



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC APPEAL NO.12 OF 2016**

**PAUL MURIITHI MWAI.....APPELLANT/APPLICANT**

**-VERSUS-**

**NATHAN WARUTERE.....RESPONDENT**

**RULING**

**Introduction**

1. On 13th, July 2016 Paul Muriithi Mwai hereinafter referred to as the applicant brought the notice of motion dated **13th July, 2016** seeking stay of execution of the decree issued against him in Nyeri CMCC No. 439 of 2011 issued on 18th May, 2016 pending the hearing and determination of the appeal he had preferred against that decree.
2. The decree appealed from required the applicant to vacate from plot No.817B in Mwirichwiri Farmers Company within sixty (60) days, failing which he would be evicted.
3. During the pendency of the application, the applicant was evicted from the suit property.
4. On 8th December, 2016, the applicant filed the motion dated 7th December, 2016 seeking the following reliefs:
  - (i) **Certification of the application as urgent and deserving to be heard on priority basis;**
  - (ii) **An order of stay of execution of the decree and certificate for costs issued on 16/11/2016 in Nyeri CMCC No.439 of 2011 pending the hearing and determination of his appeal;**
  - (iii) **An order to restrain the respondent from harassing him through auctioneers pending the hearing and determination of his appeal.**
  - (iv) **Costs of the application.**
5. The application is premised on the grounds that the application dated 13th July, 2016 got overtaken by events after he was evicted from the suit property; that the respondent has served him with a decree and certificate of costs issued in Nyeri CMCC No.439 of 2011 and that the respondent is threatening him with execution of the decree.
6. Arguing that he will be greatly prejudiced if the respondent is not restrained from executing the decree for costs, the applicant urges the court to grant him the orders sought.
7. The application is supported by the affidavit of the applicant in which the grounds on the face of the application are reiterated.
8. In reply and opposition to the application, the respondent, Nathan Warutere Ngure, through the replying affidavit he swore on **14th March, 2014**, has deposed that the prayer of stay of the decree for costs should be denied because the applicant has not demonstrated that he stands to suffer any substantial loss if the order for stay of execution of the order of costs is denied.
9. When the matter came up for hearing, the plaintiff informed the court that he had filed an appeal against the decision of the lower court and urged the court to stay execution of the decree of costs issued against him.

10. Counsel for the respondent informed the court that the decree appealed from has been executed and submitted that the applicant should pay costs and proceed with his appeal.

11. Terming the application unmerited, counsel for the respondent urged the court to dismiss it with costs.

12. In a rejoinder, the applicant informed the court that he is unable to give any security for costs because he is jobless.

### **Analysis And Determination**

#### **The Law applicable:**

13. The relief of stay of execution pending appeal is governed by **Order 42 Rule 6** of the Civil Procedure Rules. In determining an application for stay pending appeal a court should be guided by the three prerequisites provided under **Order 42 Rule 6** of the Civil Procedure Rules. These are:-

**a)The application is brought without undue delay;**

**b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;**

**c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given by the Applicant.**

#### **Has the applicant herein satisfied the above requirements?**

14. Starting with the requirement that the application must be brought without unreasonable delay, the instant application was filed barely three weeks after the applicant was served with the decree sought to be stayed. There was therefore no unreasonable delay in bringing the application.

15. On whether substantial loss may result to the applicant unless stay of execution is ordered, I begin by pointing out that this test is the Cornerstone of the jurisdiction of the High Court in granting stay of execution. In this regard see the case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018** where the Court of Appeal stated that:

***“It is usually a good rule to see if Order 41 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 jurisdiction for granting stay” (Emphasis supplied).***

16. Also see **Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto** where concerning substantial loss it was held that:-

***“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...”***

17. And the case of **Antoine Ndiaye v. African Virtue University (2015)eKLR** where **Gikonyo J.**, observed:-

***“The Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown. See what the Court said in the case of Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63, that;***

***“In this kind of application 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...”***

18. In applying the principles enunciated in the case of **Antoine Ndiaye v. African Virtue University** supra, unlike in the circumstances of that case where the applicant had offered security for due performance of such order as may ultimately be binding on it, in the instant case, the applicant has neither demonstrated the loss he stands to suffer if stay is not ordered nor provided any security for due performance of any order as may be ultimately be binding on him. For those reasons, I find and hold that the applicant has failed to satisfy the court that he will suffer irreparable loss unless the order of stay is granted. Consequently, I find the application to be lacking in merits in respect of the prayer for stay of the decree for costs. The prayer for leave to withdraw the application dated 13<sup>th</sup> July, 2016 is however found to be merited

because of the changed circumstances of the application and is allowed.

19. The costs of the application are awarded to the respondent.

20. Orders accordingly.

**Dated, signed and delivered in Nyeri on this 22nd day of February, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

N/A for the plaintiff/applicant

Ms Mwikali for the defendant/respondent

Court assistant - Esther