



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC ELC APPLICATION NO. 13 OF 2017

JOHANA MBUGUA KARANJA.....APPLICANT

-V E R S U S-

MARGARET WAITHERA GITICHE.....RESPONDENT

RULING

Before me for determination is the Notice of Motion dated 3rd March 2016 in which the Applicant seeks the following orders:

1.spent

2.spent

3. That there be temporal injunction restraining the Respondents from executing the Judgment/decree in Nyahururu CMCC No. 98 of 2014 dated the 25th May 2015

4. That there be temporal injunction restraining the Respondent from evicting the Applicant from the parcel of land known as No. Nyandarua/Silibwet 4750 pending the hearing and determination of his intended Appeal.

5. Lastly, that there be an extension of time to file an appeal out of time against the Judgment of Nyahururu Chief Magistrate's court dated the 25th May 2015 in Nyahururu CMCC No. 98 of 2014.

6. The application was supported by an affidavit sworn by the Applicant Johana Mbugua Karanja on the 3rd March 2014. The grounds on which the application was premised on were;

7. That on the 27th September 2004 he had bought from the late Tabitha Njoki Mwangi, a piece of land measuring 1/2 (half) acre out of parcel land known as Nyandarua/Silibwet 525.

8. That later this piece of land was further subdivided, without his knowledge, giving rise to the present land suit Nyandarua/Silibwet 4750 which is currently registered in the Respondents name.

9. The applicant deposed that after buying his piece of land, he settled on his 1/2 (half) acre of land with his family from 2004 and has called the said place home for the last 12 years.

10. He also deposed that during the trial in the Magistrate's court, he defended the suit in person and as a layman did not know the time frame in which to lodge his Appeal.

11. That evicting him from the said suit, following the Judgment, he stood to suffer irreparably and would be rendered destitute.

12. He also averred that he had an arguable Appeal as the trial court failed to take into account his proprietary interest in the land.

13. On 11th July 2016, the applicant successfully sought stay of execution of the decree in the Nyahururu CMCC No. 98 of 2014 pending the hearing of this application interparte. The interim orders were extended up to 4th April 2017 after the court had satisfied itself that parties had filed their submissions respectively.

14. The parties then agreed to dispose of this application by filing written submissions.

15. On the 4th April 2017, in the cause of prosecuting their applications, both parties consented to having filed their written submissions to which they did not want to highlight on, but asked the court render its ruling thereafter.

16. I shall now endeavor to list the different prayers sought by the Applicant for ease of reference in the following way.

a) Leave to appeal out of time

b) Stay of execution of the Judgment in Nyahururu CMCC No. 98 of 2014.

c) Temporal injunction restraining the Respondent from evicting him pending hearing and determination of his intended Appeal.

17. The applicant/appellant filed his written submissions on 22nd February 2017 whereas the Respondent filed her written submissions on 3rd April 2017

18. The Applicant in his written submissions filed on the 22nd February 2017 tackled the above captioned issues as follows;

a) Leave to appeal out of time

19. The applicant relied on the unreported cases of *Nyeri HCMA No. 112 of 2005, Ann Muthoni Muchiri vs David Kariuki Mundia*, (a copy which was not provided for) and the case of *Nakuru HCMA No. 106 of 2014 Samuel Mbutia Mwangi vs Beatrice Njoki Wainaina* which cases have apparently set down the principles to be considered by the court before granting leave to file an appeal out of time, the same were enumerated as;

i. Length of the delay;

ii. Reasons for the delay

iii. Merits of the intended appeal

iv. The prejudice if any that may be occasioned on the respondent

20. On this limb Counsel's, written submissions were to the effect that the applicant had satisfied the above conditions. Judgment had been delivered on the 25th May 2015 and that although the applicant was expected to file his appeal on the 25th June 2014, he instead filed the present application on the 4th March 2016. That the delay was not inordinate.

21. The reason given for the delay was that the applicant was a lay man and had no access to legal representation.

22. Counsel pointed out that the draft memorandum of the appeal proved that the Applicant had a meritorious intended Appeal because the memorandum raised issues on the validity of the sale agreement between the Applicant and the deceased vendor. Whether the same could be disregarded for having been written in vernacular (kikuyu language) and whether the same had been made before or after the Judgment, answers which, the Applicant felt, could be provided for during the hearing of the Appeal.

