



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 4 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 21, 22, 23, 40, 45, 50 AND 63

AND

IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS CONTRARY TO ARTICLE 40, CHAPTER 4 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

AND

IN THE MATTER OF THE REGISTERED LAND ACT CHAPTER 300

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012, LAWS OF KENYA

BETWEEN

RICHARD KIPKEMBOI LIMO.....PETITIONER

VERSUS

HASSAN KIPKEMBOI NGENY.....1ST RESPONDENT

LAND REGISTRAR, UASIN GISHU.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

ELDORET MUNICIPAL COUNCIL.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

The petitioner has filed an application dated 23.2.2018 seeking orders that the court be pleased to grant a stay of execution of the Decree issued on the 9.2.2018 in Petition No. 4 of 2013 pending hearing and determination of the appeal against the said judgment made by this court.

The application is based on grounds that the Petitioner is aggrieved by the judgment delivered on 9th February, 2018 and that the Petitioner has since preferred an appeal to the Court of Appeal with high chances of success. That in the meantime, there is a real danger that the

respondents will forcefully evict the Petitioner from the suit property and or move the court for execution of the Decree upon lapse of the stay and that unless stay is granted, the applicant's appeal will be rendered nugatory. There is clear substantive loss to be suffered by the Petitioner. The petitioner believes that that this application has been made without unreasonable delay. Lastly, that the Petitioner is ready and willing to provide for any security to the court which the court may deem fit to order for due performance of the order as may be ultimately be binding to them.

The application is supported by the affidavit of Richard Kipkemboi Limo who reiterates the grounds of the application and states further that there is a real danger that the respondents will forcefully evict the Petitioner from the suit property and or move the court for execution of the Decree upon lapse of the stay. That if the orders sought are not granted and a stay of execution issued, he shall suffer irreparable loss.

The petitioner believes that the appeal herein has a reasonable chance of success and unless the orders sought are granted, the appeal shall be rendered nugatory and that there has been no delay in bringing this application. He is willing to abide by any conditions and terms as to security as the court may deem fit to impose. He was aggrieved by the said judgment and he is informed by his advocates which information he verily believes to be true that the said judgment was dismissing his suit.

He has instructed his advocate to appeal the said judgment which notice of appeal has since been filed and a letter requesting for certified copies of the proceedings is on record. That he has been informed by his advocate which information he verily believes to be true that the respondents herein are likely to execute the Decree at any time once the period of stay lapses unless the court orders a stay of execution.

That he is advised by his advocates which he verily believes to be true that their appeal herein has a reasonable chance of success.

The petitioner is more than able to provide such security as this Honorable Court may order. That it is in the interest of justice that a stay of execution be granted pending the hearing and determination of the appeal. That this application is brought in good faith, timeously and in the interest of justice.

Hassan Kipkemboi Ngeny filed grounds of opposition stating that that substantial loss has not been demonstrated. There is no evidence that substantial loss may result to the petitioner unless the decree of the court is stayed. That no sufficient cause has been given to warrant a stay of execution of the decree of the court. That the intended appeal will not be rendered nugatory if the decree of the court is executed. That the application is without merit, aimed only at delaying the execution of the decree herein.

He states that no security has been offered for the due performance of the decree. The defendant ought to furnish security by a deposit of the sum that is equivalent to the value of the suit property and costs that were awarded by the court.

The respondent states that it is in the interest of justice that the judgment be satisfied without further delay as the 1st respondent who is a senior citizen of this country has been and continues to be kept away from enjoying the fruits of the judgment. That the 1st respondent's rights under Article 40 of the Constitution will be prejudiced by the grant of the orders sought by the petitioner.

In the replying affidavit of Hassan Kipkemboi Ngeny, he states that the application is made to deny him the fruits of the judgment and that it is not true that the petitioner stands to suffer any loss as he has not particularized the value of the loss that he stands to suffer or details of sentimental value, if any that he has on the property.

That he is advised by Mr. Jason Ondabu, an Advocate of the High Court of Kenya and a partner in the firm of Ondabu & Company Advocates, his lawyers on record and he verily believe it to true that the essence of granting a stay pending appeal is so that the appeal, if successful, is not rendered nugatory.

The petitioner's application is calculated to allow the petitioner to keep possession of the suit property and utilize it as he pleases pending the hearing and determination of the intended appeal. He verily believes that this is not the purposes of granting an order of stay under Order 42, Rule 6 of the Civil Procedure Rules, 2010.

