REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO. 3 OF 2017

CAROLINE ADHIAMBO OWINO........APPELLANT

VERSUS

GREGORC CLARA.............................RESPONDENT

RULING

1. By a Notice of Motion application dated 7th April 2017, the Appellant prays that there be a stay of execution herein pending the hearing and determination of the Appeal. The said application is supported by an Affidavit sworn by the Appellant Caroline Adhiambo Owino and is premised on the grounds:-

> ***i) That Judgment was delivered on this matter on 17th January 2017;***
>
> ***ii) That the Appeal herein is pending hearing yet the Respondents are bent on proceeding with execution;***
>
> ***iii) That an earlier application made for stay before the Senior Resident Magistrates Court at Kilifi was denied yet it is imperative that there be a stay to forestall a situation where the Appeal is rendered nugatory.***

2. In response to the Application, Gregorc Clara, the Respondent herein has sworn a Replying Affidavit filed herein on 8th May 2017 in which she states that the Plaintiff's suit in Kilifi SRMCC No. 358 of 2015 was dismissed in a Judgment delivered on 17th January 2017. Subsequently on 20th February 2017, the court issued a signed decree and certificate of costs in the sum of Kshs 139,000/=. On 21st February 2017, the Respondents Advocates wrote to the Appellant's Advocates giving them ten days within which to settle the amount of costs in the sum of Kshs 139,000/= but the Appellant failed to comply.

3. The Respondent avers that it is only after an auctioneer moved to proclaim the Appellant's property that the Appellant filed and served the Memorandum of Appeal herein. It is the Respondent's case that the Appeal cannot be rendered nugatory as she owns cottages within Mtwapa in Kilifi County whose value exceeds the amount of costs awarded herein and the Appellant can therefore be compensated if the Appeal succeeds.

4. I have considered the application and the response thereto. By its very nature, this is an application that invokes the discretionary powers of the Court. It is brought under Order 42 Rule (1) of the Civil Procedure Rules, 2010 which empowers this Court to exercise the discretion to stay execution, either of its own Judgment or that of an inferior Court whose, decision is being appealed from pending appeal. The conditions to be met before stay is granted are provided by Rule 6(2) thereof as follows:-

> ***"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 be ultimately binding on him has been given by the applicant."***

5. It is clear to me from the wording of Order 42 Rule 6(2) that for an applicant to succeed in an application of this nature, he/she must satisfy the Court that (a) substantial loss may result to the applicant unless the order is made; (b) the application has been made without undue delay; and (c) such security as to costs has been given by the applicant.

6. What constitutes substantial loss was broadly discussed by Gikonyo J in ***James Wangalwa & Another –vs- Agnes Naliaka Cheseto (2012)eKLR*** where the Learned Judge stated that:-

> "***No doubt, in law, the fact that the process of execution has been 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 46 Rule 6 of the Civil Procedure Rules. 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……Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

7. In this regard, I must say that in the application presently before me, the applicant has not demonstrated that she would suffer substantial loss. What the applicant seeks to stay before me is the payment of costs as assessed on 20th February 2017 in the sum of Kshs 139,000/= in favour of the Respondent. It has not been shown that the Respondent is a person of straw and that she may not repay the said sum in the event of the appeal succeeding.

8. As was stated in ***Equity Bank Ltd –vs- Taiga Adams Company Ltd (2006) eKLR:-***

> ***"……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 she is a person of no means. Here no such allegation is established by the Appellant.***

9. Similarly in the matter before me the Applicant has not made any such claim against the Respondent. On the contrary the Respondent prides herself as the owner of various cottages in Mtwapa, a fact which she asserts will enable her to refund the assessed costs if the Appeal succeeds. The Applicant has not controverted that assertion.

10. Consequently, I find no merit in the Appellant's application dated 7th April 2017. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 21st day of September, 2018.

J.O. OLOLA

JUDGE