



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 7 OF 2014

BENSON NG'ANG'A NDIRANGU APPLICANT

VERSUS

SAMUEL WAINAINA TIRAS RESPONDENT

RULING

1. What is before me for determination is a Notice of Motion dated 10/11/2017 filed here on the same date under a Certificate of Urgency. The application is brought under Order 42 Rule 6 of the Civil Procedure Rules. The Applicant – **BENSON NG'ANG'A NDIRANGU** – is the Defendant in the suit while the Respondent – **SAMUEL WAINAINA TIRAS** – is the Plaintiff. The suit itself is a concluded matter with judgment already delivered in favour of the Respondent. By this application, the Applicant is essentially seeking an order of stay of execution pending hearing and determination of his appeal.

2. The application first came up before me Exparte on 14/11/2017 and I granted an order of stay pending interparties hearing and determination. It came with five (5) prayers but only two are for consideration at this stage, the others having been considered at the exparte stage. The prayers for consideration are 4 and 5. They are as follows:

Prayer 4: That pending the hearing and determination of the appeal lodged by the Applicant, there be a stay of execution of the decree herein dated 18/10/2017.

Prayer 5: That costs be in the cause.

3. The application is premised on grounds, *inter alia*, that the Applicant felt aggrieved by the judgment issued; that he filed an appeal; and that he is willing to abide by any conditions the court may give. The Applicant expressed his fears that the Respondent may execute thus rendering his appeal nugatory. He said his appeal has overwhelming chances of success.

4. The Respondent responded vide a 13-paragraph replying affidavit dated 27/11/2017. According to the Respondent, the application is only meant “... **to buy time and delay execution of the decree herein**” in order to keep him away “**from enjoying the fruits of the judgment ...**”. The chances of the success of the intended appeal were said to be minimal. The Applicant was faulted for not offering security for due performance of the decree and/or proving the substantial loss likely to result if the order he is seeking is not granted.

5. Further, the Respondent averred that the Applicant neither lives nor conducts business in the suit premises. He is therefore unlikely to suffer substantial loss. The Applicant also posited that the Applicant has not shown him incapable of paying any monies owed to him in the vent the appeal is successful.

6. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 2/2/2018. It was submitted that the court should grant the prayers sought and can impose conditions as to security including placing and inhibition on the title to ensure that the property is not transferred or disposed of. It was further submitted that the Respondent will not be prejudiced if the prayers sought are granted. And the Applicant was said to be likely to suffer loss.

7. The Respondent's submissions were filed on 13/2/2018. It was submitted, *inter alia*, that there is need for offer of security to satisfy the decree issued. And the security requires deposit of the decretal sum in an interest earning account opened in the name of the parties or their advocates. It was submitted further that the Applicant needs to prove substantial loss that may result if the Order is not granted.

8. The decretal amount in this matter was stated to be Kshs.11,000,000. The Respondent submitted that the Applicant stands to suffer no loss as he has already been paid the full purchase price. Several cases were cited to drive home the point of risk of loss. Among them were **Antoine Ndiage Vs African Virtual University [2015] eKLR**, **Kenya Shell Limited Vs Kibiru [1986] KLR 410**, and **Nicholas Kigo Wambugu Vs Miriam Nyawira Mwaniki [2016] eKLR**. The cases stand for the proposition that loss should not only be alleged but demonstrated as well. The Applicant in this matter was said not to have demonstrated loss and the court was asked to dismiss his application.

9. I have considered the application, the response made, and rival submissions. A reading of Order 42 of Civil Procedure Rules shows that if a court of law is minded to grant an order of stay, it needs to be satisfied that:

(a) Substantial loss may result if the order is not granted.

(b) Security for satisfaction of the decretal amount is availed by the Applicant.

(c) The application has been made without delay.

10. Jurisprudence emanating from decided case law however, while generally in harmony with statutory requirements herein mentioned, has tended to give prominence to two requirements viz:

(a) Need for the Applicant to show he has an arguable appeal which might be rendered nugatory if the order is not granted.

(b) Proof of real likelihood of suffering substantial loss if the order is refused.

The cases already mentioned herein have dwelt largely on these two points.

11. In this matter, no delay is alleged. I think the application was brought timeously. On the issue of the nature or kind of appeal, the Applicant's position was that the intended appeal has overwhelming chances of success. The Respondent on the other hand felt that the appeal has minimal prospect of success. On my part, I really do not know the kind of appeal intended to be preferred. The grounds of appeal are not in the court file. The application only came with a notice of appeal. And the notice normally has little to offer by way of information. The submissions of the Respondent make reference to an attached copy of such grounds but no copy was actually attached. I think the Applicant should have availed a copy as part of an endeavour to let in the court on the nature of the intended appeal.

12. The Respondent's submissions covered the issue of the likelihood of loss extensively. The Applicant however only made a fleeting reference to the issue. I think the Applicant should have approached this issue with much more attention and circumspection than he did. As pointed out by the Respondent, a mere reference to the issue will not do. The loss needs to be demonstrated.

13. I think I should mention another decided case to make the point more abundantly clear: In **Machira t/a Machira & Co Advocates Vs East African Standard (No2)(2002) 2KLR 63**, the defendant applied for an order for stay of proceedings pending the hearing and determination of an intended appeal against a

ruling in favour of the plaintiff. The defendant argued that unless a stay was granted, the case could be set down for hearing thus rendering the appeal nugatory. The court held, *inter alia*, that in handling an application for stay, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or any decision of the court giving him success at any stage.

14. More crucially, the court in the above decision held that in order for an unsuccessful party to obtain stay or suspension of execution he must satisfy the court on affidavit or other evidential material that substantial loss may result. And the loss, the court further held, should not merely be alleged. The Applicant is duty-bound to provide specific details and/or particulars. And where no pecuniary or tangible loss is shown, the court will not grant a stay.

15. In this application, the Applicant only made a mere allegation of loss. He provided no details. He provided no particulars. As I make this ruling, I do not know the kind of loss the Applicant is likely to face or experience. As observed by the Respondent, the Applicant neither lives nor conducts any business in the suit premises. And the Plaintiff seems to have paid all the purchase price. It seems to me that it is easier for the Respondent to make a case of loss than the Applicant himself. It is therefore my finding, in light of all the foregoing, that the merits of the application herein are not adequately demonstrated. I therefore dismiss the application with costs.

Dated, signed and delivered at Busia this 4th day of December, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

Respondent: Absent

Counsel for Applicant: Present

Counsel for Respondent: Absent

Court Assistant: Nelson Odame