REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C CASE NO. 153 OF 2015

KIRINYAGA WOOD TREATMENT LTD.....PLAINTIFF

VERSUS

GEOFFREY NG'ANG'A KARIUKI T/A INTER TROPICAL

TIMBER TRADING LIMITED.....DEFENDANT

RULING

Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides as follows:

> ***6 (1)"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub-rule (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"***. Emphasis added.

Citing the above provision and also ***Sections 1A, 3A and 66 of the Civil Procedure Act***, the defendant filed this Notice of Motion dated 19th October 2017 seeking the following orders:

> ***1. Spent.***
>
> ***2. Spent.***
>
> ***3. Spent.***
>
> ***4. That this Honourable Court be pleased to order stay of execution and/or enforcement of the orders contained in the judgment dated and delivered on the 6th October 2017 pending the hearing and final determination of the intended appeal at the Court of Appeal.***
>
> ***5. That the costs of this application be in the intended appeal.***

The application is premised on the grounds set out therein and supported by the affidavit of the defendant **GEOFFREY NGANGA KARIUKI.**

The gravamen of the application is that by its judgment dated 6th October 2017, this Court made the following orders against the defendant:

1. Ksh. 6,511,524.95 on account of arrears upto 31st October 2015.

2. Ksh. 600,000 per month after 1st November 2015 as mesne profits.

3. A declaration that the defendant is a trespasser on the plaintiff's property being KIRINYAGA/GATHIGIRIRI/202.

4. An order for the eviction of the defendant from the above property.

The defendant is aggrieved by that judgment and has lodged an appeal which has a high probability of success. That the defendant did not participate in the trial due to the negligence of his counsel who did not inform him about the hearing date and

only learnt about the judgment when he was being evicted. That the defendant is now required to pay a sum of Ksh. 20,911,524.95 which is not due as he has been paying rent for the suit premises in which he has invested plant and machinery and eviction would lead to huge losses. If stay is not granted, the appeal will be rendered nugatory and he will suffer irreparable loss.

The application is opposed and **SAMUEL WAIGANJO THUO** the plaintiff's Managing Director has filed a replying affidavit in which he has deponed, inter alia, that the defendant was evicted from the suit premises on 12th October 2017 and the plaintiff took immediate possession. Thereafter, the defendant sent a text message to the plaintiff offering to settle the judgment sum by a monthly sum of Ksh. 1,000,000 but the plaintiff declined the offer. The defendant has twice booked an appointment to meet the plaintiff and discuss the mode of payment but has failed to turn up on both occasions. That the land, plant and all other developments thereon belong to the plaintiff and all the payments allegedly made by the defendant were taken into account and most of them were made before the matter came to Court and to demonstrate the defendant's dishonesty, he has annexed to his affidavit a payment of Ksh. 256,000 made in relation to another case being **MILIMANI CMCC No. 1082 of 2016** involving the same parties and since the defendant has already been evicted, there is nothing to stay.

When the application came up for hearing on 6th November 2017, it was agreed that it be canvassed by way of written submissions. However, only the plaintiff's advocate **Mr. ORENGE** filed submissions. **Mr. NDEGWA** for the defendant did not file any submission. I have therefore not had the benefit of the defendant's submissions while drafting this ruling.

I have considered the application, the rival affidavits and the submissions by **Mr. ORENGE.**

It is clear from the provisions of ***Order 42 Rule 6 of the Civil Procedure Rules*** that a party seeking an order for stay of execution pending appeal must satisfy the Court of the following:

1. That substantial loss may result to him unless the order for stay is granted,

2. The application must be made without un-reasonable delay,

3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given.

The judgment appealed was delivered on 6th October 2017 and this application was filed on 19th October 2017. I am therefore satisfied that the defendant moved to Court without un-reasonable delay.