According to Hassan Kipkemboi, he stands to suffer prejudice and substantial loss if the application is allowed as he will be deprived of the use and enjoyment of the suit property contrary to Article 40 of the Constitution for the reasons set out below.

He claims to have applied for allocation of the suit property so that he could use it for commercial purposes early in the 1980s and he is yet to put it into use despite following due process prior to its registration in his favor as held by the court.

The respondent laments that his enjoyment and use of the suit property should not be delayed further considering that he is now 77 years old. That upon the delivery of the judgment on 9th February 2018, he engaged a number of project consultants with a view to achieving his long-standing vision of erecting commercial premises comprising of at least seven (7) storey building measuring 35,000 square feet. That he has now been advised by his lawyers on record that he cannot execute the intended development by reason of the orders of stay which have been issued by this court.

He states that by a letter dated 5th March 2018, written on his instructions, he requested Reliance Valuers Limited to prepare a report setting out the current market value of the suit property and improvements thereon. The estimated monthly or annual revenue that he would receive as rent from tenants in the event that the premises are developed and fully let. The Valuer's representative visited the suit property, valued it in accordance of the terms of reference and prepared a report dated 5th March 2018.

The Valuer concluded as follows in the report dated 5th March, 2018:

a. The suit property is a prime undeveloped commercial property.

b. The current market value of the suit property is Kshs.80,000,000.

c. Temporary structures constructed with sheets whose value is estimated at Kshs.1,500,000 have been erected on the suit property.

d. If the suit property is to be developed with a seven (7) storey commercial block having shops/stores on the ground, first floor and offices on the upper floors he would receive gross monthly rent of Kshs.2,750,000. This would translate to gross annual rent of Kshs.33,000,000.

The Valuer raised invoice number GMM/ANN/008/2018 of Kshs.263,000 inclusive of taxes to cater for the valuation fees and disbursements for the services rendered. That it would not have been necessary for him to engage the services of the Reliance Valuers Limited to prepare the report but for the application of the petitioner.

He verily believes that the interest of justice require that the court orders the petitioner to settle the Valuer's invoice of Kshs.263,000. He believes that he stands to lose an annual revenue of at least Kshs.33,000,000 exclusive of taxes and predictable rent monthly increments for the period that the appeal will be pending in the Court of Appeal.

The petitioner has no known assets. His residence and sources of income are also unknown to him. He believes that he will be unable to recover the loss of user translating to at least Kshs. 33,000,000 annually for the period that the appeal will be pending. That it is also noteworthy that the petitioner has not offered any security for the appeal. It is therefore apparent that he stands to suffer more loss than the petitioner would if he is denied enjoyment of the suit property because of the appeal. To the contrary, the petitioner who has had possession of the suit property for many years having fraudulently obtained title has not developed it at all.

Mr. Hassan Kipkemboi Ngeny verily believes that the petitioner's application should fail as it does not demonstrate that substantial loss will result if the orders sought are not granted.

He is able to compensate the petitioner in the unlikely event that the appeal is successful and he is ordered to return the suit property to him because he would be carrying on business at the suit property and generating income that if a stay of execution of the judgment is to be granted, the applicant should be ordered to deposit in court the value of the property (Kshs.80,000,000) and the estimated loss of revenue (at least Kshs.132,000,000) in addition to the costs of the petition which are estimated as Kshs.10,000,000, the costs of the valuation as well as interests on each of these as security in the even that an order of stay is to be granted.

Mr. Tororei learned counsel for the petitioner submits that the petitioner has demonstrated that substantial loss may result to the applicant if the order is not made as he risks being forcefully evicted from the suit property. The petitioner has ceased development on the suit property since acquiring the same in 2003 and has even leased out a section of it for commercial purposes. This has not been disputed by the 1st respondent. The fact that the 1st respondent has valued the property and intends to put up a commercial building indicates that the petitioner can be evicted at any time.

The petitioner further argues that the application has been brought without unreasonable delay. Judgment was delivered on 9.2.2018 and a stay of execution was issued for 15 days. This application was filed on 23.2.2018. Notice of Appeal was filed on 21.2.2018. The petitioners are willing to deposit security.

Mr. Ondabu and Mr. Rapando learned counsel for the 1st respondent submit that the three issues to be considered are:

1. Whether substantial loss may result if stay is not granted.
2. Whether the application has been made without unreasonable delay.
3. Security for due performance of the decree.

