



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC MISC. APPL. NO. E012 OF 2021**

**STEPHEN KIBERE GATHIRU.....1<sup>ST</sup> APPLICANT**

**BRAND NETWORKS E.A LTD.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ABRAHAM KIBERE GATHIRU.....1<sup>ST</sup> RESPONDENT**

**LYDIA WAMBUI KIBERE.....2<sup>ND</sup> RESPONDENT**

**RULING**

The applicants filed an application in the Chief Magistrate Court at Milimani Commercial Court being Misc. Application No. 437 of 2020 (hereinafter referred to only as “the lower court case”) against the respondents seeking the following reliefs;

1. That an eviction order be issued in favour of the applicants in regard to L.R No. 330/612 Argwings Kodhek Road, Valley Arcade (hereinafter referred to as “the suit property”).
2. That Eric Ngari Kinyua be permitted to effect eviction of the Respondents.
3. That Police assistance be given to maintain peace and order.

The applicants sought the eviction of the respondents from the suit property under section 152E of the Land Act, 2012 on the grounds that the 1<sup>st</sup> applicant was the registered proprietor of the suit property, the 2<sup>nd</sup> applicant a tenant thereon while the respondents were trespassers. In a ruling delivered on 30<sup>th</sup> October 2020, the lower court (Hon. P.Muholi (MR.) SRM) dismissed the applicants’ application with costs to the respondents. The lower court held that the applicants had not satisfied the conditions set out in section 152E of the Land Act, 2012 to warrant the grant of the eviction orders sought. The lower court found that there was no evidence that the 1<sup>st</sup> applicant was the registered owner of the suit property and that a copy of the eviction notice was not served upon the local County Commissioner and the Officer Commanding Police Station. The court also found that the suit property was the subject of an active court case in the Environment and Land Court at Nyeri. The ruling of the court was delivered in the absence of both parties.

What is now before me is the applicants’ Notice of Motion application filed on 29<sup>th</sup> January, 2021 seeking; a stay of execution of the said ruling delivered on 30<sup>th</sup> October, 2020 pending the hearing and determination of the intended appeal against the same to this court, extension of time within which to file the intended appeal and/or an order that the memorandum of appeal attached to the affidavit in support of the application be deemed as duly filed with leave. The application has been brought on the grounds set out on the face thereof and on the affidavit of the 1<sup>st</sup> applicant sworn on 27<sup>th</sup> January, 2021. The applicants have averred that the 1<sup>st</sup> applicant is the registered proprietor of the suit property while the 2<sup>nd</sup> applicant is a tenant of the 1<sup>st</sup> applicant on the property. The applicants have averred that the respondents are son and wife of the 1<sup>st</sup> applicant respectively. The applicants have averred that the respondents have trespassed on the suit property and are interfering with the 2<sup>nd</sup> applicant’s quiet possession of the same. The applicants have averred that the respondents continued occupation of the suit property constitutes a nuisance and is interfering with the 2<sup>nd</sup> applicant’s business thereon. The applicants have averred that they served the respondents with a notice under section 152E of the Land Act, 2012 and upon expiry filed a suit in the lower court for the eviction of the respondents from the suit property. The applicants have averred that their application in the lower court was dismissed on 30<sup>th</sup> October, 2020. The applicants have averred that the lower court was misled into believing that there was a suit for the division of matrimonial property between the 1<sup>st</sup> applicant and the 2<sup>nd</sup> respondent pending in the ELC at Nyeri in which the ownership of the suit property was in issue. The applicants have averred that the lower court also made a finding that the 1<sup>st</sup> applicant did not prove ownership of the suit property while that was not an issue for determination since the respondents had acknowledged the 1<sup>st</sup> applicant’s title to the property.

The applicants have averred that, following the dismissal of their application by the lower court, the respondents have threatened them with execution for recovery of the respondents' costs. The applicants have averred that the ruling of the lower court was made in the absence of the parties and that it was not until January, 2021 that the applicants became aware of the said ruling when the respondents demanded the payment of their costs. The applicants have contended that this together with the slowing down of court operations due to COVID-19 pandemic explains the delay in the filing of the present application. The applicants have contended that their intended appeal has high chances of success.

The application is opposed by the respondents through separate affidavits. The 1<sup>st</sup> respondent has opposed the application through a replying affidavit sworn on 11<sup>th</sup> June, 2021. The 1<sup>st</sup> respondent has averred that the suit property is a matrimonial property and the same cannot be disposed of by the 1<sup>st</sup> applicant without the consent of the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent has averred that the applicants sought their eviction from the suit property because they were frustrating the 1<sup>st</sup> applicant's efforts in collusion with the 2<sup>nd</sup> applicant to sell the suit property. The 1<sup>st</sup> respondent has averred that the house that he is occupying on the suit property together with the 2<sup>nd</sup> respondent is a one-bedroom extension that he put up at his own costs. The 1<sup>st</sup> respondent has averred that when the 2<sup>nd</sup> applicant became a tenant on the suit property, it found the respondents in occupation of the said one-bedroom house.

