



REPUBLIC OF KENYA



KENYA LAW
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**Shalom Levi v Karny Zahrya & Rose Wanja Muregi (Environment & Land
Case 460 of 2010) [2017] KEELC 3860 (KLR) (8 November 2017) (Ruling)**

Shalom Levi v Karny Zahrya & another [2017] eKLR

Neutral citation: [2017] KEELC 3860 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 460 OF 2010

AA OMOLLO, J

NOVEMBER 8, 2017

BETWEEN

SHALOM LEVI PLAINTIFF

AND

KARNY ZAHRYA 1ST DEFENDANT

ROSE WANJA MUREGI 2ND DEFENDANT

RULING

1. For determination is the application for stay dated 8th April 2016 brought under the provisions of the *Civil Procedure Rules* seeking the following:
 1. Spent
 2. Spent
 3. Spent
 4. That there be a stay execution of the decree herein pending the hearing and determination of the appeal against the judgment herein.
 5. That the cost of this application be in the cause.
2. The application is premised on the five grounds on the face of it and the affidavit of Rose Wanja Muregi, the 2nd defendant/Applicant. She deposed that the appeal raises triable issues with high probability of success and if the appeal succeeds, it would be rendered nugatory. She also deposed that the plaintiff is a foreigner and is of unknown means. That they are willing to abide by the conditions as this Court may deem necessary. Lastly she deposed that the plaintiff will not be prejudiced if the application is allowed.



3. The application is opposed by the Plaintiff/Respondent. He deposed that the application is a mere excuse to extend the said illegal occupation of his parcel of land. That from Miss Muregi's affidavit, the applicants are not making a claim of his share of the suit land. He also contended that they had not been served with a notice of appeal. Further the applicant deposed that no execution can take place without taxation of the bill of costs. He also annexed copies of title showing he owns other parcels of land to show he is a man of means. He is of the view that this application is devoid of merit and should be dismissed. That the applicants have come to Court with unclean hands and is guilty of inordinate delay.
4. The parties filed detailed written submissions supported with case law. I have had occasion to read both sets and consider the positions taken therein by both sides. Although this application is premised under the provisions of Order 22 rule 52 of the *Civil Procedure Rules*, the applicable Order is Order 42 rule 6. Order 42 6(1) provides thus; "The Court appealed from may for sufficient cause order stay of execution of such decree or order."
5. The authority of *Cooperative Bank of Kenya Ltd vs Banking Insurance & Finance Union (Kenya)* (2015) eKLR relied upon by the defendants/applicants are distinguishable on account of two reasons. First the grounds to be considered for granting stay of execution in the Court of Appeal is different from the High Court because the applicable rules are different. The second reason is that the circumstances obtaining in both cases are different. The only plausible reason I find which the applicants have put forth for seeking the orders is that their appeal will be rendered nugatory if the order of stay is not given.
6. The Plaintiff/Respondent also quoted several case laws inter alia *Kenya Shell Ltd vs Kibiru & Another* (1986) KLR 410 where Hancox JA that, "if it is shown that execution or enforcement would render a proposed appeal nugatory then a stay can be properly given. Parallel with that is the equally important proposition that a litigant if successful should not be deprived the fruits of his judgement in his favour without a just cause."
7. The decree in this suit states thus;
 - (i) An Order is hereby issued compelling the defendants by themselves and or their servants and agents to have that piece or parcel of land known as LR No. MN/1/9930 into two equal title s of land one belonging to the defendants and the other to the plaintiff and that the defendants and the plaintiff be registered as owners of their separate parcels.
 - (ii) That general damages for refusing the plaintiff access and use of the said land be and is hereby assessed at Kshs 700,000/=, with interest at Court rate from the date of judgement until payments in full.
 - (iii) That costs of the suit be awarded to the plaintiff
8. The Applicants annexed a notice of appeal having a Court receiving stamp showing it was filed on 18th March 2016. A notice of appeal filed is sufficient for this Court while determining the application for stay. As to whether it was served is a matter to be dealt with before the Court of appeal. Therefore an appeal having been filed and balancing the interest of both parties not to render the appeal nugatory at the same time not to delay the plaintiff from enjoying the fruits of his judgement and taking into consideration that this was both monetary & non – monetary decree; I will accordingly while balancing the scales of justice grant partial stay in the following terms:
 - (a) The order requiring payment of the award of general damages in the sum of Kshs 700,000= together with interest is stayed pending hearing and determination of the appeal.



- (b) The Plaintiff/Respondent however shall be granted access to his portion of the land as per prayer (a) of the plaint and decree. I have declined to allow stay on this limb of the decree because the land still remains and the doctrine of lis pendence will not permit the Respondent to transfer the suit title to a 3rd party. The issue of transfer was also not a worry for the applicants as it was not brought out both in the body of the application and or the affidavit in support thereof.

9. Costs of this application do abide the outcome of the appeal before the Court of Appeal

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH NOVEMBER 2017.

A. OMOLLO

JUDGE

