REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 541 OF 2012

(Formerly Hccc No. 121 of 2009) and also Formerly Kitale Hccc No. 2 of 2008)

JOHNAI OKUTOI..1ST PLAINTIFF

PEGGY CHRISTINE OKUTOI.......................2ND PLAINTIFF

VERSUS

NAJIB JIWA..1ST DEFENDANT

STANDARD CHARTERED BANK (K) LTD...2ND DEFENDANT

S. MBUTHIA T/A PRIME AUCTIONEERS......3RD DEFENDANT

RULING

The application before court is dated 31.8.2015 and brought by the 2nd defendant which seeks an order that pending the hearing and determination of the intended appeal the honorable court be pleased to grant an order of stay of execution of the judgment/decree determined on 23.7.2014 and any consequential order thereof. The application is premised upon grounds that the honorable court delivered the judgment herein on the 23rd July, 2014 declaring the auction of the property as null and void and further ordering that the 2nd defendant do compensate the 1st defendant in terms of the then current market value of the subject land and that the Honorable court set a time frame within which the orders of the court were to be complied with, which time has since lapsed. The 2nd defendant has preferred an appeal on the subject orders and lodged a notice of appeal and is waiting for the typed proceedings to facilitate the preparation of the record of appeal. However, the plaintiff has demanded for the release of the ownership documents from the applicant which are rightfully held as security for the charged property which remains so charged. The applicant claims that the execution of the judgment, which is in the offing, will occasion irreparable loss to the 2nd defendant/applicant who stands to lose the colossal amount in terms of the value of the subject land and costs and therefore in the premise, it is fair and just and within the practice of this honorable court that there be a stay of execution of the subject judgment/decree delivered on the 23rd July 2014 pending the hearing and determination of the appeal.

The application is supported by the affidavit of Boniface Machuki, the Collections Manager, Mortgages and Business clients who states that judgment was delivered on 23.7.2014 and the notice of appeal lodged on 30.7.2014, and requested for the proceedings. The applicant states that the court set out the timelines for compliance with the orders of the court. Moreover, the plaintiff has threatened the institute compulsion proceedings. The applicant argues that there is need for stay of execution to preserve the subject appeal.

The 1st defendant/respondent filed grounds of opposition dated 19.7.2016 whose gist is that the application was brought after unjustifiable and inordinate delay that has not been explained. That the applicant has been laxed in prosecuting the application. The indolence and the conduct of the applicant generally disentitle it from being granted the orders sought. Moreover, that the applicant has not furnished any security for the due performance of the decree in the event the purported appeal fails. That the orders sought if granted would prejudice the 1st defendant who is not party to the appeal and would drive him from the fruit of judgment of this court. That the application in its entirety lacks merit.

The plaintiffs filed grounds of opposition stating that the applicant is guilty of laches, judgment having been delivered on 23rd July, 2014 and that the applicant has not offered any security or indicated that it would abide by any conditions imposed by the court should stay of execution be granted. According to the plaintiff, there exists no appeal as per Rules 74, 81 and 82 of the Court of Appeal rules and that this court is therefore *functus officio*. That the plaintiffs are entitled to enjoy the fruits of the judgment. Lastly, that the purported notice of appeal was never served upon the plaintiff's counsel as required.

The gravamen of the applicant's submission is that he has established that he has a prima facie arguable appeal which is likely to succeed. It is enough to show that there is one issue upon which the court can provide its decision. Moreover, the applicant argues that the appeal has been filed expeditiously and that the application for stay was also filed expeditiously. Furthermore, the applicant argues that substantial loss may result if stay is not granted. The 1st and 2nd respondents submit that the application was not filed expeditiously as it was filed more than one year after the judgment.

The 1st and 2nd respondents argue that 12 months is inordinate delay. They further argue that in the absence of an appeal, the application must fail as the court is ***functus officio***. Further, they argue that the applicant has not demonstrated that he is likely to suffer substantial loss. The 1st defendant submits that the applicant has not substantiated exactly what loss he is likely to suffer and that the defendants/respondents will not be able to compensate. Moreover, that the applicant is guilty of unreasonable delay. Lastly, that no security has been offered by the applicant.

I have considered the provision of Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 which specifies the circumstances under which the trial court or the appellate court can grant a stay of execution pending appeal. Though this rule does not fetter the court's discretion, it gives the guidelines on the grant of the stay of execution of the decree pending appeal. The relief of stay of execution pending appeal is governed by Order 42 Rule 6(2) of the Civil Procedure Rules. The power to grant stay is a discretion of the court although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, thus: a) The application is brought without undue delay; b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and c) Such security as the court orders for he due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

in the case of ***Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)l KAR 1018*** , the Court of Appeal stated that:

> ***"It is usually a good rule to see if Order 41 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 jurisdiction for granting stay"***

Substantial loss in the terms of Order 42 rule 6 **does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.**

in the case of ***Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto it was held that:***

> ***''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. This is what substantial loss would entail...''***

The applicant must show he will be totally be ruined in relation to the appeal if he pays over the decretal sum to the Respondent or complies with a non-monetary decree. In other words, he will be reduced to a mere observer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money or revering the situation should the appeal succeed. Therefore, in a money decree, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed and in a non -monetary decree it lies in the inability to reverse the situation. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege that he will suffer irreparable loss.

In the case of ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63***, that;

> ***"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars… where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."***

This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. It is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means. See ***Harlsbury's Law of England*** on this subject.

The substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small, the judgment-debtor is liable to pay it. The fact that the decree is of a colossal amount will only be useful material if the Applicant shows that the Respondent is not able to refund such colossal sum of money; it is not that the Respondent should always be a person of straw; the opposite could be true and a respondent may be a lucratively well-endowed person, individual or institution, who is able to refund the colossal sum of money.

In the case of ***Jason Ngumba [2014] eKLR*** it was held that:

> **''...Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.**

Moreover, what was stated in the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR** is relevant**,** that:

> **''The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order, does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree**

holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination''

On the first issue, I do find that the applicant has not explained in his affidavit why he took more than one year to come to court. The issue of negotiation is not properly explained in the affidavit as to why it caused the delay in filing the application. Indeed, a prudent party represented by counsel knows or ought to know that time does not stop running due to negotiations.

On substantial loss, it has not been demonstrated by affidavit how the applicant will suffer substantial loss, which loss and whether the respondents will not be able to compensate the loss. The burden of proof lies on the applicant to prove that the respondent is a man of straw and will not be able to pay back when he loses the appeal

On security, the plaintiff has not offered any security for its worth, however since the applicant has not satisfied the 1st and 2nd conditions, I do find no merit in the application and do dismiss it with costs.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE