



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 06 OF 2018

BENSON MURITHI RITHAA.....APPELLANT

VERSUS

STEPHEN MUTURI NYAGA.....RESPONDENT

RULING

1. This application is dated **17th August, 2018** and seeks orders that:

1. The application be certified as urgent and be heard ex-parte in the first instant in view of its urgency.
2. The order issued in terms of prayer 2 of the notice of motion dated 31st July, 2018 by counsel for the appellant given by the honourable court on 1st August, 2018 be set aside and/or varied.
3. That honourable court be pleased to vary the order of Kshs.500,000/= security with the appellant's Payslip or any other reasonable security.
4. The honourable court be pleased to issue orders of stay bereft of monetary conditions until this appeal is heard and determined.
5. The honourable court be pleased to issue orders of stay until the appeal is heard and determined.
6. The costs be provided for.

2. The application states that it was brought to court under Article 25(c) & 48 of the Constitution of Kenya, Order 42 Rule (6) of the Civil Procedure Rules and sections 3A and 63 (e) of the Civil Procedure Act.

3. The application has the following grounds:

- a) The appeal will be rendered nugatory unless the orders sought in this application are granted.
- b) The applicant is ready to furnish other reasonable security.
- c) It is the duty of this court to protect the applicant from being arbitrarily deprived of his property by the respondent's act of blatant indolence.
- d) The orders of the court made on 1st August, 2018 will render this appeal nugatory as the appellant is unable to raise the said security.
- e) The applicant has legal or equitable interest in the property and has extensively developed it by building a home thereon.
- f) Unless the orders are discharged, the applicant will be denied his right to property.
- g) That the respondent stands to suffer no prejudice if this application is allowed.
- h) The appeal is meritorious with a high probability of success.

4. The application is supported by the applicant's affidavit sworn on **17th August, 2018** which states:

I, BENSON MURITHI RITHAA, OF Post Office Box Number 738-60400 Chuka in the Republic of Kenya do hereby make oath and state that:-

1. That I am the applicant herein and thus competent to swear this affidavit.
2. That on 1st August, 2018 the honourable court granted me orders of stay subject to deposit of Kshs.500,000 unto the court's account as security, which sum I cannot afford nor raise and thus prays for the same order to be set aside and or varied. A copy of the Ruling dated 1st August, 2018 is annexed hereto and marked "BMR 1".
3. That I am a teacher by profession with a net pay of Kshs.19,000 thus I am unable to afford the security set by this honourable court. A copy of the pay slip is annexed hereto and marked "MR2"
4. That the respondent charged the land parcel No. Karingani/Mugirirwa/253 which he had sold to me and consequently due to that fact, consent from the land control board could not be sought as the owner did not have a physical title deed. A copy of green card is annexed hereto and marked "BMR 3".
5. That unless this instant application is heard and the prayers therein are granted, I will stand irreparable damage, as the appeal will be rendered nugatory since the orders of stay have been vacated as I cannot raise security of Kshs.500,000/=.
6. That the promulgation of the new constitution and the new land law gave me renewed hope and I have decided to seek the courts intervention.
7. That it is the duty of this court to protect me from arbitrarily being deprived of my property by the respondent by his failure to seek land control board consent and willful exploitation of the land control act which contravenes the constitution of Kenya more so article 2(4) as advised by my advocate on record.
8. That I am ready to furnish the court with any other reasonable security and orders of stay to issue to my property as the respondent has been bringing prospective buyers and is hell bent on selling off my property.
9. That unless the orders sought herein are granted, my right to my property will be denied as the respondent can sell off the same and render this appeal nugatory.
10. What is deponed to hereinabove is true and of my own knowledge and belief except whereof sources have been intimated.

5. Vide a ruling dated 1st August, 2018, the applicant was ordered to deposit in court as security the sum of Kshs.500,000/= within 14 days failing which the stay of execution granted through that ruling would automatically lapse.

6. This application was canvassed by way of written submissions. The applicant's submissions state as follows:

APPLICANT'S SUBMISSIONS

May It Please My Lord.

What we have before your Lordship is an application dated 17th August, 2018 in which, substantively, the applicant is seeking this Honorable Court's indulgence and to vary the terms of the security whereby the Honorable court directed that the Applicant does give KSh. 500,000/= as security for the due performance of the court's decree.

