



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 482 OF 2009

ALBERT KANAKE KARIUKI.....PLAINTIFF

VERSUS

WINNIE KARIMI NJUGUNA.....DEFENDANT

R U L I N G

1. Judgment in this matter was signed by Angote J on 29/2/2016 and delivered on his behalf by Gacheru J on 4/3/2016. The honourable Judge dismissed the plaintiff's suit with costs and allowed the defendant's counterclaim dated 7/1/2010 as prayed. Subsequently, on 14/7/2016, the plaintiff brought an application by way of a Notice of Motion dated 11/7/2016 seeking a stay of execution of the said judgment, pending the hearing and determination of an intended appeal. That application is the subject of this ruling.

2. The application is supported by an affidavit sworn by the plaintiff on 11/7/2016 and premised upon the grounds that: (i) the plaintiff has exercised his right of appeal and has filed a notice of appeal; (ii) the plaintiff contributed large sums of money towards acquisition of the suit premises; (iii) the defendant has extracted the decree and lodged a bill of costs for taxation and if stay is not granted, the defendant would execute the decree; (iv) the plaintiff is apprehensive that the defendant may sell and transfer the suit premises and render the appeal nugatory; and (v) the defendant has an arguable appeal with overwhelming chances of success.

3. For the umpteenth time, the applicant contends that he engaged in business partnership and intimate relationship with the defendant starting from 1985. He adds that during the said business partnership and intimate liaison, they jointly invested their earnings in the acquisition of the suit premises, Title Number **Nairobi Block 97/1641** – Fedha Estate Nairobi at a cost of Ksh 1,500,000. He further contends that the defendant has unlawfully asserted that the said suit premises belong to her solely yet she is aware that he contributed 80% towards acquisition of the suit property.

4. The defendant opposes the application for stay through Grounds of Opposition dated 12/6/2017. His grounds of opposition are that: (i) the applicant has not filed and served a notice of appeal to form the basis for the application for stay under Order 42 rule 6 (2) of the Civil Procedure Rules; (ii) the applicant has not filed and served a memorandum of appeal and record of appeal since the delivery of the judgment; (iii) the application for stay is misconceived, has no basis in law and is wholly incompetent; (iv) the applicant has not demonstrated any genuine reasons why the defendant should be denied continued enjoyment of the fruits of her judgment; and (v) the application has no merit.

5. I have considered the grounds set out on the face of the application and in the supporting affidavit. I have similarly considered the grounds of opposition filed by the respondent and the respective written submissions of the parties. Similarly, I have considered the applicable legal framework and guiding jurisprudential principles.

6. The single question to be determined in this application is whether the applicant has satisfied the criteria for grant of an order of stay pending determination of an appeal, under Order 42 rule 6 of the Civil Procedure Rules.

7. The legal framework which guides the exercise of the court's jurisdiction to grant an order of stay pending appeal is set out under **Order 42 rule 6(1) and (2) 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.

8. The jurisprudential principles upon which this court's jurisdiction to grant an order of stay pending appeal is exercised are well settled. An applicant must satisfy the court that the intended appeal or appeal is arguable. Secondly he must satisfy the court that unless an order of stay is granted the appeal, if successful would be rendered nugatory. Lastly the applicant must satisfy the requirements of Order 42 rule 6 (2) to the effect that substantial loss may result to the applicant unless the order is not made and that proper security is available for the due performance of the decree.

9. Besides, a party bringing a formal motion for a stay order is obligated to demonstrate serious intention to pursue the contemplated appeal. This is done through the filing and service of notice or memorandum of appeal and, where applicable, the filing and service of the record of appeal. Where the record of appeal is not ready because proceedings are still awaited, the applicant ought to annex a copy of the request for proceedings together with the ruling/judgment or order appealed against. These instruments, once duly filed and served are then annexed as exhibits to the affidavit in support of the formal application, to demonstrate to the court that the applicant is serious about pursuing redress through the appeal mechanism.

10. In the present application, the affidavit in support of the application does not bear any evidence of a duly filed and duly served notice of appeal, memorandum of appeal or record of appeal. Even after the respondent raised this issue as one of the grounds of opposition, the applicant did not deem it necessary to address the issue. It is not lost to this court that filing and service of notice of appeal, memorandum of appeal and record of appeal are by law time-bound and one would not be talking about a pending appeal if a proper notice has not been filed and served within the stipulated time. Consequently, in the absence of evidence of duly filed and duly served notice of appeal and/ or record of appeal, this court would have no basis for granting a stay order in an application brought more than four months after delivery of judgment. I say so because in the absence of a duly served notice of appeal, the notice of appeal is a nullity in law.

11. Secondly, the applicant has not demonstrated what substantial loss he stands to suffer if the orders granted in terms of the counterclaim are not stayed. The key aspect of the order granted in the counterclaim is a permanent injunction restraining the applicant against interfering with any portion of the suit property which is registered in the name of the respondent and is in possession of the respondent. As a mandatory legal requirement, the applicant has an obligation to demonstrate how this order would occasion substantial loss to him. He has not discharged that obligation.

12. Similarly, the applicant did not address himself to the second limb of the requirement under Order 42 rule 6(2) relating to security.

13. The sum total of the above omissions on part of the applicant is that he has failed to satisfy the criteria for grant of an order of stay pending appeal under Order 42 rule 6 of the Civil Procedure Rules. In light of the above reasons, the plaintiff's Notice of Motion dated 11/7/2016 seeking stay of execution of the judgment rendered in this suit is dismissed for lack of merit. The defendant shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF MAY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Kurauka advocate for the Applicant

Mr Ngare advocate for the Respondent

Ms Halia - Court Clerk