



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OUKO (P), KARANJA & GATEMBU, JJ.A.)**

**CIVIL APPLICATION NO. E015 OF 2020**

**BETWEEN**

**JAFFARALI KASSAM ABDULLA....APPELLANT/APPLICANT**

**VERSUS**

**1. PAULINE MUTEE MAKUMU**

**2. KILUNGU JUSTUS MULI.....RESPONDENTS**

(Being an application for stay of execution pending appeal against the judgment of the Environmental & Land Court at Busia (Omollo, J.) dated and signed at Busia on 23rd September, 2019 and delivered in Mombasa on 7th October 2019 at Mombasa (C. Yano, J. ) *in E.L.C. No. 388 of 2010*)

\*\*\*\*\*

**RULING OF THE COURT**

1. The genesis of this application is that the respondents filed a plaint seeking the following orders;

- a. A declaration that the 1st *and* 2nd defendants (not named in the appeal) acted in contempt of court when they sold and transferred Plot sub-division No. 2444 (Original Number 1938/1) Section 1 Mainland North to the applicant herein;
- b. A declaration that the sale and transfer of Plot sub-division Number 2444 (Original No. 1938/1) Section 1 Mainland North was in breach of a fiduciary duty owed to the respondents by the 1st *and* 2nd defendants;
- c. A declaration that the sale and transfer of Plot sub-division Number 2444 (Original No. 1938/1) Section 1 Mainland North by the 1st *and* 2nd defendants to the applicant dated 26/6/2012 is null and void;
- d. An order of cancellation of the transfer dated 26/4/2012 and the entry thereof over Plot sub-division Number 2444 (Original No. 1938/1) Section 1 Mainland North;
- e. An order for specific performance of Deed of Agreement dated 27/10/2003 and a mandatory injunction compelling the 1st *and* 2nd defendants to, within 30 days of the order, perform their obligations under the agreement by executing a transfer of half share of Plot No. 2444/MN/1 and to perform every other act and avail every other document required by the respondents, Lands office and/or any other authority for prompt and effective registration of the respondent's half share of the aforesaid suit property to the respondents as equal shareholders;
- f. A declaration that the threat and/or intended eviction and/or interference is in breach of the Deed of Agreement, trespass to land and goods, illegal and unlawful;
- g. An injunction restraining the 1st, 2nd defendants (not parties herein) and applicant by themselves, their servant's and/or agents from evicting the respondent from the suit business premises, removing her goods, locking her out, obstructing her and her customers access to the business premises, or in any other way interfering with her quiet occupation of the business premises known as Petuscha Guest House or selling charging, or otherwise disposing any interest in Plot No. 2444/MN/1;
- h. An order for compensation of the value of the buildings, fixtures and movables destroyed on 28th, 29th *and* 30th July 2012 and all the consequential business losses by the 1st, 2nd, 4th defendants and applicant jointly and severally;

2. On 23rd September, 2019 the Judge entered judgment for the respondents as prayed in the plaint and awarded compensation of Kshs. 53,000,000/- for the demolished improvements as against the 1st, 2nd defendants and the applicant jointly and severally.
3. The applicant being aggrieved filed an application dated 29th November, 2019 before the Environment and Land Court prior to filing an appeal, seeking orders of stay of execution pending an intended appeal to this Court.
4. It was the applicant's prayer that the respondents herein, be restrained from interfering with the suit land or executing the judgment pending appeal. The applicant averred that unless restrained, the respondents would take possession of the land and cause it to be registered in their names and also execute the decree for the sum of Kshs. 53 million.
5. The application was opposed. The respondents justified the judgment and stated that the applicant needed to furnish security by depositing the sum of KShs. 53 million. The applicant filed a further affidavit contending to be a bona fide purchaser for value and faulting the judgment and stated that the current status quo should be maintained pending the appeal.
6. The ELC (Munyao Sila, J) partially allowed the application and gave a conditional stay of execution expressing himself as follows:-

**“There is judgment for the plaintiffs for both the land and the sum of KShs. 53 million. There needs to be security for the performance of this decree if it has to be stayed pending appeal. The applicant cannot say that the land is adequate security because it is now not his land for him to offer it as security. It has already been adjudged that the land ought to belong to the plaintiffs. The applicant cannot offer as security land that does not now belong to him. Neither is it enough for the applicant to say that he will pay the money aspect of the decree after the appeal. He needs to demonstrate that if he loses the appeal, he is able to pay the money.**

