



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 156 OF 2018

JOHN MUTURA KARIUKI.....PLAINTIFF

=VERSUS=

STEPHEN N KAGOMBE.....DEFENDANT

RULING

1. On 17/5/2018, this court, [Obaga J] made an order consolidating this suit [which at the time existed as **Nairobi ELC Case No. 268 of 2017 [O.S]** with **Nairobi ELC Case No 1021 of 2016** [plaint]. Further, on the same day, the court designated this file as the lead file. Lastly, the court transferred the two consolidated causes to Thika ELC. The two consolidated causes were registered at Thika ELC as **ELC Case No 156 of 2018**. It does appear the two consolidated causes were not given distinct registration numbers at the Thika ELC Registry.

2. Gacheru J conducted trial in the two consolidated causes and on 25/6/2020, she rendered a judgment in which she made findings in favour of the plaintiff in the two consolidated causes, **John Mutura Kariuki**. With regard to the suit initiated by way of plaint, the court issued an order compelling the defendant to execute a transfer and facilitate registration of the suit property **Ndarugu/Karatu/442** in the name of the plaintiff. As regards the originating summons, the court issued the following orders:

- 1. That John Mutura Kariuki who has been in adverse possession actual occupation and user of L.R No. Ndarugu/Karatu/442 since 1965 be declared the absolute owner of Ndarugu/ Karatu/442 and be registered as the owner thereof.***
- 2. That Stephen N. Kagombe being the Administrator of the Estate of William John Kagombe Kiarie be ordered to transfer Ndarugu/Karatu/442 to John Mutura Kariuki as the beneficial owner thereof by virtue being the adverse possessor thereof.***
- 3. THAT the Deputy Registrar of this Honourable Court be authorized to sign all requisite documents/ papers on behalf of Stephen N. Kagombe to facilitate the transfer of Ndarugu/Karatu/442 to the Plaintiff/ Applicant.***
- 4. That the costs of this summons be borne by the Respondent/ Defendant.***

3. Subsequently, the defendant **Stephen N Kagombe** brought a notice of motion dated 27/8/2020 seeking an order of stay of execution of the judgment pending the hearing and determination of an intended appeal in the Court of Appeal. The said application is the subject of this ruling.

4. The application was supported by the applicant's affidavit sworn on 27/8/2020. His case was that on 7/7/2020 he filed a notice of appeal. On the same day, he applied for certified copies of proceedings and judgment to enable him file the record of appeal. As at the time of bringing the application, the proceedings had not been availed to him. There was a misdirection in the court's finding in relation to the exact year when time started running for the purpose of adverse possession. He stood to suffer "irreparable loss and damage". If the decree were to be executed as he plaintiff would be at liberty to dispose off the land. He was prepared to provide security for the due performance of the decree of the court.

5. In written submissions dated 21/6/2021 filed through the firm of *Ndumu Kimani & Company Advocates*, Counsel for the plaintiff reiterated the plaintiff's case as summarized above. Citing the Court of Appeal decision in **Bhutt v Rent Restriction Tribunal [1982] KLR 417**, counsel argued that the appeal would be rendered nugatory and the applicant would suffer substantial loss if stay was not granted.

6. The plaintiff opposed the application through a replying affidavit sworn on 11/5/2021. He deposed that this court lacked jurisdiction to entertain the application, contending that the defendant should have filed the application in the Court of Appeal. He added that the materials before court did not support the applicant's contention that his intended appeal had high chance of success. Lastly he deposed that it had taken inordinately long since the judgment was delivered and the applicant and the applicant had not exhibited any evidence of diligence in pursuing the appeal.

7. In a one page written submissions filed by *M/s Mwaure Shairi & Co Advocates*, counsel for the plaintiff/respondent submitted that **Order**

42 of the **Civil Procedure Rules** applied to appeals or intended appeal to the High Court from the subordinate courts hence the application had been filed in the wrong court. Counsel contended that the applicant should have filed the application in the Court of Appeal under **Rule 5(2)(b)** of the **Court of Appeal Rules** counsel urged the court to dismiss the application for stay.

8. I have considered the application together with the response thereto and the parties' respective submissions. I have also considered the legal framework and the prevailing jurisprudence relevant to the key questions in the application. Two questions fall for determination. The first question is whether this court has jurisdiction to grant an order of stay of execution pending the hearing and determination of an appeal or an intended appeal to the Court of Appeal. The second question is whether the applicant has made a proper case for grant of an order of stay of execution. I will briefly dispose the two questions sequentially in the above order.

9. The jurisdiction of this court to grant an order of stay of execution pending the disposal of an appeal or an intended appeal against its judgment/orders is donated by **Order 42 rule 6** of the **Civil Procedure Rules** which provides as follows:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 to 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 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 the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. A plain reading of **Order 42 rule 6(1)** clearly reveals that this court as a trial court has jurisdiction to grant an order of stay of execution pending disposal of an appeal or intended appeal to the Court of Appeal. I find no merit in the plaintiff's contention that this court does not have jurisdiction.

11. On the second question, the applicant was required to satisfy the requirements of **Order 42 rule 6(2)**. The subject matter of this application is land. The plaintiff was awarded the said land. The plaintiff is in possession of the land. The applicant contends that he would stand to suffer substantial loss if the plaintiff were to dispose the land. The application was filed three months after the judgement was rendered. The applicant has offered to provide “such security as this court order for the due performance of such decree as may ultimately be binding.” The court is however alive to the fact that as a successful party, the plaintiff is entitled to enjoy the fruits of the judgment. Further, it is more than 18 months since the judgment was rendered by this court.

12. Taking the above circumstances into account, this court takes the view that the plaintiff should be allowed to execute the judgment by registering the suit property into his name in his capacity as administrator of the estate of the **late Kariuki Muhia Mwangi**. To prevent a scenario where the intended appeal is rendered nugatory, upon registering the suit property in the name of the plaintiff, no subsequent dealings will be registered on the parcel register for a period of twelve months from now. Since the plaintiff has possession of the suit property, there will be no order relating to security.

Disposal Orders

13. In the end, the defendant's notice of motion dated 27/8/2020 is disposed in the following terms:

(a) The plaintiff shall be at liberty to execute the judgment herein by causing the suit property Ndarugu/Karatu /442 to be registered in his name as the legal representative/administrator of the estate of the late Kariuki Muhia Mwangi.

(b) No subsequent dealings shall be registered on the parcel register for a period of twelve months from the date of this ruling.

(c) This stay order shall lapse upon expiry of 12 months from today.

(d) There shall be no order as to costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF JANUARY 2022.

B M EBOSO

JUDGE

In the Presence of: -

Mr Kimani for the Applicant

Court Assistant: Ms Phyllis Mwangi