



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAKURU

ELC NUMBER OS/E1 OF 2020

MOTO FARMERS CO-OPRATIVE SOCIETY LTD.....PLAINTIFF/RESPONDENT

VERSUS

PETER CHELULE.....1ST DEFENDANT

ELIZABETH WANGUI NJENGA.....2ND DEFENDANT/ APPLICANT

JANE WANGUI CHEGE.....3RD DEFENDANT/ APPLICANT

BENSON GICHUHI CHEGE.....4TH DEFENDANT/ APPLICANT

FRANCIS NJUGUNA CHEGE.....5TH DEFENDANT/ APPLICANT

ESTATE OF THE LATE SIMON NJENGA WAINAINA.....6TH DEFENDANT/ APPLICANT

ESTATE OF THE LATE JOSEPH CHEGE NDUGUGA.....7TH DEFENDANT/ APPLICANT

RULING

INTRODUCTION

1. This ruling is in respect of the 2nd to 7th Defendants'/Applicants' Notice of Motion application dated 8th November 2021. The said application is expressed to be brought under Article 159 (2) (a), (b) and (d) of the Constitution of Kenya, 2010, Section , 63 (e) 1A, 1B and 3A of the Civil procedure Act and Order 51 Rule 1, of the Civil Procedure Rules.

2. The application is filed under certificate of urgency and seeks the following orders:

i. Spent.

ii. Spent.

iii. THAT this Honourable Court be pleased to grant a stay of proceeding herein pending the hearing and determination of the Appeal against the High Court Judgement being NAKURU HCCA 95 OF 2015.

iv. THAT the cost of this application be provided for.

3. The application is based on the grounds on its face and supported by the affidavits sworn by one Benson Gichuki Chege (the 4th Defendant/ Applicant) with authority of the 2nd, 3rd, 5th, 6th and 7th Defendants/Applicants. The Supporting affidavit is sworn on, on the 8th of November 2021.

FACTUAL BACKGROUND

4. This suit was commenced by way of Originating Summons and was filed on 21st October 2020. Very briefly, the Plaintiff seeks various

declarations and orders. The declarations and orders sought are hinged on a determination of several questions as set out below:

i. Whether pursuant to the decision and orders made in Nakuru High Court Civil Appeal No. 95 of 2015 delivered by Hon. Justice Rachel Ngetich on 11/7/19 the Plaintiff should be declared as the legal proprietor of the suit parcel.

ii. Whether all that land known as GRANT NO. IR 976 LR. NO. 533/87/II in the names of the late Simon Njenga Wainaina and Late Joseph Chege Nduguga (The 6th and 7th Defendants/Applicants respectively) should be cancelled and the same be restored to the Plaintiff by the Interested Party.

iii. Whether and order for eviction or permanent injunction should issue against the 2nd, 3rd, 4th and 5th Defendants restraining them from continued occupation, collection of rent or interfering with the occupation, use and possession of the suit property by the Plaintiff.

iv. Whether the rent collected by the Defendants since 19/12/1995 ought to be paid to the Plaintiff.

v. Whether the Plaintiff is entitled to an award of damages arising from the illegal actions perpetrated by the Defendants jointly and/or severally.

vi. Whether the Defendants ought to pay the costs of this suit.

5. The importance of setting out the background as in the preceding paragraph is to understand the nature of proceedings herein so as to appreciate the orders sought in the present application.

6. The 1st Defendant/Applicant was served by way of substituted service but neither entered appearance nor filed a response to the suit or application.

2ND -7TH DEFENDANTS' /APPLICANTS' CONTENTION.

7. The 2nd- 7th Defendants/Applicants contend that this suit was filed to enforce the judgement of the court in Nakuru HCCA 95 of 2015.

8. It is their contention that they have since preferred an Appeal against the said judgement in Nakuru HCCA 95 OF 2015 and that if this suit is not stayed, the Appeal preferred could be rendered nugatory. An extract of the record of Appeal is annexed. It also contains the Memorandum of Appeal.

9. The 2nd -7th Defendants/Applicants further contend that if proceedings in this suit are not stayed, this Honourable Court may arrive at a determination that is contrary to the finding of the Appellate court and this will embarrass the course of justice.

