Rayori v Rayori (Legal representative of the Estate of Martin Ochieng Rayori - Deceased) & 3 others (Environment and Land Appeal E029 of 2022) [2024] KEELC 3766 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3766 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL E029 OF 2022

AY KOROSS, J

APRIL 25, 2024

BETWEEN

PHOEBE ORIDO RAYORI ..... APPELLANT

AND

ERICK ODHIAMBO RAYORI (LEGAL REPRESENTATIVE OF THE ESTATE OF MARTIN OCHIENG RAYORI - DECEASED) ..... 1ST RESPONDENT

DISTRICT LAND REGISTRAR BONDO ..... 2ND RESPONDENT

AIRTEL NETWORK KENYA LTD ..... 3RD RESPONDENT

SAFARICOM LIMITED ..... 4TH RESPONDENT

RULING

1st respondent's case

1. According to Sections 1A, 1B, and 66 (e) of the *Civil Procedure Act* and Order 42 Rule 6 (1) and (2), the Civil Procedure Rules, the 1st respondent has filed the instant notice of motion that is the subject for determination which is dated 22/02/2024 and seeks the following reliefs:

    a. Spent.

    b. Spent.

    c. There be a stay of execution of judgment and decree herein delivered on 15/02/2024 pending hearing and determination of the appeal.

    d. Costs of the motion be provided for.

2. The application is premised on the grounds outlined on the face of the motion and on the annexed affidavit of the 1st respondent Erick Odhiambo Rayori sworn on 22/02/2024.

3. The 1st respondent asserts that he is aggrieved by the decision of this court and lodged a notice of appeal and that the appellant has since commenced fencing off the suit property which would render the appeal nugatory and cause him irreparable harm.

4. Further, the 1st respondent contends he has a meritorious appeal and the appellant will not suffer any prejudice if the motion is allowed.

5. According to the 1st respondent, the motion was made in good time, the appeal has high chances of success, he will suffer substantial loss if the orders sought were not granted and he was willing to furnish security.

Appellant's case

6. The motion is opposed by the appellant's replying affidavit which she deposed on 1/03/2024. It is her position the process of execution is a lawful process and the 1st respondent has not demonstrated substantial loss.

7. She asserts the mere transfer of the suit property will not render the appeal nugatory as land parcel no. Siaya/Nyangoma 5051 (suit property) can still be retransferred back to the 1st respondent.

8. In addition, it is her position, she is 85 years old and the case had dragged in court for years and the 1st respondent is incapable of eviction as he is not in occupation of the suit property. According to her, the 1st respondent has not met the threshold for a stay of execution and the motion should be dismissed. The 2nd to 4th respondents did not participate in these proceedings.

1st respondent's submissions

9. The law firm of M/s. Bruce Odeny & Company Advocates which represents him filed written submissions dated 12/03/2023. In the submissions, counsel identifies two issues as arising for resolution which are whether the 1st respondent has met the threshold for stay of execution and the costs of the motion.

10. Anchoring on Order 42 Rule 6 (2) of the Civil Procedure Rules, counsel submits the court's discretion has to be exercised judiciously and within the confines of the law and relies on the case of Antoine Ndiaye v African Virtual University [2015] eKLR.

11. Counsel identifies 3 principles that guide this court when considering applications for a stay of execution pending appeal which are substantial loss, security, and unreasonable delay.

12. On loss and relying on Antoine Ndiaye (Supra) counsel outlines several losses which were not advanced in the grounds to the motion or supporting affidavit. Counsel further submits the 1st respondent will suffer substantial losses which cannot be compensated by an award of damages.

13. On the principle of security, counsel left this to the court's discretion while on delay, counsel submits the motion is filed timeously; judgment was rendered on 15/02/2024 and the motion was filed on 22/02/2024. On the issue of costs, counsel sought for costs.

Appellant's submissions

14. The law firm on record for the appellant M/s. Ochanda Onguru & Co. Advocates filed their written submissions dated 14/03/2024. In rehashing averments contained in the appellant's replying affidavit, counsel submits the 1st respondent has not met the threshold for a stay of execution pending appeal.

