



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 196 OF 2014

JONATHAN KIPROTICH BARSULAI.....PLAINTIFF/RESPONDENT

VERSUS

JOHN KIPROP CHEMWENO & 7 OTHERS...DEFENDANT/APPLICANTS

RULING

This is the ruling in respect of an application dated 30th October 2017 seeking for orders of stay of execution of the judgement delivered on 18th September 2017 and a decree issued on 5th October 2017 pending hearing and determination of the intended appeal.

Counsel agreed to canvass the application by way of written submissions and highlighted the crucial points for consideration by the court. The court had earlier granted interim orders pending the hearing and determination of this application and the said orders were extended.

Counsel submitted that the applicant has annexed a copy of a notice of appeal and a letter seeking for proceedings to show that the applicants have triggered the process of an appeal. Counsel referred the court to the provisions of Order 42 (6) which provides for stay of execution pending appeal. He stated that the conditions that the applicant must satisfy for the grant of the orders for stay are that

- a) Substantial loss may result to the applicant unless the orders of stay are granted.
- b) The application has been made without unreasonable delay.
- c) Such security as the court orders for the performance of such decree or orders as may ultimately be binding on him.

Mr. Korir Counsel for the defendants submitted that the applicants may be evicted from their homes and be rendered destitute if the orders sought are not granted. It was submitted the applicants have satisfied the condition of Order 42 Rule 6 as losing a home is actual and substantial loss may be occasioned.

Counsel cited the case of Prilscot Company Ltd Vs Monica Heho (2015) eKLR H.C at Nairobi Civil Appeal No. 482 of 2014 where it was stated "that

substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted.

In Antoine Ndiaye Vs Africa virtual University (2015) eKLR Supra the learned Judge Gikonyo J. cited Sewankambo Dickson Vs Ziwa Abby HHCT-OO-CC MA 0178 OF 2005 where it was held that,

"Substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth of value as distinguished from loss without value or loss that is merely nominal insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals especially in a commercial court such as ours where the underlying transactions typically tend to lead to colossal decretal amounts.

Counsel submitted that the application was brought timeously without undue delay. He stated that the judgement was delivered on 18/9/17 and decree issued on 5/10/17 while the application was filed on 30.10/17.

On the issue of security Counsel submitted that it is the discretion of the court to decide whether the applicant ought to offer security at the time of making the application for stay or not. He submitted that the applicants have met the legal threshold for grant of stay of execution pending appeal and urged the court to allow the application.

The application was opposed by counsel for the plaintiff who submitted that the application has not been brought to court timeously as stated by the applicant and that he has not offered security for the performance of the decree.

Counsel also submitted that the applicant has not demonstrated any substantial loss and proof that the appeal will be rendered nugatory. Counsel further relied on the provisions of Order 42 rule 6 and stated that it is clear from the said Order and case law that there is no automatic right to stay of execution.

Miss Tum submitted that the Applicant has not met the conditions as the application was brought after 42 days and no explanation has been given for the delay. She also stated that the judgement was read in the presence of the applicants. Counsel submitted that the delay is intentional so as to prevent the Respondent from enjoying the fruits of his judgment.

On the issue of substantial loss, counsel submitted that mere mention of the applicants' likely eviction is not enough to demonstrate substantial loss as no material information has been placed before the court to enable it to conclude there will be loss suffered.

On the last limb on the issue of security for the due performance of the decree, counsel submitted that Judgment was entered in favour of the Respondent and the applicants were ordered to vacate, pay damages of Kenya Shillings One Hundred and Fifty Thousand (KShs. 150,000/ plus costs. Counsel submitted that the Applicant has only stated that they are willing to abide by any condition granted by the court. They ought to have bound themselves /demonstrated by offering reasonable security. Counsel therefore urged the court to dismiss the application with costs to the respondent.

Analysis and determination

This is an application for stay of execution pending appeal. The principles for grant of such orders are well settled and are anchored on Order 42 rule 6 of the Civil Procedure Rules. Under this Order, the court must be satisfied that substantial loss may be occasioned if the order of stay is not granted, the application must be made without undue delay and the court may order for security for the performance of such decree or order as may ultimately be binding on the applicant.

Apart from the conditions above the court may only grant stay of execution for sufficient cause. It is also important to note that the courts are guided by the overriding objective stipulated under sections 1A and 1B.

I will now deal with the issues above to determine whether the applicant has satisfied the principles of grant of stay of execution. On the issue of timeous filing of the application without undue delay, I wish to state that the judgement herein was delivered on 18th September 2017 in the presence of both the applicants and the respondents. The decree was extracted on 5th October 2017 while the application was filed on 30th October 2017. The court ordered that the respondents do vacate the suit land within 45 days from the date of the judgement failure of which an eviction order to issue. That means that the application was filed three days to the lapse of the 45 days granted by court ordering the applicants to vacate the suit land. The applicants did not apply for any oral stay pending the filing of a formal application. The respondent extracted a decree on 5th October 2017 and the applicant did not file the application.

I find that the applicants went to sleep after the judgement. They should have filed the application immediately if they felt aggrieved by the judgement. They waited for 42 days to bring this application. The delay in filing the application has not been explained by the applicants.

On the issue of substantial loss, the applicants stated that they will suffer substantial loss if they are evicted. They averred that they will be rendered homeless. The issue of substantial loss is key to the grant of stay of execution. If the same is not established then there would be no reason why the respondent should be denied the right to go ahead and execute the decree already issued. Mere allegations that the applicant will suffer substantial loss without any proof cannot be good enough to convince the court to grant the orders sought.

In the case of **EQUITY BANK LIMITED V TAIGA ADAMS COMPANY LIMITED CIVIL APPEAL NO. 722 OF 2006 eKLR** the court stated as follows:-

“In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay – reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the Appellant/Applicant.”

The meaning of substantial loss has been expounded in many precedents that have been discussed above in this ruling. They are unanimous that proof of substantial loss is key to an application for stay pending appeal. The courts must also balance the scales of justice in order not to render the applicants' appeal nugatory and on the other hand not to deny the successful litigant the fruits of his judgement. On this I also find that the applicants have not met the threshold for grant of stay of execution pending appeal as there is no evidence of substantial loss.

Lastly I will deal with the issue of security. Order 42 Rule 6(2) (b) states “**such security as the court orders for the due performance....**” In my view this rule gives the court discretion and therefore it can exercise it by granting an order for the payment or deposits of security for the due performance of the decree. The discretion however has to be exercised judiciously. From the evidence before the court it is my considered view that the appeal cannot be rendered nugatory if the applicants are ordered to pay the general damages as awarded by the court as security due to the fact that substantial loss has not been demonstrated.

The upshot is that I order that there be stay of execution of the decree herein on condition that the applicants pay KShs. 150,000/ to the respondent and deposit a further KShs. 100,000/ in court within the next 30 days failure of which the stay lapses. The deposit shall be held as security for the performance of the decree.

I further order that each party to bear its own costs.

Dated and delivered at Eldoret on this 25th day of January, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of:

Miss Tum for the Plaintiff/Respondent

Mr. Koech – Court Assistant

Mr Korir for the defendant – absent