**I am prepared to grant a stay of execution pending appeal, if the applicant through his counsel, will confirm the availability of the sum of KShs. 53 million to counsel for the plaintiffs, within 30 days from the date hereof, in which case, such money to be deposited in a joint interest earning account in the joint names of counsel for the applicant and counsel for the plaintiffs. If this money is so deposited, there will be no registration of any disposition in the register of the suit property until the appeal is heard. However, if the money is not made available and not deposited as directed above, the applicant will have to pursue his appeal without the benefit of an order of stay of execution, and the plaintiffs will be at liberty to fully execute the decree herein. If the applicant abides by the order of deposit of security as ordered above, the costs of this application will be costs in the intended appeal. However, if no security is so deposited, the applicant will bear the costs of this application.**

7. Once again, the applicant was aggrieved by this decision and filed the instant application seeking stay pending appeal. At paragraph 7 of his supporting affidavit, he deponed that he was not able to avail Kshs. 53,000,000/- as ordered by the Court below saying he had assets far exceeding that amount but was not able to sell or liquidate them to enable him come up with the amount required and that he had not derived any benefit from the suit property after purchasing it for Kshs. 25,000,000/= eight years ago.
8. The applicant averred that the application was most urgent as the respondents had filed an application at the Environment & Land Court seeking execution of the judgment by registration of transfer of the suit premises in their favour and that should this be granted, the application and the intended appeal would be rendered nugatory and he would be denied of his constitutional right to be heard by the Court.
9. The respondents opposed the application vide a replying affidavit sworn by Pauline Mutee Makumu, the 1st respondent herein. She deponed that the applicant took one year two months to file the application, from the day judgment was delivered and that no explanation had been given.
10. The respondent averred that the applicant was challenging the ruling of the superior court where he was granted a conditional stay of execution which he had not appealed and that therefore the instant court lacked jurisdiction.
11. The respondent submitted that court orders are not issued in vain and relied on the cases of **Iris properties Limited & Another vs City Council of Nairobi (2016) eKLR** and **Teacher's Service Commission vs Kenya National Union of Teachers & 2 Others**. They also cited Order 42 rule 6 of the Civil Procedure Rules that stipulates that a 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.
12. We have carefully considered the application, responses and the submissions by the parties. The Court has the discretion to grant stay of execution orders but, it must be guided by well-established principles of the law. In the matter before us, we note that the applicant moved the ELC for orders of stay of execution and he was granted the orders sought but upon fulfilment of certain conditions. We have quoted the learned Judge's order *in extenso* above to illustrate the reasons given by the learned Judge for arriving at his decision.
13. We would like to clarify from the outset that this Court has jurisdiction to entertain an application for stay of execution under **Rule 5(2) b** of this Court's Rules regardless of whether such an application has been lodged before the court appealed from.

**Order 42, rule 6** of the Civil Procedure Rules provides as follows:-

**“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.**

(Emphasis ours).

The situation here is that the applicant got conditional stay orders from the ELC which orders were to automatically lapse after 30 days if the conditions the orders were predicated on were not fulfilled. The applicant neither complied with the said conditions, nor did he move this Court or the court below to set aside the said conditions if he found the same onerous. Instead, the applicant waited for several months after the order had lapsed and then moved this Court for the same orders. This is what the respondents have an issue with, and so do we.

14. Faced with a similar situation, this Court in **Civil application No. 251 of 2013, Yusuf Kifuma Chanzu v Equity Bank Limited & Another [2014] eKLR**, held:-

“It is not lost to us too, that the applicant had already obtained from Ogola, J. substantially the same orders that he is now seeking before this Court and that he did not comply with the terms upon which those orders were granted. He did not file any notice of appeal against the order of Ogola, J. and had not otherwise challenged the conditions upon which the stay of execution was granted. In **HUNKER TRADING CO LTD VS ELF OIL KENYA LTD, (supra)** on similar facts, this Court considered such action an abuse of the process of the court and waste of judicial time and resources. The Court expressed itself thus:

**“As the applicant did not appeal against the order of stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of Rule 5(2) (b) and section 3A and is therefore incompetent. The order of stay of execution on terms was subsequent to the decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to this Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources.”**

15. This case falls on all fours with the **Yusuf Kifuma Chanzu v Equity Bank Limited & Another** case (*supra*). In our view, the applicant’s conduct amounts to abuse of the court process which we cannot countenance. We hold the view that the terms of the conditional stay as ordered by the trial court were not unreasonable. We also note that this application was filed over one year after the impugned judgment was delivered and the applicant has had sufficient time to look for the security ordered by the ELC. In the circumstances we find this application devoid on merit and dismiss it with costs in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**