23. There was also the contention that the Appeal had merit since it raised the issue of the Applicants proprietary rights which were disregarded by the trial Magistrate.

24. Lastly, that no prejudice would be occasioned by the Respondent if leave to file the Appeal out of time was granted, since the suit land was available to her until the disposal of the Appeal.

b) Stay of execution of the Judgment in Nyahururu CMCC No. 98 of 2014.

25. On this prayer, the applicant's submission was pegged on Order 42 rule 6(1) of the Civil Procedure Rules as well as on the unreported case in *Nairobi HCC No. 2411 of 1990 Indah Singh Ltd vs. Njoroge Gichara*, which summarized the conditions that needed to be met by an applicant in order to be granted Stay of execution. The said conditions were stated as:

i. The court was to be moved timeously

ii. willingness to provide security pending appeal

iii. the applicant would suffer substantial loss unless stay was granted, keeping in mind that he had lived on the subject suit land for the past 13 years.

26. It was further submitted that the Applicant was in occupation of the suit land and evicting him from therein after 13 years would render him homeless and a destitute

27. The applicant's contention was that he has satisfied all the above conditions.

c) Temporal injunction restraining the Respondent from evicting him pending hearing and determination of his intended Appeal

28. Finally on this last prayer, the Applicant relied on the unreported cases of *Naresh Darbar vs Thatra Orchids Ltd and 2 others* and the case of *Anglican Church of Kenya vs. the Secretary Muranga County Government and another* (both authorities had incomplete citations)

29. It was pointed out that based on these authorities and on order 42 rule 6(6) of the Civil procedure Rules, the court in granting temporal injunctive orders pending hearing and determination of his intended Appeal, ought to consider the following;

- i. the appeal was not frivolous.
- ii. if the injunction was refused, it would inflict greater hardship that it would avoid.
- iii. the applicant had shown that to refuse the injunction would render the appeal nugatory.
- iv. the court should be guided by the principles of *Giella versus Cassman Brown* which principles had been satisfied by the Applicant.

30. According to the Applicant, he had a meritorious and arguable appeal with very high chances of success. The said appeal, according to the applicant, would be rendered nugatory and he stood to suffer substantial loss should execution proceed. **It was further submitted that the Applicant was in occupation of the suit land and evicting him from therein after 13 years would render him homeless and a destitute. That the balance of convenience was in the applicant's favor.**

31. The above requirements had therefore been fully satisfied by the Applicant.

32. In opposing the application, the Respondent conceded that the 1st and 2nd grounds of the application had been spent but never the less urged this Court to dismiss the Applicant's application in total with costs. There was reliance on the sworn affidavit of Margaret Waitthera Gitiche sworn on the 22nd June 2016 and filed on the 23rd June 2016. The Respondents' submissions mirror the sworn affidavit.

33. The Respondent, while opposing the application to file the appeal out of time, relied on section 79G of the Civil Procedure Act and the which gave the appellate court discretion to extend time for filing an appeal from the subordinate Court to the High Court.

34. They also relied on the unreported cases *in Nakuru HCMA No. 106 of 2014 Samuel Mbuthia Mwangi vs Beatrice Njoki Wainaina* relied upon by the Applicant as well as *Kerugoya ELC Misc Application No. 13 of 2015, David Mithamo Gatitu vs Boniface Karimi Nyamu*, cases which was submitted, set down the principles, herein above stated, upon which a Court could grant extension of time.

35. The Respondent pointed out that the Judgment in this matter had been delivered on the 25th May 2015 in the presence of the Applicant who was then given 120 days to vacate the land and was then served with the decree and a Penal Notice on the 26th June 2015 and thereafter with a Notice to show cause on the 8th December 2015. The applicant did not appeal against the said order. Annexures marked MWG 2, 3, 4, 5, and 6 were also annexed to the response to support their submission.

