



IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 599 OF 2011

KWAME KARIUKI.....1ST PLAINTIFF

RUTH ABRAHAM KARIUKI.....2ND PLAINTIFF

VERSUS

MOHAMED HASSAN ALI

ALIMOHAMED JANMOHAMED.....1ST DEFENDANT

HAMIDA MOHAMED HASSAN ALI

JANMOHAMED.....2ND DEFENDANT

KARANJA KABAGE.....INTERESTED PARTY

RULING

The Plaintiffs' Application

The Plaintiffs' application by way of a Notice of Motion dated 8th April 2014 is the one before this Court for determination. The Plaintiffs are seeking the following outstanding orders:

1. That there be a stay of execution of the orders dated and delivered on 20th March 2014 pending the hearing and determination of the Appeal filed by the Plaintiffs hereto.
2. That in the alternative and without prejudice to prayer (1) hereinabove, that the Plaintiffs be allowed to substitute the cash deposit with a bank guarantee from a reputable bank of equal amount as security for costs, pending arbitration of the dispute between the Plaintiffs, the Defendants and the Interested Party hereto.

The Plaintiffs grounds for the application are as stated in the said Notice of Motion, and in the supporting affidavit and further affidavit sworn on 8th April 2014 and 5th May 2014 respectively by the 1st Plaintiff. These are that the Plaintiffs, being dissatisfied and aggrieved by the ruling of this Court delivered on 20th March 2014, have filed a Notice of Appeal against the same. The ruling *inter alia* ordered the Plaintiffs to within thirty (30) days of the date of the said ruling deposit the sum of six million Kenya shillings in an interest earning account to be opened in the joint names of the Plaintiffs' and the Interested Party's advocates, as security for costs pending arbitration and/or the final determination of the suit herein.

Furthermore, that the Interested Party is in the process of executing the said ruling and order and the

Applicant stands to suffer irreparable loss and damage, and if stay of execution of the orders is not granted then the intended appeal will be rendered nugatory. The Plaintiffs also states that there are sufficient reasons warranting variation of the order dated 20th March 2014. The Plaintiffs attached a copy of the Notice of Appeal duly filed, and of documents in support of the averment that the Interested Party was undertaking execution.

The 1st Plaintiff further stated that his occupation and business is in real estate where he relies on cash money in his various transactions and activities, and that depositing the sum of Kshs.6,000,000/= in a bank account for an undeterminable period of time will adversely affect his business transactions and his occupation. He further stated that he is the registered owner of the property known as House Number 13 on L.R No. 1160/42, and is ready and willing to have a charge registered over the said property by a reputable bank and to have the said bank provide a guarantee for payment of an equal sum of amount that was ordered deposited in court as security by this Court on 20th March 2014.

The 1st Plaintiff stated in this regard that following the orders of 20th March 2014 he applied for a bank guarantee with Chase Bank Ltd, but that the bank advised him that such an application can only be considered if it is in relation to an order made by a Court directing that a party furnishes security by way of a bank guarantee.

The Interested Party's Response

The Interested Party filed a Replying Affidavit sworn on 24th April 2014 wherein he raised a preliminary objection on a point of law that the Plaintiffs' application as drawn is fatally defective for improper joinder of prayers, as a prayer for review cannot be combined with a prayer for stay of execution since the two are mutually exclusive.

The Interested Party denied that a preliminary decree of court had issued pursuant to the ruling, and that execution proceedings were planned at this stage. He stated that he is the only one suffering irreparable loss and damage, as he has been presented by an injunction order issued in favour of the Plaintiffs restraining him from assuming the occupation of his property, and in the event that the hearing of this matter proceeds to its conclusion and the Plaintiffs fail to comply with the eventual order for costs. Further, that it is contradictory for the Plaintiffs in whose favour an injunction order has been issued to claim that they will suffer irreparable loss and damage, simply because they have been requested to provide security for costs for the action before the court.