10. They end their deposition by stating that it is in the interest of justice and fairness that the application is allowed.

RESPONDENT'S RESPONSE.

11. In response to the application, The Respondents filed a relying affidavit sworn by one Ibrahim Ngugi, secretary of the Plaintiff.

12. He deposes that the application is a delaying tactic employed by the 2nd- 7th Defendants/Applicants to deny the Plaintiff/ Respondent an opportunity to enjoy the fruits of litigation.

13. The secretary of the Plaintiff/Respondent deposes that the 2nd – 7th Defendants/Applicants sought leave for extension of time to file a notice of Appeal and record of Appeal, which leave was granted. The leave was accompanied by an order that the same be filed within 60days from 9th July, 2021.

14. According to the Plaintiff/Respondent, the Applicants herein did not comply with the said orders but instead filed a record of appeal on 30th September, 2021 without seeking extension of leave or time.

15. The secretary of the Plaintiff deposes that the date 30th September, 2021 as appears on the record of Appeal appears doctored and/or forged because it bears two dates and has not been signed by the Deputy Registrar. The Plaintiff/Respondent deposes therefore, that the integrity of the documents supplied is in question.

16. The Plaintiff/Respondent states that the present application for stay of execution has been brought two and a half years after the judgement in Nakuru HCCA No. 95 of 2015 was delivered. It is deposed further that this application has been brought without leave to file out of time.

17. It is the Plaintiff /Respondent's view that the appeal is non-existent and/or a nullity as the appeal is mischievously on record.

18. The Plaintiff/Respondent deposes that the grounds on the memorandum of appeal are not arguable and have no chances of success.

19. He deposes, finally, that the Applicants have failed to demonstrate that they are deserving of the discretionary orders sought adding that there is no threat of execution.

ISSUES FOR DETERMINATION

20. The 2nd -7th Defendants/Applicants and Plaintiff/Respondent and filed their submissions on 30th November, 2021 and 16th November, 2021 respectively.

21. The 2nd -7th Defendants/Applicants have identified the following issues for determination:

a. Whether the 2nd -7th Defendants/Applicants have met the threshold for grant of stay of proceedings in the instant suit.

22. The Plaintiff/Respondent has identified the following issues for determination:

a. Whether the conditions for grant of stay of execution have been met.

b. Who should bear the cost of this application?

23. After perusal of the Application, Supporting Affidavit, Replying Affidavit, Annexures and Submissions filed in respect of this Application, my considered view is that the triple issues for determination are:

a. Whether an appeal has been preferred against the Judgement in Nakuru HCCA No. 95 of 2015.

b. Whether it is in the interest of justice that the proceedings in this suit be stayed, pending the hearing and determination of the Appeal.

c. Which party bears the cost of the application?

ANALYSIS AND DETERMINATION

24. I must start by pointing out that the Plaintiff/Respondent completely missed the point. This application is for **stay of proceedings pending Appeal** and not for Stay of Execution pending appeal. Needless to say that there is a marked difference between the two.

25. On account of this misapprehension by the Plaintiff/Respondent on the nature of the application, the replying affidavit and submissions have gone to great lengths to address issues pertaining to criteria for grant of orders of stay pending appeal such as: Substantial loss, Unreasonable delay and Security for performance of the decree. These matters are therefore irrelevant for purposes of this application and I shall not take them into consideration.

26. The other matter that has been brought to my attention by the plaintiff/Respondent is the allegation that this application is anchored on an appeal which is a nullity and non-existent. The Plaintiff/Respondent questions the integrity of the documents which it says bears different dates one of which has been crossed out and the correction not endorsed by the Deputy Registrar.

27. The existence or non existence of an Appeal and/or whether it is properly on record is both a question of law and fact.

28. From a factual point of view, I begin by saying that I deem court documents as public documents. This means that they are open for inspection and/or perusal by parties under supervision and on payment of requisite fees. How much more would this general statement hold true for judicial officers in whose custody court documents remain?

29. In discharge of my duties and in order to meet the ends of justice, I called for the file and/or documents from the Court of Appeal; Nakuru Sub-registry. I established the following:

i. The Appeal in this matter in Number 81 of 2021

ii. The Court of Appeal is fully digitized and once documents are uploaded, the system automatically provides a number.

iii. On account of digitization, documents filed may or may not bear a court stamp. In the instant case the court documents bear a stamp dated 30th November, 2021.

iv. Kshs. 6000 has been paid as filing fees.