They submit that the applicant has failed to demonstrate substantial loss. In essence, the 1st respondent submits that substantial loss has been alleged but not proved or demonstrated. The fear of eviction in itself does not constitute substantial loss. The applicant must demonstrate that execution of the decree will create a state of affairs that will irreparably affect him. According to the 1st respondent, the applicant has not demonstrated that execution of the decree will create a state of affairs that will irreparably affect him. No particulars of substantive or irreparable loss has been demonstrated.

On security, the 1st respondent argues that if a stay of execution has to be granted, sufficient security should be provided. According to the respondent, sufficient security would amount to the current market value of the property, loss of user and anticipated costs. The total security anticipated by the 1st respondent is Kshs. 222,000,000 to be deposited in a joint interest earning accounts.

I have looked at the supporting affidavit and do find that the application was filed timeously as there is no inordinate delay. Moreover, that the applicant is willing to deposit security. However, there is no material before the court to enable the court determine that the applicant would suffer substantial loss. Apart from the value of the property which has been given by the respondent, there is no valuation report filed by the applicant to show the nature of his investment. Nothing is on record to demonstrate that the applicant has invested on the property so that if the decree is executed, the applicant will suffer substantial loss.

In such matters, the judgment debtor should not only state that he is likely to suffer substantial loss but he must prove that he will suffer the said loss.

The applicant states that he has caused some development on the parcel of land and has leased out parcel of the land to third parties. However, the applicant has not annexed the leases and has not been candid to state the kind of loss he is likely to suffer. He has not informed the court the rent he is receiving or the income the property is generating.

Order 42 and Order 51 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act are applicable in this matter.

Order 42 Rule 6 (1) & (2) provides as follows: -

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 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 of stay 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 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

The policy of the court is to exercise discretion judiciously in its interpretation of the rules so as to facilitate determination of appeals. This is so as to facilitate access to justice by ensuring that deserving litigants are not shut out. However, the court should weigh both sides of an unsuccessful party who wants status quo to prevail and a successful party who wants to enjoy the fruits of his judgment.

The Court of appeal in the case of **Butt vs Rent Restriction Tribunal Civil App No. NAI 6 of 1979 (Madan, Miller and Porter JJA)** while considering an application of this nature had this to say: -

“i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

It is clear from the wording of Oder 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a) Substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) such security as to costs has been given by the applicant.**

The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.

What constitutes substantial loss was also discussed by **Gikonyo J** in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto {2012} eKLR** where it was held *inter alia* that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

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, a question that was aptly discussed in the case of Silverstein vs. Chesoni,the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

In Equity Bank Ltd vs Taiga Adams Company Ltd 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 is a person of no means. Here, no such allegation is established by the appellant.”

In *Elena D. Korir vs Kenyatta University* Justice **Nzioki wa Makau** had this to say:-

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd* where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- **Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.**”

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd* (2013) as follows:-

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. **These twin principles go hand in hand and failure to prove one dislodges the other**”.

Apart from proof of substantial loss the applicant is enjoined to provide security. The applicant states that he is ready to provide security. There is therefore an offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. An offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others*.

In the above cited case of *Equity Bank Ltd vs Taiga Adams Company Ltd* it was held that: -

“.....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought..... let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay..” which principle was also emphasized in *Carter & Sons Ltd vs Deposit Protection Fund Board & 3 others*.

The importance of complying with the said requirement was clarified in *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* where it was held that: -

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

I have carefully considered the application before me and the law, I’m persuaded that proof of substantial loss and proof that the appeal will be rendered nugatory have not been established as stated above.

As was held in *Hassan Guyo Wakalo vs Straman EA Ltd*

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. **These twin principles go hand in hand and failure to prove one dislodges the other**”.

In view of the value of the property as valued by the 1st respondent’s agents and the anticipated investment, and the fact the decree sought to be stayed from execution is not a monetary decree, this is a matter where the court has to consider these special circumstances.

Ultimately, in the interest of justice for all parties in this matter, I do grant an order that all parties to be restrained from utilizing the parcel of land in way whatsoever until the appeal is heard and determined. Orders accordingly. Costs of the application to be borne by the applicant.

Dated, signed and delivered at Eldoret this 30th day of July, 2018.

A. OMBWAYO

JUDGE