



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**Civil Appeal No. 19 Of 2016**

**SOPHIA WANJIKU CHEGE..... APPELLANT**

**VERSUS**

**MARY WAMBUI KINUTHIA .....RESPONDENT**

**RULING**

1. The Applicant seeks stay of orders made on 27/04/2016 by the Hon. J. Kituku in Kiambu Chief Magistrate's Court Civil Suit No. 197 of 2013 (?Civil Suit?) pending the hearing of an appeal she has filed against the order (?Application?). The Application is dated 17/05/2016. It also seeks costs of the Application.

2. Briefly, the facts of the case are as follows. The Applicant is the Plaintiff in the Civil Suit. In that suit she wants a declaration that the Respondent has no interest in Land Title Ndumberi/Tinganga/2338. She also seeks for an injunction restraining the Respondent from claiming any rights over the leases and/or rental proceeds from that parcel of land and from interfering with her (Applicant's) enjoyment of her interests in the land including the right to quiet possession.

3. Neither parties have filed sufficient materials before this Court for the Court to get a full picture of the procedural posture of the Civil Suit but it would appear that an application dated 18/01/2016 was taken pursuant to which the Honourable J. Kituku, after listening to the parties, made the following consequential orders on 27/04/2016 (?Impugned Orders?):

a. THAT the Rental income in respect to the GSM Site from Safaricom be deposited in court pending the hearing and determination of this suit.

b. THAT the Plaintiff to provide accounts for years 2013, 2014 and 2015 within 21 days and deposit them in court within the next 7 days thereof pending the hearing and determination of this suit.

4. The Applicant is aggrieved by those orders. She timeously filed her appeal on 09/05/2016 cataloguing a long list of 16 grounds of appeal. She subsequently filed the present Application. On the face of her Application, she has also listed 19 grounds for her Application. There is little point in repeating the wide-ranging grounds listed. Suffice it to say that they include the following:

a. That the Impugned Orders were given before a Defence was filed in the case;

b. That the Impugned Orders are ambiguous;

- c. That the Impugned Orders violate the Land Law Act and the Law of Succession Act;
- d. That the suit property is part of the estate of Chege Marandu and the Applicant is the Administrator to that estate;
- e. That the Respondent does not have interests in the Suit Property but in another adjoining parcel of land;
- f. That the Lower Court misapprehended the rules of Civil Procedure in granting the Impugned Orders;
- g. That the Impugned Orders are incapable of being obeyed since the rent was paid to the Applicant pursuant to a lease between herself and Safaricom respecting the Suit Property;
- h. That the accounts ordered are in excess of the Court's jurisdiction;
- i. That the Applicant was invited by Safaricom to sign a lease.

5. I have reproduced some of the grounds above to demonstrate their irrelevance to the present Application. As far as I can tell, the vast majority of these grounds, culled and expanded from the Memorandum of Appeal, are meant to persuade the Court that the Appeal is arguable. Mission accomplished.

6. While the Applicant's lawyer seemed intent on demonstrating the seriousness of the Applicant's appeal, that is but one of the elements one must satisfy to be entitled to an order for stay. The conditions one must fulfil to be entitled to stay are based on the fact that there is already a valid court order in favour of one party. One must therefore show exceptional circumstances to be permitted to deny the party that prevailed in the lower court the fruits of her court order pending the appeal filed.

7. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsulated in **Order 42, Rule 6** of the Civil Procedure Rules in the following terms:

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 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 may ultimately be binding on him has been given by the applicant.

8. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

It was laid down in ***M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979***, (following ***Wilson v Church (No 2) (1879) 12 Ch 454 at p 488***) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not

rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

9. Hence, under our established jurisprudence, to be successful in an application for stay, an Applicant has to satisfy a four-part test. She must demonstrate that:

a. The appeal she has filed is arguable;

b. She is likely to suffer substantial loss unless the order is made. Differently put, she must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. The application was made without unreasonable delay; and

d. She has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on her.

10. Through her advocate's strenuous enumeration of the grounds of appeal, the Applicant has easily satisfied the first condition. To earn a stay of execution, one is **not** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicant has easily met that standard.

11. But what is the substantial loss that the Appellant is likely to suffer if the order is not granted? Though the Applicant's advocate devoted very little time and space to this crucial condition, the facts reveal that to satisfy part of the order will require the Applicant to raise more than Kshs. 919,843 which she has already received as rents associated with the disputed Suit Property. This is because the Court ordered her to deposit all rents received in Court pending the hearing of the suit.

12. The Applicant argues that she received and spent these monies under her colour of right as the Administrator to the estate of the late Chege Marandu. She avers that it will be very difficult and potentially devastating financially if she is asked to raise this amount of money to deposit in Court. I agree that this aspect of the order would lead to substantial loss to the Applicant. This is especially so if one considers that there has been no determination of the case on the merit yet. To require the Applicant to raise this steep amount for deposit in Court pending the hearing on the determination of the suit would seem unnecessary especially given the fact that the lease is still subsisting and any damages which the Respondent wins in the Civil Suit can be recouped from the future rents to be deposited in Court. It therefore seems that the Applicant satisfies this condition for part of the Impugned Order.

13. There is no doubt that the Application was filed without any delay.

14. Finally, the nature of this case obviates the need for security to be deposited for the satisfaction of the Impugned Order if the part that requires future rents to be deposited in Court is maintained. Those future rents will serve as the security for the due satisfaction of the Impugned Order. I note that the Impugned Order is not for any sums to be paid to the Respondent but for the sums to be deposited in Court.

15. Consequently, all considered, it appears just and fair to dispose of the Application dated 17/05/2016 thus:

a. There will be a stay of execution of the Orders granted by the Hon. J. Kituku on 27/04/2016 only to the extent of rents already paid to the Applicant as at the date of the orders (27/04/2016) pending the hearing of the appeal against the ruling and order.

b. For avoidance of doubt, all rental incomes in respect of the GSM site on the suit property from Safaricom paid after 27/04/2016 will be deposited in court pending the hearing and determination of the Civil Suit in the lower court or reversal of the orders of 27/04/2016 on Appeal.

16. Orders accordingly.

**Dated and delivered at Kiambu this 28th day of November, 2016.**

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**JOEL NGUGI**

**JUDGE**