



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC CA NO. 11 OF 2016

DESTERIO NYONGESA WANYAMA RESPONDENT

VERSUS

GILBERT WESONGA MUGENI

AHMED MAHAMED APPELLANTS/APPLICANTS

R U L I N G

1. For my determination is the notice of motion dated 26th August 2019 brought under the provisions of order 42 rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Appellant/Applicant prays for orders that;

(i) Spent

(ii) Spent

(iii) That pending the hearing and final determination of the Applicant's Appeal there be issued an order of stay of execution of the decree herein.

(v) Costs be in the cause.

2. The application is premised on the affidavit of Gilbert Wesonga and the grounds inter alia;

(i) That the Respondent has already extracted a Decree and has notified the Applicants of his intention to execute the same.

(ii) That the Applicants have already filed and served a Notice of Appeal against the said Decree and if stay is not issued then the Applicants' Appeal shall be rendered Nugatory.

(iii) That the Applicants' Appeal is arguable and with overwhelming chances of success.

(iv) That the Applicants stand to suffer irreparable damage and loss should stay not be granted.

(v) That the Applicants are ready and willing to abide by any reasonable conditions the Honourable court may deem just to grant.

3. The application is opposed by Desterio Nyongesa Wanyama vide a replying affidavit sworn on 13th September 2019. The Respondent deposed that the application is misconceived and an abuse of the Court process because;

(a) The purported Notice of Appeal was filed out of time without leave.

*(b) The alleged Notice of Appeal has not been served upon my Advocates and annexure **GWM 1** is an outright forgery.*

(c) The application has not been brought within the confines of Order 42 Rule 6 of the Civil Procedure Rules.

(d) The application seeks to promote, sustain and celebrate impunity.

4. The Respondent deposed further that the Applicant does not have the physical possession of the shops thus does not stand to suffer substantial loss if the stay is not granted. That the execution of the decree with regard to taking back possession is against the 2nd Respondent who has not appealed. The respondent urged the Court that should a grant of stay orders be made; to also make the following orders;

(a) *The Applicant deposits in court or in an interest earning account all the accrued mesne profits being the “rent” received from 2011 to date.*

(b) *Any subsequent “rents” due from the “tenants” be paid to court and in default the so called tenants be evicted.*

(c) *The Party and Party costs in the sum of Kshs.266,900/= paid by him to the Applicant be refunded forthwith.*

5. Parties filed written submissions in arguing the application which submissions I have read. There is a notice of appeal dated 7th August and filed on the same date. Whether the same was lodged in time or not is not within this Court’s jurisdiction to determine. Consequently, I will determine the application only on whether it meets the principle of substantial loss provided for under Order 42 rule 6(2).

6. The notice of appeal has been made by the Applicant only. The Applicant deposed that he has been notified of the Respondent’s intent to execute the decree by the letters addressed to them dated 8/8/2019 and 20/8/2019 annexed as **GWM 4 & 3** respectively. In paragraph 8 of the affidavit in support, the applicant deposed thus;

“That from the above should stay not be granted then the Applicants shall be left exposed to execution rendering their appeal nugatory and leaving the Applicants with likelihood of suffering irreparable damage and loss, yet the Applicants have an arguable appeal with overwhelming chances of success”.

7. The Respondent stated that the Applicant has not demonstrated the substantial loss he will suffer if the stay is not granted. However, the Applicant stated that his appeal will be rendered nugatory. Pursuing an appeal is a right given in law and if such process would amount to academic exercise unless the stay is granted, that is a loss which would be resultant in the event the appeal succeeds. The question would be whether the loss stated herein is irreparable.

8. The Respondent deposed that the Applicant was not in possession of the suit premises. The Applicant did not counter this averment. The Applicant in my view has not demonstrated to this Court the nature of the substantial loss besides the appeal being rendered nugatory that he will suffer unless the stay orders are granted. In his submissions, the Applicant paraphrased the grounds listed on the face of the motion. He went further to accuse the Respondent of unclean hands because he (the applicant) had earlier consented to the Respondents’ appeal being heard without depositing of the decretal sum awarded in the subordinate Court. The Applicant did not go further to show this Court that the consent was to apply mutatis mutandis to future proceedings. I therefore find no proof of allegations of unclean hands.

9. Having analysed and found that there is no substantial loss proved, I would have dismissed the application. I will in the interest of justice grant the Applicant a conditional stay to enable him pursue his Right of Appeal. Accordingly, an order of stay of execution pending appeal is granted on terms that;

(i) All rents due from the tenants in occupation of the suit premises to be deposited in Court from December 2019 until the Appeal before the Court of Appeal is heard and determined and or if the stay lapses.

(ii) In case of default by any of the tenants’ the Respondent is at liberty to levy distress to recover the arrears which once recovered to be deposited in Court less costs incurred for such distress.

(iii) The Applicant to refund the Respondent the sum of Kshs.266,900/= paid to him as party and party costs within 45 days of today.

(iv) In default/disobedience of any one condition the stay given herein shall lapse.

(v) Costs of this motion abide the winner of the Appeal before the Court of Appeal.

Dated, signed and delivered at BUSIA this 3rd Day of December, 2019.

A. OMOLLO

JUDGE