



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 44 OF 2015

GEORGE KITIYO KIMARY.....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN LOWASIKOU MWOI... DEFENDANT/APPLICANT

R U L I N G

1. By an application dated 14/3/2018 the plaintiff/applicant sought the following orders:-

1. That pending the hearing of this application *inter partes* this honourable court be pleased to grant an order of stay of execution of judgment dated 7th November, 2016, Ruling dated 28th February, 2018 and all their consequential orders, delivered in favour of the plaintiff/respondent and against the defendant/applicant
2. That this honourable court be pleased to grant orders of stay of execution of judgment dated 7th November, 2016 and the Ruling dated 28th February, 2018 pending the hearing of the intended appeal before the Court of Appeal.
3. That costs of this application be in the cause.

2. The grounds on which the said application is made are as follows:-

- a. That on 28th February, 2018 the honourable court dismissed the defendant/applicant application, for review dated 3rd June, 2017.
- b. That the defendant/applicant has sought to review the judgment dated 7/11/2016.
- c. That the defendant/applicant is aggrieved by the said Ruling date 28/2/2018 and intends to prefer an appeal against the same.
- d. That on 8/3/2018 the defendant lodged a Notice of Appeal against the said Ruling.
- e. That defendant has a good appeal with high chances of success.
- f. If this application is not heard expediently and order of stay granted, the defendant risks suffering substantial loss that cannot be adequately compensated by damages.
- g. That the plaintiff/respondent will not suffer any loss or damage if this application is allowed since the appeal will entirely be heard on merits.
- h. That this application has bene taken out expediently and without undue delay.
- i. That the defendant undertakes and is willing to abide by al the prerequisite conditions that the honourable court may deem fit to impose as conditions for granting stay.

3. The application is supported by the affidavit of the applicant also dated 14/3/2018. In that affidavit the grounds in the application are reiterated.

4. The plaintiff/respondent filed his submissions on 20/4/2018. The defendant/applicant had filed his submissions on 11/6/2018.

5. The issues that arise in the instant application are whether:

1. Whether the application has been brought timeously; and

2. If the applicant would suffer irreparable loss if the orders sought were not granted.

1. Whether the application has been brought timeously.

6. Order 42 rule 6(2) of Civil Procedure Rules provides as follows:-

“(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.”

7. The application at hand was lodged on the **15th March 2018**. The decision that led to this application was given on the **28th February 2018**. The intervening period is about a month and a half. Without more I therefore find that the application herein has been brought timeously.

2. If the applicant would suffer irreparable loss if the orders sought were not granted.

8. The original suit concerns land. The applicant is in possession of the suit land which he had intended to purchase. He deposited an amount of Ksh 300,000/= with the plaintiff and he was supposed to pay the balance by a certain date, which he never did. The respondent therefore rescinded the agreement and wrote the applicant a cheque for Ksh 300,000/= it being intended to be the refund of the sum paid by the applicant, which the applicant never collected. The applicant failed not only to collect the refund but also failed to give vacant possession of the land hence the suit.

9. I have considered that the applicant is settled upon the land in question. He has been in possession for a period of 6 years now.

10. I have considered the supporting affidavit of the applicant in support of the instant application. He submits that he has discovered that the respondent had no good title to pass to him in respect of the suit land. The issues he raises concerning the discovery of new evidence concerning the respondent's lack of individual title to that land were part of his case in the application dated 3/6/2017 which sought review. The ruling in that application is the origin of the instant application.

11. He also raises the issue of representation, stating that his advocate abandoned the case informally. The applicant further submits that he had the right to elect to appeal or apply for a review of the judgment.

12. The respondent submits that this court lacks jurisdiction to entertain this application alleging that there is no notice of appeal filed but I find this to be incorrect since a copy of a notice of appeal is in the court record, having been filed timeously on **8th March 2018**.

13. I take the view that in all litigation a party is entitled as of right to pursue an appeal and that where found fit the party intending to appeal should not have his right hindered unnecessarily, especially where he has filed a notice of appeal and brought an application for stay promptly as in this case.

14. The respondent also submits that an order issuing a negative command can not be stayed since it has not commanded any positive action to be undertaken against the applicant. He cites the cases of **Western College of Arts And Applied Sciences Versus Orange And Others** and also **NBI HCCA 273 of 2007 (UR 165/2007) - Hon Peter Anyang Nyong and 2 Others Vs the Minister for Finance and Another** for this proposition.

15. Regarding that submission I note that the applicant's prayers in the application at hand do speak by themselves and it is clear that if the stay is not granted the judgment of this court which he had attempted to review earlier through the application may be executed. He seeks a stay of the judgment in order to be appeal against the ruling that denied him orders of review of that judgment.

16. So whereas there may be nothing to be executed under the ruling the same may not be the case regarding the judgment of the court dated **7th November 2016**.

17. In the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR Civil Application No. 74 OF 2015 (UR 63 OF 2015) (Visram, Koome & Mwilu, JJ.A)** it was stated as follows:

“These are issues which in our view would best be addressed on merit at the hearing of the intended appeal. We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this court's decision in

follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

18. I find that the issues raised in the application dated **14th March 2018** to be fit to be addressed in an appeal. It is proper therefore to consider that upon appeal all parties will go home feeling that their respective cases have been determined on the merits. In the case of **Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR High Court (Nairobi) Civil Appeal No. 354 Of 2015 Hon Justice Aburili** referred to a Ugandan decision in emphasis of the need to have matters determined on substance on appeal as follows:

“In the case of Banco Arabe Espanol V Bank of Uganda [1999] 2 EA 22 it was held that:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

“Though persuasive, the above decision speaks to this court in no uncertain terms that it is good precedent and I have therefore no reason to depart from such noble principles of law established by the courts over a period of time and which have withstood the test of times. I am further fortified by the decision and principles laid down in Factory Guards Limited V Abel Vundi Kitungi that the right of appeal should not be impeded as it is a constitutional right and the cornerstone of the rule of law. Where there is delay which is explained and the court accepts that explanation in order to render substantive justice and to facilitate access to justice for all by ensuring that deserving litigants are not shut out of the judgment seat, such leave should be granted.”

19. In this case I have come to the conclusion that the application for stay was brought timeously and that the applicant would suffer substantial loss were the orders herein sought not issued.

20. Consequently I find that the application dated **14th March 2018** has merit. I therefore grant the application in terms of prayer **No 3** thereof and order that the applicant shall, as a condition for the granting of that order, deposit within 30 days of the orders herein the sum of **Ksh 900,000/=** into an interest earning account opened in the joint names of the advocates for both parties.

21. The costs of this application shall be in the appeal.

Dated, signed and delivered at Kitale on this 19th day of July, 2018.

MWANGI NJOROGE

JUDGE

19/7/2017

Coram:

Before - Mwangi Njoroge Judge

Court Assistant - Collins

Mr. Kaosa holding brief for Kiarie for the plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

19/7/2018