36. The Applicant instead filed the present application on the 4th March 2016 which was (nine) months after the delivery of the judgment yet he was aware of the existence of the judgment.

37. It was submitted that ignorance of the law was not an excuse and as such the Applicant could not rely on the same in his defence for not having filed the present application on time. Further that the court was not under any statutory duty to inform him about his right of Appeal. The delay, it was submitted, was inordinate and his explanation of delay for more than 30 days as is prescribed by law was therefore not tenable.

38. The Respondent further submitted that the Applicant, after receiving information from the OCS Ngano Police station that he would be evicted from the suit land on the 7th March 2016, filed the present application which, according to the Respondent, was an afterthought.

39. Further submissions were to the effect that the purported sale of agreement tendered in by the Applicant was not translated from Kikuyu language into either of the official languages.

40. Secondly, in transacting the said alleged sale, there was no consent from the Land Control Board thus making it void and as such the Applicant did not acquire any proprietary rights over land parcel No. Nyandarua/Silibwet 525 or its subdivision including land parcel No. Nyandarua/Silibwet 4750 (the suit Land)

41. The Respondent while arguing her case, relied on the Court of Appeal decision in the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others, [2014] eKLR* to emphasize on this point and further on section 6(1) of the Land Control Board Act which states;

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b)

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act

42. In the absence of a consent form the Land Control Board, it was submitted, the Appeal had no chance of success.

43. The Respondent further submitted that if the application is allowed she would suffer serious prejudice as the judgment in the Nyahururu CMCC No. 8 of 2014 was entered against all 8 defendants of which none of them have filed their Application/Appeal save for the Applicant.

44. The Respondent took all the requisite steps towards its execution, and by allowing this application thereof, the Respondent would not be able to evict all the other 7(seven) defendants from her land which is registered in her name and which was decreed to her by the trial court.

45. On the issue of stay of execution, and temporal injunction, the Respondent submitted that it would all depend on whether or not leave to file the Appeal out of time would be granted and went further to state that the said Application should fail.

46. She relied on the case of **Peter Nganga Mwaura Vs Alfred Mbugua Ngugi [2008] eKLR**, **Peter Rugu Gikanga and another vs Weston Gitonga and 10 others [2014] eKLR** as well as on order 42 Rule 69(2) of the Civil Procedure Rules.

47. The Respondent submitted that the Applicant, in his submission, had only stated that he would suffer irreparable loss if stay of execution was not granted but had not demonstrated the same by swearing an affidavit, or presenting other evidential Material.

48. Further, that the Applicant had not given any form of security.

49. It was thus submitted that the plaintiff had not fulfilled the three requirements that should be fulfilled in order to be granted a stay of execution of judgment.

50. On the issue of granting temporal injunction pending appeal, the Respondent cited the case of **Naresh Darbarbar vs. Thara Orchards Ltd and 2 others(2008)eKLR** among others which case laid down the principles the court ought to consider before issuing an order for temporal injunction pending appeal.

The said principles include:

(a) The discretion will be exercised against an applicant whose appeal is frivolous (see **Madhupaper International Limited vs Kerr (1985) KLR 840** The applicant must state that a reasonable argument can be put forward in support of his appeal *see J.K. Industries vs KCB (1982-88) KLR 1088*.

(b) The discretion should be refused where it would inflict greater hardship than it would avoid

(c) The applicant must show that to refuse the injunction would render his appeal nugatory.

(d) The Court should also be guided by the principles in **Giella vs Cassman Brown & Company Ltd (1973) EA 358**.

51. The respondent reiterated that the sale agreement upon which the Applicant had based his intended Appeal, was void by operation of the law there having been no consent acquired from the Land Board as is required by the law.

52. The respondent submitted further that the Applicant had not demonstrated how he would suffer substantial loss if the order for temporal injunction was not granted. She relied on the case of **Kenya shell limited vs. Kibiru and another (1986) KLR 410** where the court of appeal had held that the burden lay on an Applicant to demonstrate the likelihood that they would stand to suffer substantial loss if the order for temporal injunction was not granted. The Applicant had not demonstrated through affidavit or evidence that he would suffer substantial loss and/or that this refusal would render his intended appeal nugatory.

