



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT AT KERICHO

CIVIL SUIT NO. 24 OF 2007

LUCIO MATINGWONY (Suing as the administratrix of the estate of

KIMALEL MATINGWONY (DECEASED.....PLAINTIFF/RESPONDENT

VERSUS

JEREMIAH CHIRCHIR.....1ST DEFENDANT/APPLICANT

ERICK CHIRCHIR.....2ND DEFENDANT

GEOFFREY CHIRCHIR.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE HONORABLE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Introduction

1. By a Notice of Motion dated 11th October 2018 the 1st Defendant moved the Court seeking the two main prayers; firstly, that there be temporary stay of execution of the judgment and decree of this Honourable court pending the hearing and determination of the 1st Defendant/Applicant's appeal in the Court of Appeal against the whole of the judgment delivered by this Honourable Court on the 14/09/2018 and secondly, that the Plaintiff/Respondent be stopped from plucking the 1st Defendant's tea and cutting of trees until the appeal launched is heard and determined.

Applicant's Case

2. The application is based on the grounds inter alia that the applicant has filed an appeal against the judgment delivered on 14th September 2018 and if this application is not granted, the said appeal shall be rendered nugatory.

He further states that there is a risk that the Respondent may execute the judgment entered in her favour and unless the orders sought are granted, the applicant stands to suffer irreparable loss and damage.

3. The application is supported by the applicant's affidavit sworn on the 11th October 2018 and Further affidavit sworn on the 2th November 2018. In his affidavits reiterates the above stated grounds and adds that the Respondent is cutting trees and plucking tea on the suit land and that the Plaintiff has never been in occupation and use of the land. The Applicant further states that the suit land is his only land and that he has lived on the said land with his family and developed it since 1991.

Respondent's case

4. The application is opposed by the Respondent through her Replying Affidavit dated 23rd October 2018 and a Supplementary Affidavit dated 15th November 2018. In the said affidavit the Respondent depones that the Applicant's application lacks merit and is a veiled attempt to defeat the course of justice.

5. In response to the Applicant's assertion that he has been in occupation of the suit land, the Respondent has stated that in light of the Court's finding that the purported ownership by the Defendant of part of that parcel of land known as L.R. NO. KERICHO/KABIANGA/1129 was fraudulent, his occupation is clearly borne of an illegality which should not be entertained any longer by

this Honourable Court.

6. Further, the Respondent depones that the orders issued by the Court were declaratory and took effect immediately upon delivery of the judgment and therefore cannot be stayed.

7. The Respondent has pointed out that the Applicant is guilty of misleading the Court by stating that he does not have any land apart from the suit land whereas he has other parcels of land namely L.R NO. KERICHO/KABIANGA/4323 and L.R NO KERICHO/KABIANGA/3901.

8. It is the Respondent's contention that if the application is granted, the Respondent will be prevented from enjoying the fruits of her judgment.

9. The application was canvassed by way of written submissions and counsel for both parties filed their submissions which I have considered.

Issue for determination

10. The main issue for determination is whether the Applicant should be granted a stay of execution pending appeal.

Analysis and disposition

11. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following: -

1. That Substantial loss may result to the applicant unless the order was made;

2. That the application was made without unreasonable delay; and

3. That 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.

12. The principles that guide the court in the exercise of its discretion to grant an application for stay pending appeal were enunciated in the case of **Elena D.Korir vs Kenyatta University (2014) eKLR** where Justice Nzioki wa Makau stated as follows;

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton & Turpin Ltd where the Court of Appeal (Gicheru JA, Chesoni JA & Cockar Ag JA) held that “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo vs Straman EA Ltd[11](2013) as follows:

“In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

13. The courts have held that the above conditions set out in Order 42 Rule 6 of the Civil Procedure Rules cannot be severed and must be met in full. See **M.O.M Amin Transporters Limited & another v Alexander Ndung’u Mbugua & 2 others [2017] eKLR and Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR.**