My Lord, the genesis of this application is an order emanating from a ruling delivered vide CHUKA ELC CIVIL APPEAL CASE NO. 6 OF 2018 by your Lordship on 01/08/2018 in which it was directed that the prayer for stay of execution was granted SUBJECT to the Applicant depositing in the Court's account the sum of Kenya Shillings Five Hundred Thousand (KShs. 500,000/=) within 14 days of the said ruling as security FAILING which the stay of execution granted would automatically lapse.

BACKGROUND

The applicant herein came to this court in an appeal from the learned Trial Magistrate's judgement entered on 4th July, 2018, in CIVIL SUIT NO. 195 OF 2015 in THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT CHUKA.

In the Notice of Appeal the applicant raises compelling grounds upon which his appeal is founded. In this the applicant has demonstrated and satisfied the requisite demand that the application has been made without unreasonable delay, and that substantial loss will result to the applicant unless the order is made.

The applicant had also applied for orders for Stay of Execution upon which the court properly directed that the Applicant deposits security. It is instructive to admit that by issuing the said orders the court was properly guided.

It is further instructive to note that the court, in spite of affording the applicant a temporary relief limited to 14 days of Stay of execution the rider that in case of default and/or inability by the applicant to deposit the security within the stipulated period of 14 days the Stay of execution then issued would automatically lapse defeats the vitality of the same order. The potency of this rider is to fatally negate the purpose and spirit of the applicant's appeal and to render his appeal nugatory. This is the precipice on which this matter now subsists.

THE MATTER IN ISSUE

The Applicant herein entered into a contract with the Respondent in which the Respondent agreed to sell a piece of land to the applicant.

The Applicant paid substantial amounts of money to the Respondent which amounts of money the Respondent gladly accepts and receives from the applicant. As a consequence, the Respondent goes head shows the applicant the piece of land the subject of their agreement and allows him (the applicant) entry into, occupation and use of the said piece of land. As a result the applicant, who is a family man and a high school teacher, a person of sound mind, expends substantial amounts of his resources investing on the acquired property by erecting a home for his family thereupon. The family house erected on the piece of land is developed by the applicant to completion.

At the time the parties herein enter into the sale transaction it is part of the mutual gentleman's understanding that because the title deed to the land in question is charged the applicant will give him monies as part of payments for the consideration for the property to enable him discharge the title and to transfer the same to the applicant.

The glaring question to any reasonable person is why allow a party entry into a property, allow them ample time to undertake developments thereupon to completion undisturbed, if there was no intention, either constructive or otherwise, to transfer the said property to them and to allow them ownership and occupation of the same????

STAY OF EXECUTION AND THE LAW

Order 42 rule 6 (2) (b) Civil Procedure Act, Cap.21 states, inter alia.... "**such** security as the court orders....", (c)....**Notwithstanding anything contained** in subrule (2) the court shall have **power** to.....". The import of this is that the Honorable Court has jurisdiction and discretion to deal with this requirement as it may deem fit, desirable, right and proper for the purpose and sake of ensuring and ascertaining the ends of justice.

Article 48 of the Constitution of Kenya, 2010: "...if any fee is required, it shall be reasonable and it shall not impede access to justice."

My Lord, the applicant has not been able to raise the KSh. 500,000/= ordered as security for stay of execution. This inability should not be an impediment for to bar him from accessing justice in a fair judicial process. This court has the jurisdiction and discretion and can vary the terms of security as ordered and to grant his prayers.

Article 159 of the Constitution is explicitly candid that (2) (a) "...justice shall be done to all, irrespective of status". My Lord, in this respect "**status**" may also be constructed to refer to a citizen's economic and/or financial status. The applicant's current financial status must not cause him to be denied access to justice which he is so desirous of.

The applicant finds shelter under Article 40 (3) (b) (i). The essence of this is that property that is the subject matter of this application, if not preserved by an order of Stay of execution of the Lower Court's judgment stands the risk of being disposed off by the respondent. There is no doubt that the applicant has put in substantial investments into the property. Placed on the scales of fairness and justice the scales will in the highest probability tilt in favour of the applicant. In any eventuality the applicant stands the risk of being prejudiced more than the respondent. This is why it is pivotal that this court takes the initiative to preserve the status of the property in question awaiting hearing and determination of the appeal before it.

JUSTICE VERSUS THE LAW

My Lord, this court is the temple of justice. When citizens come before court they do so because it is right and essential to do so. Guided by the doctrines of equity courts are able to dispense justice and fairness. The supreme question in this matter is where does fairness lie, is it in handing over the property in question to the Respondent without even considering reasonable compensation for the applicant who has already put in his lifetime savings in investing in the property?

