



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 166 OF 2011**

**DIESEL CARE LIMITED.....PLAINTIFF**

**VERSUS**

**MEGVEL CARTONS LIMITED.....1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES.....2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before me is the Application by the 1<sup>st</sup> Defendant dated 29<sup>th</sup> January, 2018. In the Application, the 1<sup>st</sup> Defendant is seeking for the following orders:

***a. That this Honourable Court, pending the hearing and determination of the intended appeal, be pleased to stay the execution of the entire Judgment and Decree in Machakos Environment and Land Case No. 166 of 2011, Diesel Care Limited vs. Megvel Cartons Limited & 2 others (the Honourable Justice (Mr.) O. Angote) dated and delivered on the 26<sup>th</sup> day of January, 2018.***

***b. That the Applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit and just to grant.***

***c. That the costs of and incidental to this Application be provided for.***

2. The Application is supported by the affidavit of the 1<sup>st</sup> Defendant's director who has deponed that this court "*perverted justice*" in nullifying the 1<sup>st</sup> Defendant's title while glossing over the fact that the Plaintiff had never been in possession of the suit land nor made any investment on the suit land; that the Judgment was arrived at in deference to the overriding objective in Section 3A (1) of the Civil Procedure Act and that the court failed to determine the matter in a just manner.

3. The 1<sup>st</sup> Defendant's director further deponed that after the Judgment of this court, the Plaintiff's directors, with the help of armed thugs and protected by officers from Mlolongo Police Station, invaded the suit land and began demolishing the 1<sup>st</sup> Defendant's factory.

4. The 1<sup>st</sup> Defendant's director has deponed that unless an order of stay is issued, the Applicant's investment of close to a decade will ultimately be obliterated and the Applicant will suffer immense and irreparable loss and damage; that on the contrary, no actual or substantial injury will be suffered by the Plaintiff and that the Applicant has filed a Notice of Appeal against the Judgment of the Court.

5. In his Further Affidavit, the Applicant's director stated on oath that despite the Plaintiff being aware of the temporary order of stay of execution, the Plaintiff has locked up the suit premises and that goons have been ransacking the 1<sup>st</sup> defendant's factory and carting away the 1<sup>st</sup> Defendant's goods.
6. The 1<sup>st</sup> Defendant's director has deponed that the Plaintiff had brought on site a bulldozer threatening to demolish everything on the suit land.
7. In reply, the Plaintiff's director deponed that this court found that the Plaintiff is the lawful owner of the suit land; that due to the 1<sup>st</sup> Defendant's acts of trespass, the Plaintiff has suffered loss and that the 1<sup>st</sup> Defendant was not forcibly removed from the suit premises but left on its own violation.
8. In her submissions, the 1<sup>st</sup> Defendant's advocate submitted that the power to grant the orders of stay of execution by the trial court is discretionally; that a stay of execution must be granted so that the appeal is not rendered nugatory and that unless the order of stay is granted, the 1<sup>st</sup> Defendant will suffer substantial loss.
9. The 1<sup>st</sup> Defendant's advocate submitted that the 1<sup>st</sup> Defendant has been in possession of the suit land since the year 2009 and that it has put up a factory which manufactures cartons.
10. The 1<sup>st</sup> Defendant's counsel finally submitted that there is imminent and real danger that the Plaintiff will demolish the structures on the suit land unless the Decree is stayed and that the Applicant had filed the Application expeditiously. According to counsel, the 1<sup>st</sup> Defendant was willing and ready to offer security for the due performance of the Decree by way of a bank guarantee as may be ordered by the court.
11. The Plaintiff's advocate submitted that the Plaintiff has suffered loss for the years that it has not been utilizing the suit land; that the 1<sup>st</sup> Defendant's occupation of the suit land has been illegal from the beginning and that the stay of the Judgment of the court will continue prejudicing the Plaintiff.
12. The Plaintiff's advocate submitted that the Plaintiff is in possession of the suit land pursuant to the Judgment of the court and that it should not be denied from enjoying the fruits of Judgment.
13. The counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that there should be a limited order of stay to enable the 1<sup>st</sup> Defendant ventilate its case in the Court of Appeal; that the rights of a decree holder have to be balanced with those of the party who seeks to appeal and that the Application for stay of execution should be allowed.
14. Counsel submitted that we need to have equality of arms and that the Applicant can be directed to deposit security.
15. The Plaintiff and the Defendants' counsels relied on numerous authorities which I have considered.
16. This court delivered its Judgment in this matter on 26<sup>th</sup> January, 2018. In the said Judgment, the court issued a permanent injunction restraining the Defendants – whether by themselves, their agents and or servants from remaining upon, selling, allocating or denying the Plaintiff access to or in any way interfering with land known as L.R. No. 1504/11 (I.R 85400). The court also declared the grant for land known as L.R. No. 25064 (I.R 85088) null and void.
17. The 1<sup>st</sup> Defendant is seeking for a stay of execution of the Judgment pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules provides that no order for stay of execution shall be granted unless the court is satisfied that substantial loss may result to the Applicant. In addition, the Applicant is required to provide security for the due performance of the Decree as may be ultimately be binding on him. The Application for stay of execution should also be filed without unreasonable delay.