14. Having set out the conditions for grant of stay, I shall proceed to consider whether the three conditions have been satisfied by the applicant.

a) Substantial loss

15. As to whether the applicant has demonstrated that he shall suffer substantial loss, the applicant has deponed in his affidavit that the Respondent will execute the judgment. He has further deponed that the Respondent is plucking tea and cutting down trees on the suit land. He has however not annexed any photos to show the trees that have been cut down. He claims that he is about to be evicted from a home he has occupied since 1991 though he not laid any material before the court to show that the process of execution has commenced.

16. In any event the process of execution does not amount to substantial loss. This was so held in the case of **James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR** where Gikonyo J observed as follows:

“No doubt, in law the fact that the process of execution has been put in motion or is likely to be 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, that does not amount to substantial loss under order 42 Rule 6 of the Civil Procedure Rules. This is 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 irreparable affect or negate the very essential core of the applicant as the successful party in the appeal”

17. In its judgment issued on 14th September, 2018, the court did not include an order for eviction of the Applicant. The threat of eviction is therefore imaginary and unfounded.

18. In the case of **Elijah Githinji v Assunta Murugi Nkonge & another [2015] eKLR** the Court held as follows;

“In the instant case, the applicant has merely averred that if execution is to proceed, he will be evicted from the suit property which he occupies and has developed.

On whether the applicant is likely to be evicted from the suit property, counsel for the respondent informed the court that the applicant is not under threat of eviction because the ruling/order appealed from did not decree that the applicant be evicted from the suit property.

Having read the ruling/order appealed from, I can confirm that it did not order eviction of the applicant. That being the case, there is no evidence whatsoever of the loss the applicant would suffer if the orders sought are not granted.”

19. The applicant has alluded to the fact that he has a home on the suit land and that he has planted tea and maize thereon. He therefore claims that if the judgment is executed, he shall be rendered homeless. However, from his supplementary affidavit it is evident that the applicant owns two other parcels of land namely KERICHO/KABIANGA/3901 and KERICHO/KABIANGA 4323. Furthermore, it is clear from the evidence on record that the original parcel no. KERICHO /KABIANGA/1128 measured 8.4 hectares before 4.8 acres was unlawfully added to it. This shows that the applicant is not being very forthright and his claim that he will be rendered homeless has no basis. It is also instructive to note that the orders issued by the court are purely declaratory and no eviction order has been issued.

b) Undue delay

20. With regard to the second principle, I agree with learned counsel for the applicant that the application was filed without undue delay as it was filed less than a month after judgment was delivered.

c) Security for costs

21. As regards, security for costs, the applicant has not demonstrated by way of affidavit that he is willing to furnish security for costs which is one of the prerequisites for the grant of an order of stay pending appeal.

22. In the case of **Exclusive Mines Limited & another v Ministry of Mining & 2 others [2015] eKLR**, the court stated as follows:

“...On the issue of furnishing security, my understanding is that an applicant seeking an order of stay pending appeal should, as a sign of good faith, offer or propose any such security for the performance of the decree which the appeal has been preferred. I have looked at the Interested party’s affidavit in support of his Notice of Motion and nowhere in his seventeen (17) paragraph affidavit does he make any offer of any security nor bind himself to meet any such orders that the Court may impose. While the law leaves it to the Court’s discretion to make such orders as to security as it may deem fit, it is a good practice for an applicant seeking such an order to intimate to the Court his preparation to meet such orders as the Court may impose as this assists the Court while exercising its discretion in that respect”.

23. Whether or not to grant stay of execution pending appeal is a matter of judicial discretion and the court must balance the interests of both parties. It is trite law that a successful party is entitled to the fruits of their judgment and the court cannot disregard this fact. The court in the case of **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** stated as follows:

2. Mr. Mwita for the Plaintiff/Respondent

3. Court assistant - Rotich