The 1<sup>st</sup> respondent has contended that the ELC suit between the 1<sup>st</sup> applicant and the 2<sup>nd</sup> respondent is still pending hearing and determination. The 1<sup>st</sup> respondent has averred further that the applicant is guilty of inordinate delay in bringing the application. The 1<sup>st</sup> respondent has averred that the delay of 8 months from the date when the ruling of the lower court was delivered has not been reasonably explained. The 1<sup>st</sup> respondent has averred that the intended appeal is frivolous and has no chances of success. The 1<sup>st</sup> respondent has contended that the application is an afterthought brought in bad faith for the purposes only of delaying justice.

The 2<sup>nd</sup> respondent has opposed the application through grounds of opposition dated 23<sup>rd</sup> September, 2021 and a replying affidavit of the same date. The 2<sup>nd</sup> respondent has contended that failure to file the appeal on time has not been explained by the applicants. The 2<sup>nd</sup> respondent has contended that the delay in the filing of the application is inordinate and that the appeal has no chances of success. The 2<sup>nd</sup> respondent has contended further that a stay cannot be granted in respect of costs and that the application is an abuse of the court process. The 2<sup>nd</sup> respondent has contended that although the ruling was brought to the attention of the applicants on 18<sup>th</sup> December, 2020 it was not until 29<sup>th</sup> January, 2021 that the applicants brought the present application. The 2<sup>nd</sup> respondent has averred that the applicants only brought this application when they were called upon to pay the costs of the lower court application. The 2<sup>nd</sup> respondent has averred that the application is an attempt to prevent her from recovering her costs of the lower court proceedings.

The application was heard on 9<sup>th</sup> November 2021 when the parties relied on their affidavits and grounds of opposition in support of and in opposition to the application. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavits and grounds of opposition filed by the respondents in opposition to the application. The applicants' application has two limbs. The first limb seeks a stay of execution pending the hearing and determination of the intended appeal to this court while the second limb seeks extension of time to file the intended appeal. I will deal with the two limbs one after the other. The application for stay was brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

**“(2) No order for stay of execution 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 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 ultimately be binding on him has been given by the applicant.”**

In Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018 the court stated that:

**“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”**

I am not persuaded that the applicants are likely to suffer substantial loss if the stay sought is not granted. The order of the lower court sought to be stayed merely dismissed with costs the applicants' application for eviction of the respondents from the suit property. There was no positive order made by the lower court against the applicants capable of being executed save for the order on costs. From the evidence on record, the cost was assessed at Kshs. 57,300/-. The applicants have not contended that they are unable to pay the said amount or that in case they make the payment, they are not likely to recover the same from the respondents. In the circumstances, there is no evidence that the respondents would suffer substantial loss unless the stay sought is granted. Having made a finding that no substantial loss would be suffered by the applicants unless the stay sought is granted, it is not necessary to consider the other conditions for granting an order for stay of execution. The order for stay of execution is in the circumstances not for granting.

On the second limb of the application, I am satisfied that a proper basis has been laid for the extension of time sought. The applicants' contention that the lower court delivered its ruling in the absence of the parties without notice was not contested. The averment that the ruling was not brought to the attention of the applicants until 18<sup>th</sup> December, 2020 was also not controverted. The fact that as at the time the applicants learnt of the ruling the time within which to file an appeal against the same had lapsed is also not controverted. I am satisfied that the applicants have given valid reasons for the delay in filing of the intended appeal. I am also not persuaded that the respondents would suffer prejudice if the extension of time sought is granted.

In conclusion, the applicants' undated application filed on 29<sup>th</sup> January, 2021 succeeds in part. The court makes the following orders in respect thereof;

1. The time for filing appeal against the decision of the lower court is extended up to and including 1<sup>st</sup> February, 2022.
2. The appeal shall be filed in a separate file.
3. The application for stay is refused.
4. Each party shall bear its own costs of the application.

**DELIVERED AND DATED AT NAIROBI THIS 25TH DAY OF JANUARY 2022.**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Mugo h/b for Ms. Wambugu for the Applicants

Mr. Omondi h/b for Mrs. Kahindi for the 1<sup>st</sup> Respondent

Ms. Mwihaki for the 2<sup>nd</sup> Respondent

Ms. C. Nyokabi - Court Assistant