



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C.A CASE NO. 14 OF 2016

(FORMERLY HCCA NO. 21 OF 2015)

STEPHEN KARIUKI NJERU.....APPELLANT

VERSUS

JOEL MUNYI NYAGA.....RESPONDENT

RULING

1. By a notice of motion dated 5th December 2017 brought under the provisions of **Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, section 1A and 3A of the Civil Procedure Act (Cap 21)** and **all enabling provisions of the law**, the Respondent sought an order for stay of execution of the judgement and decree dated 23rd November 2017 pending the hearing of an intended appeal. He also sought an order for costs to be in the “cause.”

2. The said application was based upon the grounds stated on the face of the motion. The main grounds were that the Respondent had an arguable appeal with high chances of success; that the intended appeal would be defeated and rendered nugatory unless stay was granted; that the application had been filed without unreasonable delay and that the Appellant would not suffer any prejudice if the stay was granted.

3. The said application was supported by an affidavit sworn by the Respondent on 5th December 2017 in which he reiterated and expounded upon the grounds stated in the notice of motion. The Respondent annexed a copy of a notice of appeal filed under Rule 75 of the Court of Appeal Rules intimating his intention to appeal against the judgement of this court dated 23rd November 2017 to the Court of Appeal.

4. The appellant filed a replying affidavit sworn on 8th December 2017 in opposition to the said application for stay pending appeal. It was contended that the Respondent had failed to satisfy the conditions for granting a stay under the law. It was contended that the Respondent has failed to demonstrate what substantial loss, if any, he would suffer if the stay was declined. The Appellant contended that an order for stay would unfairly deny him the fruits of his judgement. Finally, the court was urged to impose a condition for the provision of security for the due performance of the decree should the application be granted.

5. When the said application was listed for *inter-partes* hearing on 10th April 2018, the Respondent orally prosecuted the application in person whereas the Appellant’s advocate opposed the same. The Respondent submitted that he should not be evicted from the suit property whilst his appeal was still pending. He submitted that he had no other place to settle hence he would be rendered homeless if evicted at the moment.

6. The material provisions of **Order 42 Rule 6 (2) of the Civil Procedure Rules** on stay of execution provide as follows;

(2) 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 ultimately be binding on him has been given by the applicant.

c) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit to stay of execution pending the hearing of a formal application.

7. The main question for consideration and determination is whether or not the Respondent has demonstrated that he would suffer substantial loss unless the stay sought is granted. In the case of **Kenya Shell Ltd Vs Kibiru & Another [1986] KLR 410**, it was held by the Court of Appeal, *inter alia* that;

“It is usually a good rule to see if Order XL1 Rule 4 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 a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

8. In the case of **Butt Vs Rent Restriction Tribunal [1979] eKLR**, the Court of Appeal considered an application for stay and held, *inter alia*, that;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory. per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

9. So, what substantial loss has been demonstrated in the instant matter? The Respondent’s contention that he would be rendered homeless and destitute should he be evicted whilst his appeal is pending was not seriously contested by the Appellant. The court has considered that the Respondent has been in possession of the suit property for a considerable period of time hence the Appellant may not suffer any significant prejudice were he to remain in occupation pending the determination of the intended appeal. The court considers the potential eviction and uprooting of the Respondent from the suit property before his intended appeal is concluded to constitute substantial loss within the meaning of the law.

10. The upshot of the foregoing is that the court is satisfied that the Respondent has made out a case for the grant of the orders of stay sought. The application for stay was also filed without unreasonable delay as required by law.

11. The Appellant has raised the issue of provision of security for the due performance of the decree should the intended appeal fail. The court has carefully considered the nature and the circumstances of the case. The Appellant is the current registered proprietor of the suit property. His prayer for eviction of the Respondent from the suit property was granted by this court vide its judgement of 23rd November 2017. In the opinion of the court, the Respondent does not need to provide any security for handing over the suit property should his appeal fail. He would simply be evicted through the court process should his appeal ultimately fail.

12. The upshot of the foregoing is that the Respondent’s notice of motion dated 5th December 2017 is hereby allowed in terms of order No. 3 thereof. Costs of the application shall abide the result of the intended appeal.

13. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 18th day of JANUARY, 2018.

In the presence of Mr Muriithi holding brief for Ms Fatuma for the Appellant and the Respondent in person.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

18.10.18