It was the Interested Party's view that if the payment of Kshs 6 Million will constrain the Plaintiffs' cash flows, that is all the more reason why this Court should dismiss this application and insist on the compliance with its order for provision of security for costs. Further, that the Plaintiffs' cannot ask for a stay/review of a court order based on the same grounds or evidence that was previously before the court. Lastly, that if indeed the Plaintiffs are ready, able and willing to charge their property to a reputable bank for issuance of a guarantee for payment of the Kshs.6 million, then they should proceed to secure the Kshs 6 million as security for costs as directed by the Court on 20th March, 2014, rather than for the Court to stay/or review its order.

The Submissions

The parties were directed by the Court to file written submissions. The Plaintiffs' Advocates, A.N Ndambiri & Co Advocates, filed submissions dated 13th May 2014 wherein it was contended that application as filed is not defective, and that the prayers sought are not misjoined and are separate and distinct. Further, that so far no appeal has been lodged by the Plaintiffs, and that an application for review of an order or decree is not rendered incompetent until and unless an appeal is preferred heard and determined. The Plaintiffs' counsel relied on the decision in **Kenya Investment Ltd vs The Attorney General and R.C. Odupoy, Civil Appeal No 31 of 1992** and **Motel Schwelster vs Thomas Edward Cunningham and Another, (1955) Vol 22 E.A.CA. 252** in this respect.

The Plaintiff's Advocate further submitted that their application to have the order made on 20/3/2014 reviewed and varied is based on matters of evidence that were not brought before the Court prior to the making of the said order. Further, that the issues raised in this application are also very different from those raised and considered in the 20/3/2014 ruling, and that a variation of the 20/3/2014 order will not occasion the Interested Party any loss or damage. The counsel submitted that the Plaintiffs were willing to have their property charged by a reputable bank and to have the said bank provide a guarantee for payment of equal sum to that ordered by court as security deposit.

Lastly, the Plaintiffs submitted that they had adduced sufficient evidence to show that if execution of the order is not stayed, they are likely to suffer irreparable loss and damage as they will be deprived the opportunity to conduct their real estate business. Further, that the appeal he intends to file and for which a Notice of Appeal has already been given has very high chances of success and will be rendered nugatory if the order of 20/3/2014 is not stayed.

Kyalo & Associates, the Interested Party's Advocates filed submissions dated 9th September 2013, and reiterated that that a prayer for review and a prayer for stay of execution are mutually exclusive. In addition that the averments raised for review of the orders were considered during the hearing of the application dated 26th June 2014.

The counsel relied on the conditions for stay of execution as provided for in Order 42 Rule 6(2) of the Civil Procedure Rules, and the decisions in Joseph Chege vs. Gikiru Heho (2008) eKLR, Ben Mukhana Wepukhulu Vs. Tom David Wanyonyi, (2014) eKLR, Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation), (2004) EA, and Butt vs. Rent Restriction Tribunal, Civil Application No. NAI 6 of 1979 on the requirement for satisfaction of these conditions.

The counsel submitted that the Plaintiffs had not provided any evidence to prove how the paying of the security of costs as ordered by the court would cause them any substantial loss, and reiterated that it is the Interested Party that will suffer irreparable loss and damage since he has been prevented by the injunction orders issued in favour of the Plaintiffs from occupying his property. Lastly, it was contended by the Interested Party that the Plaintiffs had not furnished the court with any security for costs as ordered, but instead sought a review of the orders for security for costs and a stay of execution at the same time.

The Issues and Determination

I have carefully considered the pleadings and submissions made by the Interested Party and Plaintiffs. The preliminary issue arising is whether the relief of review is available to a party once a Notice of Appeal has been filed as regards that order. The Interested Party has argued in this respect that the prayers for stay of execution of this Court's order and for review of the same order are mutually exclusive. The Plaintiffs have on the other hand argued that no appeal has been preferred against the order and ruling of this Court of 20th March 2014, and that they have only filed a Notice of Appeal, a copy of which they annexed.

