



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 584 OF 2015

(FORMERLY HCCC NO 86 OF 2003)

JOSEPH MURIITHI NJERU PLAINTIFF/RESPONDENT

-VERSUS-

SHEM MATHENGE NJERU DEFENDANT/APPLICANT

RULING

1. The appellant filed a Notice of Motion dated **15th March, 2016** seeking orders of stay of execution of the judgment of this court delivered on 15th February, 2016. In the aforesaid judgment this court found that the plaintiff was entitled to half portion of the suit property (**Title Number Mwerua/Mukure/60**). The applicant also prays that costs abide the outcome of the appeal.
2. The application is premised on the grounds on its face and is supported by the affidavit of applicant sworn on 15th March, 2016. In that affidavit, the applicant depones that his advocates had already filed a Notice of Appeal and that his intended appeal has high chances of success. It is his contention that if the orders for stay are not granted, the appeal will be rendered nugatory. Further, if execution takes place, the applicant will suffer substantial loss. He states that the balance of convenience lies with the applicant as the subject matter of the suit is land and no prejudice will be suffered by the respondent if the orders sought are granted. He is willing to abide with any orders of the court on security.
3. The application is opposed vide the respondent's replying affidavit sworn on **22nd April, 2016**. In that affidavit, he depones that the application is incompetent, bad in law and an abuse of the court process; that the applicant has not fulfilled any of the conditions laid out in **Order 42 Rule 6** of the Civil Procedure Rules by demonstrating the substantial loss to be suffered, neither has he offered any security. According to the respondent, this is a mere delaying tactic designed to frustrate the fruits of his judgment.
4. He further depones that the Notice of Appeal is invalid, having been filed out of the required 14 days; that he has no intention of selling the suit property, therefore no loss will be occasioned to the applicant
5. The application was heard on 25th October, 2016 with **Mr Kingori** holding brief for **Ms Wambui** for the applicant and **Mr Magee** appearing for the respondent. Both advocates chose to rely on their respective pleadings and their contents as filed.

6. The law on stay of execution pending an appeal is found in **Order 42 Rule 6(2)** of the **Civil Procedure Rules 2010** (CPR) which provides as follows:-

“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.

7. These conditions were set out in **Butt v. Rent Restriction Tribunal (1982) KLR 419**, as follows:-

“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...”

8. Courts have interpreted **Order 42 Rule 6** of the Civil Procedure Rules and determined that in addition to the conditions set out in the **Butt** case (supra), the primary issue to consider in exercising the court’s discretion is that of “substantial loss”. See the case of **Sammy Some Kosgei v. Grace Jelet 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).

Analysis and determination:

9. The court has discretionary power to grant orders of stay pending appeal under **Order 42 Rule 6** of the Civil Procedure Rules and the principles as established in the **Butt** case (supra).

10. Applying the above principles to the circumstances of this case, I find that the instant application was filed without unreasonable delay therefore the 1st condition has been fulfilled. On condition number two on security, the applicant has not demonstrated what security he will offer. He merely states that he is ready to abide with any direction the court may give, but has not put forward any proposal to the court.

11. Regarding the condition of substantial loss, the applicant has not demonstrated what loss he stands to suffer if the orders of stay are not granted. Loss of land by itself, does not occasion substantial loss, as was held in **Daniel Kihara Murage v. Jacinta Karuana Nyangi & Another [2015] eKLR**. On the other hand, the applicant has stated under oath that he has no intention of selling the suit property so no loss will be occasioned to the applicant.

12. The applicant having failed to satisfy the conditions set out in **Order 42 Rule 6** of the Civil Procedure Rules, I find that the application must fail and the same is hereby dismissed with costs.

Dated, signed and delivered at Nyeri this 25th day of November, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

M/S Kimotho h/b for Magee for plaintiff/respondent

Mr. Kioni h/b for Ms Wambui for the applicant/defendant

Court assistant - Esther