has been complied with.”

14. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

(a) The application was brought without delay;

(b) Substantial loss may result to the Applicant unless the stay is granted; and

(c) Security for the due performance of the order or decree has been provided.

15. Going by the record the judgment complained of was delivered on the 22/7/19. This application was filed on the 29/7/19, a period of 7 days. The Court finds and holds that there is no delay in bringing this application. It was filed timeously.

16. In respect to the second limb, it is not sufficient to simply aver that they shall suffer loss and that they have an arguable Appeal with

chances of success which shall be rendered nugatory. It is also trite that the fact that execution has been put in place is not a good ground to order stay.

17. In the case of In **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** (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 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.

18. Equally in the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR** the Court held ‘ that in such 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...

19. Further in the case of **Antoine Ndiaye v African Virtual University [2015] eKLR**, learned judge Gikonyo J. cited the holding in **Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001, (unreported)** where it was held that;

“substantial loss is what is likely to be suffered by the Applicant if the stay order is not granted, she was bound to place before the Court such material and information that should lead this Court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay.”

20. In the case of Charles **Wahome Gethi -vs. Angela Wairimu Gethi (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007)**, the Court of Appeal held –

“... 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.” The Court held that Applicant have not shown or suggested that they would suffer substantial loss rendering the Appeal nugatory if the land were sold before the Appeal were determined. On the balance there is no evidence that the Applicants would suffer substantial loss if a stay was not granted.

21. In the case of **Leonard Mambo Kuria v Ann Wanjiru Mambo [2017] EKLR**, the Court of Appeal Justices Kiage Waki Nambuye JJA held that Whether or not an Appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

22. In the case of **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, Platt, Ag.JA gave his observations as to the meaning of ‘substantial loss’ when he detailed:

“The application for the stay made before the High Court failed because the first of the conditions set out in Order XLI Rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents be unable to repay the decretal sum plus costs in two Courts. The learned judge later went on to say: “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 cornerstone 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.

23. It is the case of the Applicants that they have a strong case on Appeal. That be the case, it is not enough to have a weighty Appeal but the conditions of grant of orders of stay must be met. In the case **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997** at Page 4 the Court of Appeal held as follows:

“ . . . the mere fact that there are strong grounds of Appeal would not, in itself, justify an order for stay. . . the Applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

24. The long and short of the above case law that I have deliberately quoted is that substantial loss being the corner stone of granting orders of stay of execution must be supported by evidence of substantial loss and not mere speculation.

25. The Applicants have stated that they are apprehensive that if the Respondent gets a share of the land he is likely to sell the same. There is no evidence that has been adduced to support their apprehension. In other words their plea before the Court is an invite to the Court to speculate based on a mere apprehension. Substantial loss is a matter of tangible evidence of its existence.

26. In the end the view of the Court is that the Applicants have not met the threshold in respect to demonstrating that they stand to suffer substantial loss if the stay is declined.

27. In respect to the requirement of security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the Applicants. This is to ensure that the discretion bestowed on the Court is not fettered.

28. In this case the Applicants have stated that they are willing to abide by the conditions of this Court in respect to security of costs.

29. Having failed to prove substantial loss, this Court is not persuaded that the application is for granting.

30. It is dismissed with costs to the Respondent.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 19TH DAY OF DECEMBER, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Bwonwonga HB for Kirubi for the Plaintiff/Respondent

Mureithi HB for Wachira for the 1st – 4th Defendants/Applicants

Irene and Njeri, Court Assistants