



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

CIVIL CASE NO. 55 OF 2013

AMOS MURIITHI KARIAMATU APPLICANT

-VERSUS-

MARGARET WAMBUI WAMUGUNDA 1ST RESPONDENT

JOHN WACHIRA WAMUGUNDA 2ND RESPONDENT

RULING

1. Through the notice of motion dated **1st September, 2015** the applicant, Amos Muriithi Kariamatu, seeks an order of stay of execution of the decree issued by this court (read Environment and Land Court) on 21st May, 2015 pending the hearing and determination of the application and the intended appeal.

2. The application is premised on the grounds that the applicant has filed an appeal against the decree herein; that the respondents have begun executing the decree appealed from and that the application has been brought without inordinate delay. It is the applicant's case that unless the orders sought are granted, in addition to the appeal being rendered nugatory, he will suffer irreparable/substantial loss.

3. The application is supported by the affidavit of the applicant in which the grounds thereon are reiterated.

In addition to reiterating the grounds on the face of the application, the applicant has deposed that he has applied for certified copies of proceedings and judgment, which documents he is yet to be supplied with.

4. In reply and opposition to the application, the 2nd respondent, John Wachira Wamugunda, filed the replying affidavit he swore on 19th October, 2015 in which he has, *inter alia*, deposed that the applicant has not satisfied the conditions for being granted the orders sought.

5. When the matter came up for hearing counsel for applicant, **Mr. Wachira**, urged the court to allow the application so that the applicant's appeal, which has high chances of success, is not rendered nugatory.

6. The 2nd respondent, **Mr. John Wachira**, informed the court that on 25th August, 2014 the plaintiff had filed a similar application; that there has been undue delay in making the application and that there has been delay in filing a record of appeal. Pointing out that the applicant has a portion of land which will not be affected by execution of the decree, the 2nd respondent submitted that the applicant will suffer no prejudice if the orders sought are denied.

7. In a rejoinder, counsel for the applicant informed the court that the application filed on 25th August,

2015 was withdrawn. Concerning the delay in filing a record of appeal, Mr. Wachira submitted that the delay has been properly explained.

Law applicable to the application

8. This being an application for stay pending appeal, the law applicable to the application is found in **Order 42 Rule 6(2)** of the Civil Procedure Rules which provides as follows:-

“(2) 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. Also see the case of **Sammy Some Kosgei v. Grace Jejel Boit (2013) eKLR** where it was observed:-

“...The relevant provisions in relation to stay pending appeal are contained in order 42 Rule 6(2) of the Civil Procedure Rules, 2010..... The more critical issues herein are whether the applicant stands to suffer substantial loss if the order is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal...” (emphasis supplied).

10. The legal position canvassed in **Sammy Some Kosgei v. Grace Jejel Boit (supra)** is replicated in many cases. To name but just a few, the position is replicated in the following cases:-

i) Daniel Kihara Murage v. Jacinta Karuana Nyangi & Another (2015)e KLR where it was stated:-

“To justify the grant of stay, the applicant must show or establish facts to satisfy the court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant’s case as the successful party in the appeal...The applicant ought to have placed before the court facts to show to the satisfaction of the court that if no stay is granted, he will suffer a loss that is substantial. The mere fact that land is concerned does not make any loss substantial.” (emphasis supplied).

ii) Everlyn Jebitok Keter v. Henry Kiplagat Muge & 2 Others (2011) eKLR where it was stated:-

“It is usually a good rule to see if O.41 r.4 (present Order 42 Rule 6) 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 corner stone of both jurisdictions for granting a stay...In this case the applicant has not shown how he stands to suffer unless stay is ordered. She has therefore not demonstrated that substantial loss may result to her unless the order of stay is made.”

iii) Robert Ngaruiya Chutha vs. Joseph Chege Ndungu (2014) eKLR where it was stated:-

“The Court of Appeal in the case of Charles Wahome Gethi v. Angela Wairimu Gethi, Civil Application No.302 of 2007 (2008) eKLR held that:-

“...It is not enough for the applicant to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them”....It is my finding that the defendant has not established that he shall suffer loss if the orders sought are not granted. Further, under Order 42 this court is not required to inquire into the merits of the intended appeal as that is a question that can only be determined by the Court of Appeal. Consequently, the ground that the appeal shall be rendered nugatory does not suffice....Lastly, the rules of procedure require that the applicant must offer security as the court may order. On perusal of the application before court, it is evident that the defendant has not stated that he is willing and ready to give security subject to the directions of the court....I accordingly decline to grant the orders sought.” (emphasis supplied).

Analysis and determination:

11. From the cases cited above, it is clear that for this court to exercise the discretion vested on it in favour of the applicant, the applicant must satisfy the conditions set in **Order 42 Rule 6(2)** of the Civil Procedure Rules. More importantly, the applicant must by way of evidence demonstrate that unless stay pending appeal is granted he will suffer substantial loss. The applicant must also furnish security for satisfaction of such decree as may ultimately issue against him.

12. The instant application was filed on 1st September, 2015, about four (4) months from the date the decree appealed from was given. Apart from admitting that there was a similar application, which was withdrawn, no explanation has been given why the applicant had to wait for about four (4) months to bring the instant application. In the circumstances, I agree with the respondent that there was inordinate delay in bringing the application for stay.

13. With regard to the requirement for security, the applicant has not expressed willingness to furnish security for due performance of such decree as may ultimately issue against him.

14. On whether the applicant has demonstrated that he stands to suffer substantial loss if the orders sought are not granted, I note that the applicant has merely stated that he stands to lose irreparably without demonstrating what loss if any he would suffer.

15. As pointed out above, it is not enough for the applicant to allege that if the judgment is executed he stands to suffer substantial loss. The applicant is under a legal obligation to, by way of evidence, prove that he indeed stands to suffer substantial loss. It has been held, in many cases, that the mere fact that the subject matter of the appeal is land is not proof that the applicant will suffer substantial loss.

16. The upshot of the foregoing is that the applicant has failed to demonstrate what substantial loss, if any, he stands to suffer if stay of execution is not granted. Consequently, the application for stay pending appeal fails and is dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered at Nyeri this 2nd day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Wachira for the applicant

Margaret Wambui Wamugunda – 1st respondent

John Wachira Wamugunda – 2nd respondent

Court assistant - Lydia