



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 16 OF 2017

JOSEPHINE MUENI MBATHA.....APPLICANT

VERSUS

GABRIEL NJUE JOSEPH.....RESPONDENT

RULING

1. **Josephine Mueni Mbatha**, the applicant, has taken out a motion on notice dated 16th January, 2020 and filed on the same day for stay of execution of the judgment and decree of this court, (**Nyakundi, J.**) delivered on 11th December, 2019 pending appeal. The application has been brought under Order 22 Rule 22 of the Civil Procedure Rules, 2020.

2. The application is premised on the grounds on the face of the motion and on the affidavit by the applicant sworn on the 16th January 2020.

3. The grounds on the face of the motion include that in its judgment, the court declared **Parcel No. Kajiado/Kaputiei North/19876** Matrimonial property, which should be divided equally; that the applicant being dissatisfied with the said judgment, is desirous of appealing against that decision and has filed a notice of appeal; that the respondent violently entered the premises and delivered letters to tenants threatening them with dire consequences and verbally insulted a number of the tenants and has threatened them eviction from the property. The applicant further contended that if stay if not granted, her appeal will be an academic exercise.

4. In the replying affidavit, the applicant deposes that the respondent has threatened the tenants in the premises and some of them are considering moving out which will expose her to financial hardships. She states that the respondent has indicated that he wants to execute the judgment and decree which threatens her appeal, and unless the court grants stay of execution the intended appeal will be rendered nugatory.

5. The respondent has filed a replying affidavit to the application sworn on 3rd February 2020 and filed on 4th February 2020. He deposes that among the orders made in the impugned judgment was that the property be valued by a professional valuer within 30 days from the date of judgment. He also states that on 19th December, 2019 his advocate wrote to the applicant informing her that the respondent would visit the premises with a valuer on 6th January, 2020 at 10 am; that the applicant responded that the date was not convenient to her and that his advocate wrote to the applicant's advocate to have the date confirmed but in vain.

6. The respondent denies that he violently visited the premises and threatened the tenants and that no tenant has moved out of the premises. It is the respondent's contention that a notice of appeal does not operate as stay of execution or proceedings under a decree or order appealed from. He relies on Order 42 Rule 6(1) of the Civil Procedure Rules. He also contends that the notice of appeal filed by the applicant is not a bar to execution, as no substantial loss will be suffered.

7. During the hearing of the application, Mr. Mutunga, learned counsel for the applicant, has moved the motion and argued that the applicant has moved to appeal against the judgment. Counsel submits that if stay of execution is not granted, the applicant will suffer irreparable loss. He argues that tenants will move out of the premises which will be detrimental to the applicant.

8. According to counsel, if valuation is done now there may be need for further valuation which will be expensive in the end. He also argues that if execution proceeds, it will mean the property shared before the appeal is determined and should the appeal succeed, the property will have been shared. He retransferred back to the applicant. He relies on **Butt v Rent restriction Tribunal** (Civil App No. NAI 6 of 1979) and **Amal Haullers Ltd v Abdul Nasal Khan Hassen** [2017] eKLR to urge for the prayers.

9. Betty Rashid, learned counsel for the respondent, submits in opposition to the application, first, that no substantial loss will be suffered. According to counsel, all the respondent wants to do is have the property valued and have her half share as declared by the court. Counsel therefore argues that alone will not cause substantial loss.

10. Second, counsel contends that a notice of appeal does not operate as stay of execution. In counsel's view, unless the applicant shows that there will be substantial loss the application should not be granted.

11. Third, counsel submits that if valuation is done, it will assist in determining the value of the shares of each party. She argues that the applicant is currently enjoying all rent from the property at the detriment of the respondent. Counsel argues that the authorities relied on are distinguishable.

12. Counsel points out that in the decision in **Butt v Rent Restriction**(supra), the court ordered security for costs. Regarding the decision in **Amal Haullers Ltd v Abdul Nasal Khan Hassen**(supra), is of a persuasive value being of a court of concurrent jurisdiction.

13. Ms. Rashid contends that the power to grant stay is discretionary and not absolute and that the applicant has not shown that she will suffer substantial loss. She urges that the application be dismissed with costs.

14. I have considered the application, the response and submissions made on behalf of the parties. I have also considered the authorities relied on. This is an application for stay of execution pending appeal and although it is said to be brought under Order 22 Rule 22, the proper Order is 42 Rule 6(1)(2) of the Civil Procedure Rules.

