



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC SUIT NO. 601 OF 2014

MATHINGIRA WHOLESALERS LTD PLAINTIFF

-VERSUS-

KIMWATU KANYUNGU 1ST DEFENDANT

KIIRU GACHUIGA 2ND DEFENDANT

GADSON GITONGA 3RD DEFENDANT

KIBERA GATU 4TH DEFENDANT

SAMUEL GITHINJI KIBAKI 5TH DEFENDANT

HON. MWAI KIBAKI 6TH DEFENDANT

RULING

1. On **17th August, 2016** the 1st and 6th defendants herein brought the notice of motion dated 16th August, 2016 seeking, among other orders, stay of execution of the judgment of this court delivered on 12th July, 2016 pending the hearing and determination of the application or until further orders of the court and the intended appeal.

2. The application is premised on the grounds that the applicants who were dissatisfied with the judgment hereto intend to appeal against it; that the applicants have an automatic right of appeal; that this court has discretion to make orders that will serve the ends of justice and ensure that their intended appeal will not be rendered nugatory.

3. The applicants contend that, in the circumstances of this case, substantive justice demands that this court preserves the subject matter of the suit. The applicants have expressed willingness to furnish such security as the court may order for due performance of orders that may ultimately issue against them.

4. The application is supported by the affidavit of His Excellency Honourable Mwai Kibaki in which the grounds on the face of the application are reiterated or emphasized.

The application is also supported by the affidavit (supplementary) of the applicants' Counsel Gibson Kamau Kuria, sworn on **17th August, 2016** in which it is deposed that the plaintiff and the 2nd defendant have begun executing the orders of this court by causing notices to issue to the plaintiff's shareholders to attend a meeting to elect a Board of Directors pursuant to the judgment appealed from. Based on the said

notices, the applicants who have since filed a notice of appeal against the judgment of this court and applied for typed proceedings are apprehensive that unless the orders sought are granted, the respondents may execute the impugned judgment thus rendering the appeal nugatory.

5. The application is opposed through the affidavits (replying) of Joseph Kiiru Gachuiga (a shareholder of the plaintiff) and Peter Nderitu Munuhe (the Secretary of the Plaintiff Company), both of whom have contended that the applicants have not satisfied the conditions for being granted an order of stay of execution pending appeal. The deponents of the said replying affidavits have argued that being minority shareholders of the plaintiff company, the applicants should not be allowed to sabotage the operations of the plaintiff company. They have further contended that the applicants have not demonstrated any loss, if any, that they would suffer if stay is denied.

6. They have further deposed that the plaintiff company will be prejudiced if stay is granted because it has not transacted its affairs since 2008.

7. According to the deponents of the replying affidavits, the loss if any that the applicants may suffer, can be compensated by an award of damages.

8. The duty of this court is said to be balancing the interest of all parties involved, which duty the court is urged to discharge by rejecting the application.

9. When the matter came up for hearing counsel, for the applicants, **Mr. Karanja**, submitted that the applicants have complied with the condition for grant of an order of stay pending appeal. In this regard, he submitted that the application was filed without delay, applicants are the registered proprietors of the suit property; if execution ensues the appeal will be rendered nugatory; appeal has high chances of success; there is evidence that execution has already started. He pointed out that the applicants are ready to abide with such order for costs as the court may order and such other conditions as the court may order.

10. In opposing the application, counsel for the respondent, **Ms Mwai**, submitted that the applicants have not demonstrated that unless the orders sought are granted, they will suffer substantial loss. She pointed out that only a minority of the plaintiff's shareholders are opposed to the judgment. According to Ms Mwai, the minority should not hold the majority at ransom.

11. Pointing out that the applicants have not said anything about the suit property, counsel for the plaintiff/respondent urged the court to dismiss the application with costs to the plaintiff/respondent because any money collected as rent can be refunded.

12. In a rejoinder, Mr. Karanja, submitted that under **Article 48** of the Constitution of Kenya 2010 the applicants are guaranteed the right to be heard, which right includes the right to appeal.

Law applicable to the application

13. 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.

14. Also see the case of **Sammy Some Kosgei v. Grace Jelel 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).

15. The legal position canvassed in Sammy Some Kosgei v. Grace Jelel 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).

iv. In Butt v. Rent Restriction Tribunal (1982) KLR 419 it was held:-

“It is in the discretion of court of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule out to

exercise its best discretion in a way not to prevent the appeal if, successful from being nugatory...The court will grant a stay where special circumstances of the case so require...”

Analysis and determination:

16. From the cases cited above, it is clear that this court has discretionary power to grant stay pending appeal. That power is, however, exercised on the basis of settled principles or conditions namely; the applicants must satisfy the conditions set in Order **42 Rule 6(2)** of the Civil Procedure Rules. The application for stay pending appeal must have been brought without undue delay. The applicant must also furnish security for satisfaction of such decree as may ultimately issue against him/her. Further, the applicant must demonstrate that unless stay pending appeal is granted he/she will suffer substantial loss.

17. In the circumstances of this case, it is conceded that the instant application was filed without unreasonable delay. The applicants have also expressed willingness to offer such security as the court may order for due performance of such decree or order as may ultimately be binding on them. That being the case, the only condition on which this application turns is whether the applicants have demonstrated that unless the orders sought they may suffer substantial loss.

18. With regard to this, I note that a notice of appeal has already been filed in this matter. Notices calling for a meeting as directed by the court have also been issued. It is my view that unless a stay of execution of the judgment is granted, the aforesaid meeting may be held and certain resolutions passed that could change the nature of the case and status of the land rendering the appeal nugatory. To avoid the above scenario from happening, I allow prayer 3 in the notice of motion. Costs to abide the outcome of the appeal.

Dated, signed and delivered at Nyeri this 18th day of October, 2016

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ndung'u h/b for Dr. Kamau Kuria for the applicants

Ms Mwai for the respondents

Court assistant - Lydia