Unfortunately, the Respondents have conveniently dwelt on legal technicalities which has been known to aid meting injustices bereft of fairness. The driving spirit motivation to do what is just and fair. Depriving the applicant of the property is not fair play. We urge that what has been playing in this matter is an abuse veiled under the guise of technicalities and tactics that are being employ by the respondent to deprive the applicant by all means available. The essence of the law is to aid achievement of justice and to minimize fatal conflicts.

THE APPLICANT'S PRAYER

My Lord, this Honorable has a duty to apply it's discretion to ensure ends of justice. This court has unfettered jurisdiction to make orders for the purpose of upholding rule of law and to ensure justice and fairness.

It is in the best interest of justice and fairness to cause the status quo of the property the subject matter herein to be preserved. By doing so none of the parties herein would suffer any prejudice.

The applicant herein deserves and is desirous of being granted an opportunity to exercise his right of appeal. It is ,therefore, instructive that a stay of execution pending the hearing and determination of the appeal from the judgement of the learned trial Magistrate be granted so as not

to render the appeal nugatory.

It is, therefore, the applicant's humble prayer that this Honorable Court finds that it is only just and fair to vary the security directed to be given by the applicant so as to preserve the property the subject matter in this appeal and to order that there be a stay of execution of the lower Court's Judgement by the Learned Magistrate in Civil Case No. 195 of 2015 at Chuka. In the substantive application hereof the applicant has offered some possible modes in which he may be allowed to satisfy the requirement for security.

We humbly Submit and pray.

Dated at Chuka this 5th day of October, 2018.