The defendant was also required to prove that he will suffer substantial loss if the order for stay is not granted. It must also be remembered that to grant or refuse an order for stay of execution pending appeal is a discretionary order and therefore an equitable remedy that will be denied to a party that has not approached the Court with clean hands.

The issue of substantial loss was considered by the Court of Appeal in the case of ***KENYA SHELL LTD VS KIBIRU 1986 K.L.R 410*** where the Court stated as follows:

"It is usually a good rule to see if Order XLI 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 jurisdictions for granting stay. That is what has to be prevented".

See also the following cases:

1. MUKUMA VS ABUOGA 1988 K.L.R 645

2. SILVERSTEIN VS CHESONI 2002 1 K.L.R 867.

In the Kenya Shell case (supra), the Court went on to state that it is not enough for the Applicant to merely states that he will suffer substantial loss. He must produce evidence to show what substantial loss he will suffer if the order for stay Is not granted.

In an attempt to demonstrate that he will suffer loss if the stay is not granted, the defendant has deponed in paragraph twenty (20) of the supporting affidavit as follows:

"That if stay of execution is not granted, the Defendant/Applicant stands to suffer irreparable harm which will render the intended appeal nugatory".

Even if such "***irreparable harm***" will amount to substantial loss, this Court has not been told what type of loss the defendant will suffer. One of the orders granted by the Court in its judgment dated 6th October 2017 was that the defendant pays the plaintiff a sum of Ksh. 6,511,524.95 on account of rent arrears and a further Ksh. 600,000 being mesne profits. In an application such as this where the decree is a monetary one, the Court would have expected the defendant to demonstrate by evidence that if that sum is paid to the plaintiff and the appeal succeeds, the plaintiff will not be in a position to refund that sum and therefore the appeal would be rendered nugatory. No such evidence has been placed before this Court to enable it arrive at such a conclusion. In my view, the plaintiff, being the registered proprietor of the land parcel No. KIRINYAGA/GATHIGIRIRI/202 on which, by the replying affidavit of **SAMUEL WAIGANJO THUO**, stand ***"plant, building"*** and other ***"developments"***, should have no difficulties refunding the decretal sum should the defendant's appeal succeed.

The other limb of this Court's judgment was to order the eviction of the defendant from the suit premises. **SAMUEL WAIGANJO THUO** has deponed in paragraph three (3) of his replying affidavit that following the Court's judgment dated 6th October 2017, the defendant was evicted from the suit premises on 12th October 2017 and the plaintiff ***"took immediate possession***" thereof. That averment was not rebutted by the defendant. Since the defendant is no longer on the suit premises, nothing can be served by any order for stay of execution against the defendant's eviction. The Court would be acting in vain by making an order for stay of an act that has already been carried out and Courts do not act in vain.

The defendant is also not deserving of the exercise of the Court's discretionary powers in his favour as he has not approached the Court with clean hands. Among the annextures filed with the supporting affidavit of **GEOFFREY NGANGA KARIUKI** are payments made in 2013, 2014 and 2015. He then depones in paragraph eleven (11) that he does not owe the plaintiff the sum on the decree since he has "***been paying the plaintiff rent during the subsistence of the Court proceedings***". This suit was filed on 3rd December 2015 and therefore those payments made in 2013 and 2014 could only have been made pursuant to other proceedings and even looking at the defendant's defence filed on 25th January 2016, it was never his case that he had infact already paid the sum claimed. He only made a blanket denial.

On the claim that the defendant's appeal has a high probability of success, that is not a requirement under the provisions of ***Order 42 Rule 6 of the Civil Procedure Rules***.

The up-shot of the above is that the defendant's Notice of Motion dated 19th October 2017 lacks any merit. It is hereby dismissed with costs.

B.N. OLAO

JUDGE

10TH MAY, 2018

Ruling dated and signed at Bungoma this 10th day of May 2018.

To be delivered at Kerugoya on notice.

Ruling read and Signed on 26th June 2018

S.N.MUKUNYA

JUDGE

26TH JUNE, 2018