



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERICHO

E & LC APPEAL NUMBER 4 OF 2018

(Being an appeal against the Judgment of Hon. P. Achieng, Principal Magistrate,

in her judgment dated 31st May 2018, in Bomet PMCC NO.16 OF 2015)

SAMWEL RONO.....1ST APPELLANT

BOARD OF MANAGEMENT OF

MAGENJI PRIMARY SCHOOL.....2ND APPELLANT

VERSUS

WESLEY KIPNGETICH CHIRCHIR.....RESPONDENT

RULING

INTRODUCTION

1. What is before me is the Appellants' Notice of Motion dated 13th June, 2018. The same is brought under Order 22 Rule 22 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) of the Laws of Kenya. However, the applicants urge that the court to proceed with the application as if the same was brought under Order 42 Rule 6 of the Civil Procedure Rules in the spirit of the Constitution, Order 51 Rule 10(1) and (2) of the Civil Procedure Rules and the wider interests of substantive justice. The Notice of Motion seeks inter alia, the following order:-

- a. Pending the hearing and determination of this appeal there be stay of execution of the decree in ***Bomet PMCC 16 of 2015 – Wesley Kipngetch Chirchir Versus Samwel Rono and Board of Management Magenji Primary School***"

2. The application is grounded on the supporting affidavit of Samwel Rono, the 1st appellant and the Secretary of the 2nd appellant School, sworn on 13th June 2018; and the grounds disclosed on the face of the application.

3. Despite being served with the application, the Respondents did not file and serve any Replying Affidavit or submissions, and appellants' application is not therefore opposed.

4. The appellants' application for stay of execution is based on the grounds that:-

they have filed an appeal being Kericho E & LC Appeal No. 4 of 2018

5. Mr. Koske, learned counsel for appellant submits that the appeal has overwhelming chances of success as the Respondent sought to enforce a contract for the sale of agricultural land yet consent of the Land Control Board was not obtained within 6 months from the date of the said agreement. Counsel further submits that if execution is not stayed the 2nd Appellant will suffer substantial loss as the education, welfare and future of its pupils will be adversely and irreparably be affected.

6. It is counsel's submission that in the event that the respondent succeeds in this appeal the appellants will then be in a position to mobilize funds and the Respondent will not therefore suffer any loss or prejudice as it will then receive its decretal sum, costs and interest and still retain the suit land.

7. Counsel submits that Order 42 Rule 6 clothes the court with jurisdiction to order stay of execution as it may seem just; while Order 42 Rule 2(a) empowers the court to issue such an order if the court is satisfied that substantial loss may result to the applicant unless the order of stay is made.

8. It is therefore counsel's submission that if the order of stay is not made, the innocent pupils of the 2nd appellant Public School will suffer substantial loss which will affect their future.

Issue for determination

9. The main issue for determination is whether the applicant has met the threshold for grant of an order of stay of execution.

Analysis and determination

10. The principles that the court must consider in order to grant an application for stay of execution pending appeal are set out in the case of **Global Tours and Travels Limited Nairobi Winding Up Cause No. 43 of 2000** cited in **Kenya Power & Lighting Company Ltd V Esther Wanjiru Wokabi 2014 eKLR** where Ringera J (as he then was) stated as follows:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.. the sole question is whether it is the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

11. The Court must therefore consider the following principles

- a. Whether the application was filed without undue delay
- b. Whether the applicant has established that he has an arguable appeal
- c. Whether the applicant has established sufficient cause that it is in the interest of justice to grant the orders sought.
- d. Whether the applicant is willing to furnish security for costs.

12. An analysis of the instant application from the above perspective shows that the application was filed within a reasonable time as the Ruling was delivered on 21st May 2018 while the application was filed on 13th June 2018.

13. Regarding the question as to whether the applicant has an arguable appeal, I am unable to make a determination on this question as the appellant has not attached a copy of the proceedings nor has he provided a detailed background of the case in the lower court. The material placed before the court so far is therefore insufficient.

14. On the question as to whether the Applicant has established sufficient cause, the applicant has stated that if the decree is executed, the education and welfare of the pupils of the 2nd appellant's school will be adversely affected. I have no reason to doubt him.

15. Regarding the issue of security for costs, the applicant has stated in his supporting affidavit that the school has no funds or savings at the moment to discharge the decree but if the appeal does not succeed, the Board of Management will organize a public harambee to raise funds and also seek contributions from parents to discharge the decree. Whereas I appreciate the candidness of the appellant, I can't help wondering if the appeal is not intended to delay the finalization of this matter.

16. I have carefully considered the application herein, the affidavits, pleadings and the appellant's counsel's submissions. In light of the above analysis, and in the absence of any opposition by the respondent I am persuaded that the application is merited and I grant it on condition that applicant deposits the sum of Kshs. 50,000 in court as security for costs within 30 days from the date hereof. If the said amount is not deposited within the stipulated period, the order for stay of execution shall automatically lapse.

17. Each party shall bear their own costs.

Dated, signed and delivered at Kericho this 27th day of August, 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kiprono for Mr. Koske for the Appellant
2. N/A for the Respondent
3. Court assistant - Rotich