15. The rules give this court a wide discretion to grant stay pending appeal. However, such discretion is to be exercised judiciously and under well-settled principles. Most important of all is that an applicant must establish that if stay is not granted he or she will suffer substantial loss. The application must have been brought without delay and that the applicant has offered security for the performance of the decree should the court so require.

16. Order 42 rule 6 provides;

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 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 of stay shall be made under sub rule (1) unless-

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and 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"

17. When considering the grounds for granting or refusing to grant stay pending appeal, the Court of Appeal stated in **Butt v Rent Restriction Tribunal**(supra) that;

"i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion

should be exercised in such a way as not to prevent an appeal.

ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

18. Although stay may be granted as a matter of discretion, the discretion must be exercised judiciously and only where circumstances of the case may permit. That is why from the wording of Order 42 rule 6, the guiding principle is that the applicant should show that he will suffer substantial loss if stay is declined.

19. As to what substantial loss is, the court observed in James Wangalwa & another v Agnes Naliaka Cheseto [2012]eKLR, the Court;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”(emphasis)

20. In Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR, the Court again stated that the only way to show or establish substantial loss is by demonstrating that if the decretal sum is paid to the respondent, that is; execution is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse because he is a person of no means.

21. Further, in Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] 2 KLR 63, the Court went on to state that in attempting to satisfy a court that substantial loss is likely to be suffered, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance. The court made it clear that it is not enough merely to state that substantial loss will result, or that the appeal, if successful, will be rendered nugatory as that will not do.

22. As already adverted to herein above, the grounds under which a stay should be granted are that the applicant should have moved the court without delay, should show that he or she will suffer substantial loss and is willing to offer security if the court were to so require.

23. On the first ground, there is no doubt that the application was filed timeously. The judgment was delivered on 11th December, 2019 while the application was filed on 4th January, 2020. This was timeous given that there was Christmas recess between 21st December and 13th January. The applicant cannot be faulted on this ground.

24. Regarding whether the applicant has established substantial loss, there are two varied arguments for and against this ground. The applicant argues that if the property is valued and shared, that is; if execution proceeds, the applicant will suffer irreparable loss. The argument put forward by the applicant is that if her appeal was to succeed, the property will have been subdivided and shared. This she argues will amount to substantial loss and her appeal will be an academic exercise

25. The respondent on his part contends that the applicant has not shown that she will suffer substantial loss. According to the respondent all he wants is valuation of the property and sharing of their portions and shares. This he argues will not result in substantial loss. He also argues that the notice of appeal filed does not operate as stay of execution. Further to grant stay of execution or not is a matter at the discretion of the court.

26. The court declared the property matrimonial property to be valued and shared equally between the applicant and the respondent. Valuation was to be done within thirty days. The respondent has moved to actualize that decision while the applicant has intimated her desire to challenge the judgment on appeal. She has signified that intention by filing a notice of appeal.

27. The applicant is exercising her statutory right of appeal. On the other hand the respondent has a judgment and decree in his favour. There is no doubt the if valuation is done now, it will mean that the property should be shared based on that valuation as the basis for determining each party's share. If the property is shared equally as decreed by this court, it will mean each party has the right to deal with his or her share of the property as he or she desires.

28. What effect would that have on the intended appeal if the property is shared" There is no doubt that the result would most likely affect the result of the intended appeal. There would be no much if the appeal were to be dismissed. However, if the appeal were to succeed when the property has already been shared, there would be difficulties to trace the property and return it to the original state it was before execution of the decree to be appealed against.

29. The purpose of stay is to maintain the status quo by preserving the subject matter of the appeal pending the decision of the court appealed to. And as was observed by the court in *Butt v Rent Restriction Tribunal*(supra), the general principal when considering to grant or refuse a stay is that if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

30. Considering the unique circumstances of this application where the property is to be shared equally or one party purchases the share of the other once valuation is done within a given time, and given that the applicant is exercising his right of appeal, the circumstances militate in favour of granting stay of execution. However, this should be on conditions to protect both parties' interests.

31. Consequently, the application dated 16th January, 2020 is allowed and I make the following orders:

a) Stay of execution of the judgment and decree made herein on 11th December, 2019 is hereby granted pending the hearing and determination of the intended appeal.

b) All rents and income from Parcel No. Kajiado/Kaputiei North/19876 be deposited in a joint interest earning account in the names of advocates for the parties with effect from the date of this ruling.

c) Each party do bear own costs for this application.

Dated, signed and Delivered at Kajiado this 23rd day of April, 2020

E. C MWITA

JUDGE



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