



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

HCCC NO. 90 OF 2011

JOHN GATERI KIMANI.....1ST PLAINTIFF

CHARLES MUNENE KINGI.....2ND PLAINTIFF

-VERSUS-

NDERITU THATHUA aLias KAYIYI IHUTHIA.....DEFENDANT

RULING

1. I have before me two applications for determination. The first one is by the plaintiff seeking orders that the Registrar signs the necessary documents to give effect to the decree given on 22nd November, 2016. The second application is by the defendant seeking an order of stay pending appeal.

I will begin by considering the defendant's application for stay because if allowed, it will not be necessary to consider the plaintiff's application at this stage.

2. The defendant's application is dated 14th February, 2017 seeking the following orders;

1. That this application be certified as urgent and be heard ex-parte in the first instance due to its urgency.

2. The Honourable court be pleased to grant an order of stay of execution of the Judgment and or decree delivered on 22nd November, 2016 in this matter, pending the hearing and determination of this application.

3. The Honourable court be pleased to grant an order of stay of execution of the Judgement and or decree delivered on 22nd November, 2016 and all other consequential orders, pending the hearing and determination of the applicant's appeal.

4. The Honourable court be pleased to grant an order of stay of execution of the Judgment and or decree delivered on the 22nd November, 2016 in this matter pending the hearing and determination of this application.

5. Costs of this application be provided for.

3. The application is said to be prompted by the Judgment of this court delivered on 22nd November,

2016. The defendant being dissatisfied with the Judgement, filed the instant application pending hearing and determination of his appeal.

4. The application is grounded on the apprehension that if execution of the decree given on 22nd November, 2016 takes place, he will suffer substantial loss and his appeal will be rendered nugatory. Further, that if the application dated 23rd December 2016 is allowed, the Deputy Registrar will proceed and sign transfer documents to allow issuance of the title to the plaintiffs and he will not be able to reclaim the suit property. He states that he is ready and willing to abide by any conditions and terms imposed by the court.

5. The application is supported by the affidavit sworn by the defendant on **14th February, 2017** in which the grounds in the application are reiterated. In support of the averments contained in the application, the defendant has annexed to his supporting affidavit a letter addressed to the Deputy Registrar received on 24th November, 2016 requesting for certified typed proceedings and Judgment marked NT-JA, notice of appeal dated 24th November 2016 and draft memorandum of appeal (undated) marked NT 2.

6. The application is opposed. In his replying affidavit sworn and filed on **9th March 2017**, John Gateri Kimani, the 1st plaintiff herein, deposes that the application for stay is unmerited and meant to delay the disposal of the dispute; the delay in filing the instant motion is inordinate having been filed 3 months after Judgment was delivered; that the application was filed to preempt the application for execution coming up for hearing; that the intended appeal is not arguable and has no chances of success and that the applicant is trying to introduce new issues which he never raised during the hearing of the case.

7. After considering the application, the grounds and the affidavits, I find the issue for determination to be whether the applicant has made up a case for grant of the orders sought.

The Law applicable to the application:-

8. The guidelines for grant of an order of stay pending appeal are provided for under **Order 42 Rule 6 (2)** which provides:-

“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 applicant.”

9. According to the pleadings/documents filed in this application, the judgement appealed from was delivered on 22nd November, 2016 and the current application was filed on 14th February, 2017, barely three months after the date of delivery of the judgment appealed from.

10. Although counsel for the respondent submitted that there was an unexplained delay of 3 months and that this application was prompted by the respondent’s application for execution which had been set down for hearing, I find the delay of less than three months not to be excessive. I have also taken into consideration that a notice of appeal was filed on 22nd November, 2016, two days after judgment was delivered and the applicant on the same date wrote letter to the Deputy Registrar requesting for typed proceedings and judgment.

11. On whether the applicants have demonstrated that they stand to suffer substantial loss unless the orders sought is granted, there is evidence that a decree was issued on 22nd November, 2016 and the respondent has filed an application for orders that the Deputy Registrar signs the necessary documents on behalf of the applicant to give effect to the aforesaid decree. I hold the view that if an order for stay is not

granted and the plaintiff's application is allowed nothing will stop the Deputy Registrar from signing the necessary documents to effect transfer and the respondents executing the decree before the appeal is heard and determined.

12. Noting that the respondents are in occupation of the subdivided portions of the suit property, I am of the view that they will not suffer any loss if the parcels they occupy are not transferred to them immediately. On the other hand, if the order of stay is not granted, the title to the suit property will be interfered with thereby changing the structure of the suit property.

13. On the issue of security, I note that the applicant has intimated his willingness to abide with any terms and conditions imposed by the court.

14. Being satisfied that the applicant has made a case for granting of the order sought, I allow the application on condition that the applicant shall, within 60 days from the date of this ruling, deposit in court the sum of Kshs.250,000 as security for costs. The applicant is also directed to, within 45 days from the date of this ruling, to file an undertaking to prosecute the appeal filed herein without unreasonable delay.

15. As the application by the defendant has succeeded, I find it unnecessary to consider the application filed by the plaintiff at this stage.

16. The costs of this application shall be costs in appeal.

Dated, signed and delivered at Nyeri this 18th day of December, 2017.

L N WAITHAKA

JUDGE

Coram:

Ms. Ndegwa h/b for Ms Mwikali for the applicant

Ms Maina h/b for Kebuka Wachira for the respondent

Court assistant - Esther