18. This Court and the Court of Appeal have in numerous decisions considered the applicability of the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. In the case of ***Kenya Shell Limited vs. Benjamin Karuga Kigibu and Ruth Wairimu Karuga (1982-1988) 1 KAR 1018***, the Court of Appeal held as follows:

***“It is usually a good rule to see if Order 41 Rule 4 (now Order 42 Rule 6(2)) 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 jurisdiction to granting stay.”***

19. In the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No. 2) (2002) KLR 63***, the Court was emphatic that where no pecuniary or tangible loss can be shown, the court will not grant a stay of execution.

20. Indeed, a party has to show by way of evidence the substantial loss that he may suffer unless the order of stay is granted. This is important because a successful party in a trial should have access and enjoy the fruits of his Judgment, and only be restrained in a situation where the court is convinced that the substratum of the appeal will be lost in the event that the appeal succeeds.

21. To cushion the successful party, the rule further requires the Applicant to furnish security for the due performance of the Decree.

22. The 1<sup>st</sup> Defendant’s director has deponed that it has build on the suit land a factory which manufactures cartons. According to the 1<sup>st</sup> Defendant, the Plaintiff is likely to bring down the entire building unless the order for execution is granted thus occasioning immense loss. I am therefore convinced that considering that the 1<sup>st</sup> Defendant has build godowns of a permanent nature on the suit land, in the event the Plaintiff demolishes them, which he is entitled to do on the basis of the Judgment of this court, the 1<sup>st</sup> Defendant will suffer substantial loss before the appeal is heard and determined.

23. However, and pursuant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, the successful party has to be re-assured that in the event the appeal does not succeed, and having being kept out of the land for more than ten (10) years, it will be restored in the financial position it would have been in had the Applicant not filed the appeal. That is why the Applicant is required to give security for the due performance of the Decree as a pre-condition for an order of stay of execution.

24. The 1<sup>st</sup> Defendant’s advocate informed the court that the 1<sup>st</sup> Defendant was willing to give security in terms of a bank guarantee as the court may order.

25. During the hearing of the main suit, the 1<sup>st</sup> Defendant’s director informed the court that the 1<sup>st</sup> Defendant purchased the land for Kshs. 110,000,000 vide an agreement dated 19<sup>th</sup> July, 2008. That is almost ten (10) years ago. If indeed that was the value of the suit land which measures 22.95 acres and is situated along Mombasa Road, the same must be worthy more than Kshs. 100 million.

26. In the circumstances, the 1<sup>st</sup> Defendant should deposit in a joint interest earning bank account Kshs. 100,000,000 as security for the due performance of the Decree.

27. For those reasons, I allow the Application dated 29<sup>th</sup> January, 2018 in the following terms:

***a. Pending the hearing and determination of the intended appeal, there be a stay of execution of the entire Judgment and Decree of 26<sup>th</sup> January, 2018, on condition that the 1<sup>st</sup> Defendant deposits Kshs. 100,000,000 in a joint interest earning bank account (Escrow account) to be opened in the names of the Plaintiff’s and the 1<sup>st</sup> Defendant’s advocates within twenty one (21) days of the date of this Ruling.***

*b. Each party to bear their own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018.**

**O.A. ANGOTE**

**JUDGE**