7. The respondent's submissions state as follows:

RESPONDENT'S SUBMISSIONS

1. Your lordship the appellant/applicant hereinafter the applicant by notice of motion dated 17th August 2018 moved this honorable court for the following orders;
 - (i) That the application be certified urgent and be heard exparte iin the first instance in view of its urgency.
 - (ii) The order issued in terms of prayer 2 of notice of motion dated 31st July 2018 by counsel for the appellant given by the honorable court on 1st August 2018 be set aside and/or varied.
 - (iii) That the honorable court be pleased to vary the order of Ksh 500,000 security with the appellant's PAYSLIP OR ANY OTHER REASONABLE SECURITY
 - (iv) That the honorable court be pleased to issue orders of stay bereft of monetary conditions until this appeal is heard and determined
 - (v) The honorable court be pleased to issue orders of stay until this appeal is heard and determined.
 - (vi) The cost be provided for.
2. The applicant's application was supported by the applicant's supporting affidavit sworn and dated 17th August 2018. In summary the applicant's supporting affidavit was saying that the court gave the applicant orders of stay on condition that the applicant deposited Ksh 500,000 for security of cost. The applicant being a teacher earning Ksh 19,000 cannot afford the security. If the applicant's application is not heard it will render the appeal nugatory and the applicant will suffer irreparable loss and damage. The applicant relies on the provisions of the constitution to defend his application. That the applicant is ready to offer other securities in place of money as security.
3. The respondent opposed the applicant's motion by filing and serving a replying affidavit sworn by the respondent and dated 1st October 2018. In the affidavit the respondent avers that he has never been served with any papers upon this appeal being instituted and in particular he was not served with the orders of this honorable court issued on 1st August 2018 whereby the court directed that he be served with the orders of the same day within 10 days from the date of such order. The applicant has kept the respondent in darkness after the filing of the appeal and he only came to know about the appeal after being served with the instant application. That the issue of stay of execution was determined on 1st August 2018 when the court pronounced itself that the applicant was granted stay on condition that the applicant deposited Ksh 500,000 as security. That the applicant ought to have appealed if they were not satisfied. That an appellant should always be ready to cater for costs in the event the appellant loses the appeal. Appellants should not be allowed to joy ride by rushing to appeal otherwise frivolous and vexatious appeals will be filed. That an alternative security other than monetary as in this case money from applicant's employment is not guaranteed. Salary is not a secure way of offering security. The applicant can lose his job anytime and he can also overcharge his salary. That the application should be dismissed with cost to the respondent.
4. When this matter came up for mention for directions the court directed that the issues raised in the applicant's application dated 17th August 2018 be canvassed by way of written submissions. The applicant was directed to file and serve his written submissions within 7 days of the directions but to date the 16/10/2018 the respondent or his counsel have not been served with the submissions. The respondent has decided to respond to the application despite that he has not been served with the submissions as ordered by the court.
5. In our humble view the main issue for determination in this application is whether the orders of this court of 1st August 2018 should be reviewed, set aside and/or vacated so that the applicant offers a different security for costs other than the amount of Ksh 500,000 that the court ordered. We submit that the applicant's application lack merit and the same should not be allowed.
6. Order 42 rule 6 (2) the C.P.R donates power to an appellate court to order the depositing with the court of such sums as the court may deem fit. The main purpose of an appellant being ordered to deposit certain sums of money as security of costs is to prevent appellants who go for joy ride without serious issues on appeal. Security for cost is meant to guard filing of vexatious and frivolous suits by persons who litigate for the sake. Ksh 500,000 as ordered by the court is reasonable given the magnitude of the appeal. The applicant should be ready to face the consequences of the appeal if he loses the appeal. He should not be allowed to go to court for the sake of litigation. If the applicant strongly feels that chances of appeal succeeding is very high he should find no problems in depositing the amount ordered by the court.
7. The alternative provided by the applicant in place of Ksh 500,000 cash ordered by the court is his salary. The applicant's net pay is Ksh 19,000. The applicant has a family and children. He has to travel to work. The family and the applicant must feed and have shelter. That Ksh 19,000 is barely enough to cater for the basic requirements of his family. Salary therefore is a very insecure way of offering insecurity. God forbid the appellant can lose his job and his pay slip will not appear again. The applicant may further charge his salary thus making the security very insecure.
8. The court has a duty to defend and protect both sides in a suit. The respondent is entitled to be protected from uncalled for, frivolous and vexatious litigations. The court should always endeavor to see that a litigant enjoys fruits of a successful litigation. The respondent in this case has a judgment in his favor against the appellant. If the court has to stop the respondent from enjoying fruits of his successful litigation then it is important that the appellant should give good and proper security. It was for this reason we believe the court in its wisdom found it fit to order the applicant to deposit Ksh 500,000 as security.
9. The applicant seems to tell the court "feel mercy on me I am a poor teacher". The applicant is a litigant like any other litigant. Rules of the game should apply squarely to both the applicant and the respondent. The appellant opted to appeal and he should go with all the legal requirements and consequences of an appeal. An appeal is an attempt to stop a successful litigant from enjoying fruits of a successful litigation. A successful litigant has spent a fortune in getting a judgment in his favor. The applicant has all the rights to appeal but this should not be at the expense of the respondent. We are of the view that Ksh 500,000 ordered by the court to be deposited as security is a reasonable amount in the circumstances. If the applicant cannot afford the said sum then he ought not to even have appealed in the first instance. The applicant's application lacks merit and we urge the court to dismiss the same with costs to the respondent.
10. We rest our submissions your lordship and pray.

DATED AT CHUKA THIS 19th DAY OF October, 2018

8. I have considered the pleadings and the submissions filed by the parties in support of their diametrically incongruent assertions.

9. I note that as the applicant did not abide by the order issued by the court on 1st August, 2018, requiring him to deposit the stipulated amount of money as security within 14 days of that day, there is no extant stay order.

10. The requirement for the applicant to deposit security is a legal requirement. Indeed order 42 rule 6 (2) (b) makes it a mandatory requirement that such security as the court deems necessary for the due performance of a court's decree or order as may ultimately be binding be given by the applicant. By requiring the applicant to deposit security there is no breach of any constitutional or statutory provision.

11. This is a matter where the court would be entitled to declare itself functus officio. I opine that things such as payslips cannot suffice to be deposit for security.

12. This application is hereby dismissed with costs to be in the cause.

13. As I have already directed the appellant to file his Record of Appeal within 14 days from 25th October, 2018, I will rather unorthodoxically exercise my judicial discretion and vary the order issued on 1st August, 2018 to read as follows:

***“The applicant is ordered to deposit as security in the court's account the sum of Kshs. Four Hundred Thousand (Kshs.400,000/=) only within the next 14 days failing which the stay of execution constructively granted herein will automatically lapse.*”**

14. It is so ordered.

Delivered in open court at Chuka this 20th day of November, 2018 in the presence of:

CA: Ndegwa

Kirimi present for the applicant

I.C. Mugo for the Respondent absent

P.M. NJOROGE

JUDGE