Section 80 of the Civil Procedure Act provides as follows with regards to review:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

It is evident that the relief of review is only available where an appeal has not been preferred as against an

order. Once an appeal is preferred then the door is closed on review and for good reason, as the Appellant is then seeking a re-examination of the affected order on its merits, and the court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal.

The question therefore is whether an appeal has been filed in the present suit so as to exclude review of this Court's order. It is notable that the Plaintiff's application for stay of execution has been brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(4) provides as follows with regard to the effect of a Notice of Appeal in stay proceedings:

“ For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”

It is thus evident that an application for stay of execution of an order cannot co-exist with an application for review of the same order where a Notice of Appeal has been filed, as upon filing the Notice of Appeal it is deemed for purposes of stay of execution that the appeal has already been filed. Any possibility of review of such order is therefore ruled out. In the circumstances this Court can therefore only consider the prayer and arguments made for stay of execution of this Court's order made on 20th March 2014 pending appeal, as the alternative prayer for review is not available to the Plaintiffs.

The outstanding issue therefore is whether the Plaintiffs have met the conditions for stay of execution pending appeal. The applicable provisions are Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provide as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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

Upon perusal of the court record, this Court finds that the Plaintiffs filed their application for stay of execution on 8th April 2014, after delivery of the ruling on being appealed from on 20th March 2014. They cannot therefore be said to be guilty of delay in making the application. On the other applicable conditions for stay of execution pending appeal, the Plaintiffs argue that they stand to suffer substantial loss if they deposit the 6 million Kenya Shillings as they will be denied the opportunity to conduct their real estate business which is dependant on cash flows. No evidence was however provided of the said business or cash flows, and in addition, the Plaintiffs admit to having property that is available for charging to provide the security ordered by the Court.

On the last condition as to provision of security, the Plaintiffs in their pleadings and submissions were emphatic that their prayer and offer of a bank guarantee of equal amount from a reputable bank was as an alternative to the prayer for stay of execution, and also as substitution of the order to deposit of Kshs 6 million in court. The offer of a bank guarantee is therefore not being offered as a security for the due performance of the orders of this court, but as an alternative.

The offer by the Plaintiffs to charge its property was also made in the context of the provision of a bank guarantee as an alternative. The 1st Plaintiff averred as follows in this regard in paragraph 17 of his supporting affidavit sworn on 8th April 2014:

“That I am ready and willing to have a Charge registered over the property known as House Number 13 on L.R No. 1160/42 by a reputable bank and to have the said bank provide a gurantee for payment of equal sum or amount that was ordered deposited in court as security by this Honourable Court on 20th March 2014.”

These averments were reiterated in paragraphs 10 -12 of the further affidavit sworn on 5th May 2014 by the same deponent as follows:

10. **“That indeed my application that the order made on 20/3/14 be varied is supported by Mr. Kabage in his Replying Affidavit at paragraph 8 (page 3), I reiterate that I am ready able and willing to have my property charged to a reputable bank for issuance of a guarantee for payment of the Kshs.6M.**
11. **That to succeed in having a reputable bank issue a guarantee, my advocate on record has advised me which advise I believe that a court order to that extent is paramount and necessary, hence my application hereto.**
12. **That following the orders of 20th March 2014 I applied for a bank guarantee with Chase Bank Ltd but the bank advised me that such an application can only be considered if it is in relation to an order made by an Honourable Court directing, that a party furnishes security by way of a bank guarantee. Annexed hereto and marked KK-1(b) are copies of documents in support.”**

In effect there has been no security offered by the Plaintiffs for the due performance of the order to deposit Kshs 6 million. On the contrary the charge and bank guarantee that they offered was as a variation and substitution of the said order, which would in themselves still require further security to be furnished. This court is therefore not inclined to grant the stay of execution sought, as the Plaintiffs have not offered any security as required by Order 42 Rule 6 of the Civil Procedure Rules.

The Plaintiffs’ Notice of Motion dated 8th April 2014 is therefore denied and the Plaintiffs shall meet the costs of the said Notice of Motion

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 31st day of July, 2014.

P. NYAMWEYA

JUDGE