



REPUBLIC OF KENYA



Lomoro v Spring Hillpark Limited (Environment & Land Case E151 of 2021) [2024] KEELC 1156 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E151 OF 2021**

JA MOGENI, J

FEBRUARY 29, 2024

BETWEEN

OLIVIA ADONG' GEORGE LOMORO PLAINTIFF

AND

SPRING HILLPARK LIMITED DEFENDANT

RULING

1. This Motion filed on the 15/08/2023 is brought under Section 3A of the *Civil Procedure Act*, Order 9 Rules 9 & 10 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* and Rule 3 of the *High Court Practice and Procedure Rules* under the Judicature Acts seeking the following orders;
 - a. Spent
 - b. Spent
 - c. The Defendants be granted leave to change their advocates on record from Igeria & Ngugi Advocates to Wafula Simiyu & Co Advocates after judgment
 - d. This Honorable Court be pleased to order a temporary stay of execution of the judgment delivered on 27th July 2023 pending the hearing and determination of this application inter partes.
 - e. This Honorable Court be pleased to order for stay of execution of the judgment delivered on 27th July 2023 pending the hearing and determination of the intended appeal to the court of appeal on terms and conditions it shall please
 - f. Costs of this application be in the cause.
2. The grounds in support of the application are that the Applicant is dissatisfied with the judgement of the Court and has requested for a certified copy of the judgment and typed proceedings for purposes of



the appeal vide its letter dated 31/07/2023. Further that the court ordered for a refund of the purchase price to the suit property plus interest yet the purchase price is not available as they were used in construction and the contract that the refund in case the contract is rescinded would be upon resale of the unit to another party.

3. It is there contention that for security the defendant is prepared to give alternative security like title to another apartment or bank guarantee as security for costs. Further that the court be minded to order reasonable terms of security so as not to impose an obstacle to exercise of the constitutional right of appeal. The applicant has stated that the defendant's appeal is arguable and stands high chances of success.
4. The supporting affidavit of the Applicant sworn on the 15/8/2023 by David Ojjo Agili the director of the of respondent, reiterates the grounds upon which he has based his application and in addition states that the court makes an order under Order 42 Rule 6(6) issuing an injunction against it restraining it from selling the suit property unit to a third-party pending the hearing and determination of this intended appeal as a measure of security to the plaintiff/respondent. He attached a copy of the Notice of Appeal as Exhibit DOA 1.
5. In response the Respondent deponed through a replying affidavit sworn on 16/10/2023 by Olivia Adong' George Lomoro the plaintiff/respondent herein averred that the application is unmerited and does not give any security for the performance of the Decree which is a key condition for grant of stay orders. Further that the applicant has not demonstrated substantial loss that he stands to suffer and that there is no Memorandum of Appeal attached to the application. Further that the proposal to offer alternative title/apartment show the applicant's ability to settle the respondent's claim but choosing to dictate terms. They attached a letter dated 12/10/2023 to the Counsel of the defendant seeking a proposal for security which however they aver was not responded to.
6. It is the respondent's contention that the prayer sought is discretionary and must be exercised judiciously so as not to prejudice the successful litigant and deny them their rights of the fruit of the judgment.
7. The respondent has not in her response raised any objection to the change of the Advocates by the Applicant.
8. The application was canvassed by way of written submissions.

Analysis and Determination

9. Upon consideration of the Applicant's Notice of Motion dated 15/08/2023 including the parties' affidavits and rivalling submissions, the following are the issues for determination:
 - a. Whether the firm of messrs Wafula Simiyu & Co Advocates should be allowed to come on record for the Respondent in place of messrs Igeria & Ngugi Advocates.
 - b. Whether there should be a stay of execution of the Judgement delivered on 27/07/2023.
10. As to whether the firm of messrs Wafula Simiyu & Co Advocates should be allowed to come on record for the Respondent in place of messrs Igeria & Ngugi Advocates. I do note that the Applicant's erstwhile advocate and the firm of messrs Igeria & Ngugi & Co. Advocates entered into a consent for the said firm to come on record for the Applicant. From the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) it states that: 'When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—'



- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.’
11. Since the Advocates entered into a Consent, and in relying on the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#), I will proceed and allow the firm of messrs Wafula Simiyu & Co. Advocates, to come on record for the Applicant herein.
 12. Further the Respondent submitted that the principles for granting stay of execution are trite; there must be a valid Appeal and for the purposes of the Court of Appeal, a valid notice of Appeal should suffice; there must be substantial loss that may result to the Applicant unless an order of stay of execution is granted; the Court may require security for the due performance of the decree. In addition, the Respondent stated that the power to grant stay by a Court is discretionary which is granted in line with sound legal and judicial doctrine which include preservation of the subject matter of the suit and to do justice and equity to the parties. The legal burden is on the Applicant to proof that it is entitled to the orders of stay of execution.
 13. These principles are clearly provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - “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.”
 14. In addition, it is important to note that, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions
 15. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
 16. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.



17. On the issue of substantial loss the court observed in in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so 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 irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. It is clear that for the Court to grant stay of execution of the Judgment, the Applicant needs to satisfy the Court that he will suffer substantial loss. In the case of *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 the Court stated;-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.

The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

19. With the above in mind, the Court must then determine whether the Applicant has established that he will suffer substantial loss and or has presented special circumstances that will warrant the Court to exercise its discretion and grant stay of Execution.
20. It is the Applicant’s averment that he will suffer substantial loss if stay of execution is not granted as the Court in its Judgment ordered the applicant to refund the money that the plaintiff had paid for the suit property plus interest.
21. The Applicant contends that he had already used the money paid for the subject property and if orders of stay are not granted, he stands to suffer substantial loss because he does not have money to pay the plaintiff. He also avers that the court did not the recession clause in the contract and therefore the appeal has a high chance of success. However, there is no evidence placed in this court to show how the Applicant will suffer substantial loss.
22. Failure to produce evidence means that the applicant will not suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment. I am therefore not persuaded that the applicant has shown that they stand to suffer substantial loss if the order of stay is not granted.
23. Secondly the Applicant must satisfy the Court that the Appeal was made without inordinate delay. Judgement was delivered on 27/07/2023, and the instant Application is dated 15/08/2023. The Court notes that there was no inordinate delay in bringing this Application.
24. On Security of Costs, the Applicant has sought to provide security that is owned by someone else who is not party to this instant suit someone he calls his proxy. Despite stating that he is willing to provide a bank guarantee, there was no such instrument or facility provided to show the commitment. Suppose just for argument sake this court gave the applicant a go ahead to provide the apartment which is in another person’s name as a guarantee how will the decree holder get this security and convert it to her



benefit in the event that the appeal was not successful? It is incumbent upon the applicant to show commitment by providing security of Cost which he has failed to do so.

25. Therefore, whereas the applicant has satisfied the limb of filing the appeal without inordinate delay he has failed on the other two limbs which are very critical to application for stay.
26. It is virtually impossible for this instant application to succeed, as the applicant has failed to demonstrate that he will suffer substantial loss, if stay is not granted. Consequently, the Court finds and holds that the applicant has not satisfactorily explained to Court why it should exercise its discretion and grant the said Stay of Execution.

Disposal Orders

27. Having now carefully considered the instant Notice of Motion Application dated 15/08/2023, the Court finds it is merited in terms of prayer (C) only. However, the other prayers are not merited and are dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2023.

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MOGENI J

JUDGE

In the virtual presence of:

Ms. Koki for the Plaintiff

None appearance for the Defendant/Applicants

Ms. Caroline Sagina: Court Assistant