15. According to counsel, execution is a lawful process and the essence of a stay of execution pending appeal is to preserve the subject matter of the appeal and to buttress his argument, cites the case of Ena Investment Limited v Benard Ochau Mose & 2 others [2022] eKLR.

16. On the principle of loss, counsel submits the motion, its grounds and the supporting affidavit are wanting since none is disclosed and, on that basis, the motion should be dismissed and relies on the case of Richard Muthusi v Patrick Gituma Ngomo & another [2017] eKLR.

Issues for determination, Analysis, and Determination

17. Having considered the motion and its grounds, affidavits, and parties' rival submissions and being guided by provisions of law and judicial precedents, this court shall adopt the 1st respondent's issues as the matters arising for determination.

18. Before I proceed further, I must mention the 1st respondent introduced facts in his submissions. Parties are reminded submissions are arguments. Further, the authorities that the 1st respondent relies upon were not availed to this court and on that basis, this court will not consider them. I will now proceed to address the issues together.

19. If one is seeking a stay from the court from whose decision an appeal is preferred, an applicant has to satisfy the court that he will suffer a substantial loss, has moved the court without unreasonable delay, and has furnished security. As submitted, these principles are laid out in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and these provisions state: -

> "(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.

20. These provisions of the law were expounded in the Court of Appeal decision of Halai and Another v Thornton & Turpin [1963] Limited [1990] eKLR where the court stated: -

> " Thus, the Superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay."

21. The 1st respondent has appealed against the decision of this to the Court of Appeal. Since it is the court to which the decision of this court has been preferred, it has a wider discretion than this court and some of the principles that guide such an appellate court include whether the appeal is arguable or will be rendered nugatory.

22. The 1st respondent's assertions before this court that the appeal will be rendered nugatory and grounds of appeal are meritorious and arguable are misplaced; they are the preserve of the Court of Appeal.

23. Being a court against whose decision an appeal has been preferred, its discretion is essentially limited to such conditions as substantial loss, security, and unreasonable delay, and as submitted by both counsels, such discretion has to be exercised judiciously. However, at times this court is called upon to give effect to the overriding objective of the *Civil Procedure Act* as set out in Sections 1A and 1B thereof.

24. On the principle of unreasonable delay, it is undoubted the motion was filed close to a week after the decision being appealed against was rendered. It therefore follows the motion was filed timeously. On the principle of security, it is left to the court's discretion.

25. On the outstanding principle of substantial loss, this court has to determine whether the 1st respondent will suffer substantial loss and if so, what will be the nature of the security and how will it be settled?

26. Both counsels submitted on the principle of substantial loss which is the cornerstone in an application for a stay of execution and the Court of Appeal decision of Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR which I hereby adopt stated thus on this principle:-

> " ... it is not enough for the Applicants 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 the substantial loss that the Applicants stand to suffer if the Respondent executes the decree in this suit against them."

27. Now, turning to the grounds of appeal and supporting affidavit, the 1st respondent avers he will suffer irreparable harm without disclosing the nature and extent of the loss he will suffer.

28. The onus was on the 1st respondent to prove his loss and in the absence, I must agree with the appellant that the 1st respondent has not demonstrated by way of evidence the loss that will be occasioned upon him if execution proceeds. I am afraid the 1st respondent merely left it to the court's speculation.

29. It must be noted not one but all the conditions for a stay of execution has to be met and by failing to meet the condition for substantial loss, I find the 1st respondent has not met the threshold for a stay of execution.

30. For the foregoing reasons and findings, the upshot is that the notice of motion dated 22/02/2024 is devoid of merit. It is accordingly dismissed with costs to the appellant.

    It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 25TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

25/4/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Omondi h/b for Mr. Ochanda for the appellant.

Miss Khisa for the 1st respondent

N/A for the 2nd respondent

Miss Ouma for the 3rd respondent

N/A for the 4th respondent

Court assistant: Ishmael Orwa