Save for certain pending administrative issues pertaining to underpayment of filing fees, which has been called up.

30. In the decision of **Republic Vs Public Procurement and Administrative Review Board Ex-Parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR** it was held as follows:

“In my view, a document is deemed to be lodged when it is presented, paid for, acknowledged as received by stamping and allocated a number.”

31. Bearing this decision in mind and my finding from the registry as set out in the preceding paragraphs, I find that there is an appeal properly on record. It has a stamp, and has been allocated a number; it is number 81 of 2021. The question of failure to comply with the timelines within which to file the record or memorandum as ordered by the Learned Judge of Appeal and the legal effect of such non-compliance are matters which the Respondent is free to take up before that Court and seek appropriate orders. As things stand and important to this application is that there is an appeal filed and it arises from the Judgement in Nakuru HCCA No. 95 of 2015.

32. The second question for determination is whether the 2nd -7th Defendants/Applicants have met the criteria for grant of orders of stay of proceedings pending appeal.

33. The decision in *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* persuasively stated thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order Appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended Appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis is mine)

34. *Halsbury’s Law of England, 4th Edition. Vol. 37* pages 330 and 332, sheds more light on stay of proceedings and states thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will not be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

35. The 2nd -7th Defendants/Applicants have also referred me to the decision of *David Macharia Gotonga Vs Joyce Wanjiku Macharia [2020] eKLR*. In this case the learned Judge relied on the decision in *Nazons (Kenya) Ltd Vs China Road and Bridge Corporation Kenya Ltd, Nairobi HCC No. 126 of 1999* where it was held that;

‘Where the Appeal may have serious effects on the entire case so that if stay of proceedings is not granted the result of the Appeal may well render the orders made nugatory and render the exercise futile....stay should be granted.’

36. I have also been referred to the decision in *Muchanga Investment Limited Vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229*. It was stated that;

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

37. In *Nurex Zaherali Kurji & 3 others Vs Ameer Kassim Lakha & 9 Others [2020] eKLR* in his obiter dictum, the Learned Judge stated:

“11. Having said so, this court took cognisance of the fact that in the event the matter herein proceeded to trial, when it does, and the Court of Appeal found that this court had not exercised its discretion judiciously, not only would the 5th, 6th, 8th, 9th and 10th Defendants’ appeal be rendered nugatory as their witness would have testified to their detriment but also precious and scarce judicial time would have been wasted in hearing proceedings only for the same to be set aside and/or vacated. The Appeal was not frivolous as it had raised a triable issue that was best determined on appeal before any further proceedings could continue in this court.

12. It is better that a case is delayed for a little while longer and is heard on merit and an appeal be heard and determined on merit as opposed to the 5th, 6th, 8th, 9th and 10th Defendants participating in proceedings which could be terminated by the Court of Appeal if their appeal was found to be merited.” (Emphasis is mine).

38. The third and final issue for determination is that of costs. The general rule is that costs shall follow the event. This is provided for in section 27 of the *Civil Procedure Act (Cap. 21)*. A successful party shall ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in *Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA*

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DETERMINATION

39. In conclusion, therefore, I am satisfied that the 2nd -7th Defendants/Applicants have demonstrated that their Appeal is arguable and that the application has been brought expeditiously; taking into account the date of grant of orders extending time within which to file the Appeal and the date of actual filing of the Appeal.

40. Further, I am convinced that it would not be prudent to utilize precious and scarce judicial time to hear a suit indented to give effect to orders which are subject of Appeal.

41. Consequently, it is in the interest of justice that I exercise discretion in favour of granting an order of stay of proceedings.

42. The Upshot of the foregoing is that the Notice of Motion Application dated 8th November, 2021 is allowed with costs to the 2nd -7th Defendants/Applicants.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURUTHIS 24TH DAY OF JANUARY 2022

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the 2nd – 7th Defendants/Applicants.

Mr. Mutai for the Plaintiff/Respondent.

No Appearance for the 1st Defendant

Court Assistant; Jenniffer.