53. Further submission by the Respondent was to the effect that the principles that were to be met before the granting of an injunction as laid down in the case of **Giella vs. Cassman Brown & Company Ltd** had not been satisfied/demonstrated by the Applicant.

54. The Applicant had failed to establish the first principle set down in the **Giella vs. Cassman Brown & Company Ltd** to wit, establishing a prima facie case with a probability of success, and therefore the court ought not to look at the other two tests for granting the temporal injunction.

The court was therefore asked to dismiss the applicant's application with costs.

55. Having considered the application, the supporting affidavit and the written submissions hereto, I opined that the Application dated 3rd March 2016 herein was not brought without unreasonable/excusable delay.

56. Judgment was delivered on the 25th May 2015 in the presence of the applicant who was given 120 days to vacate the land and was then served with the decree and a penal Notice on the 26th June 2015 and thereafter with a Notice to show cause on the 8th December 2015. The applicant did not appeal against the said order. Instead he filed the present application on the 4th March 2016 which was nine (9) months after

the delivery of the judgment yet he was aware of the same. The delay was inordinate in my humble opinion.

57. The Applicant's explanation of why it took him nine (9) months from to file the application for stay, the subject of this Ruling holds no water as he was aware of the judgment since it was delivered in his presence. He cannot now turn around and say that he was a lay man and did not know what to do next. Ignorance is not an excuse.

The application for Leave to appeal out of time fails.

58. The trial magistrate in her Judgment, found that the sale agreement between the Applicant and the deceased one Tabitha Njoki Mwangi, was void as there had been no consent from the Land Control Board allowing this transaction which was in contravention of Section 6(1) of the Land Control Board Act. The trial magistrate, in the absence of the said consent, had found the Respondent to be the absolute proprietor and legal beneficial owner of the suit land.

59. The court also finds that the Applicant has offered no security for the performance of the decree, and taking into account the unreasonable and inexcusable delay in filing the application, he should have figured out what security to provide in the event a stay was granted. In any event a stay of 120 days had already been given, he refused to take advantage of that period to approach court for extension of that period.

The Applicant on the question of security also fails.

60. It is clear from the Replying Affidavit of the Respondent Margaret Waitheera Gitiche sworn on the 22nd June 2016 and filed on the 23rd June 2016 that 7 out of the 8 Defendants have moved out of the suit land in obedience to the order of court, only the Applicant persists on living on the land, allegedly because he has no alternative land. This, with due respect, is no ground for granting a stay of execution. In **Charles Wahome Gethi vs. Angela Wairimu Gethi** (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007), the Court of Appeal held -

i. "... 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 execute the decree in this suit against them."

61. Indeed as it was held in the said case (**Charles Wahome Gethi vs. Angela Wairimu Gethi**) the Applicant has not shown or suggested that he would suffer substantial loss rendering the appeal nugatory if he was evicted from the land before the intended appeal was determined. On the balance there is no evidence that the Applicant would suffer substantial loss if a stay was not granted.

62. The court has to balance the interest of the Applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of her Judgment. See **Attorney General vs. Halal Meat Products Ltd Civil Application No. Nai. 270 of 2008; Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410; Mukuma vs. Abuoga [1988] KLR 645.**

It was stated by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

63. In an application of this nature, the Applicant should show the damages he would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgment and that would be denying a successful litigant of the fruits of her judgment which should not be done if the Applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Ltd vs. Benjamin Karuga Kibiru and Another [1986] KLR 410; 1 KAR 1018; [1986-1989] EA 266.**

64. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay; and 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.

65. The application for Stay of execution of the Judgment in Nyahururu CMCC No. 98 of 2014 herein fails.

66. Having failed on all three grounds set out in Order 42 rule 6(2) of the Civil Procedure Rules, 2010, there is no basis for allowing the application.

67. In the result, the Defendants/Applicants' Notice of Motion dated the 3rd March 2016 and filed on 4th March 2016 lacks merit and is hereby dismissed with costs to the Plaintiff/Respondent.

Dated and delivered at Nyahururu this 30th day of May 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE