



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC ORIGINATING SUMMONS NO. 118 OF 2011

ALEXANDER MBUGUA 1ST PLAINTIFF

MWARI MBUGUA 2ND PLAINTIFF

VERSUS

BEATRICE MUTUNGI M'ITUAMIKWA 1ST DEFENDANT

EVEREST ENTERPRISES LTD. 2ND DEFENDANT

RULING

1. Though an application dated 17.9.2021, the court is asked to stay execution of its judgment pending hearing and determination of the intended appeal at the Court of Appeal. The application is supported by an affidavit of Beatrice Mutunga M'Tuamikwa sworn on 17.9.2021.
2. The grounds of the application are there is likelihood of the 2nd plaintiff selling and or transferring 15 acres of the suit parcels after executing the decree; that the applicant resides with her family on the suit land hence the likelihood of suffering substantial and irreparable loss; the intended appeal is arguable and is likely to be rendered nugatory unless the orders sought are granted.
3. Further, the applicant states there will be no prejudice if the application is allowed.
4. The 1st and 2nd defendants oppose the notice of motion through a replying affidavit of Mwari Mbugua filed on 18.12.2021. She denies that the applicant been on the suit land hence the reason for adverse possession.
5. Secondly, she avers that the applicant has taken no action since the filing the notice of appeal on 12.5.2021 so as to fastrack the hearing of the appeal hence was engaging in delaying tactics.
6. Thirdly, she asserts the allegations of her intention to sell the suit property is absurd and unbelievable bondering on attempts to seek sympathy and or deny her enjoyment of the fruits of her judgment.
7. Further, she avers the applicant has not met the threshold for the issuance of stay orders.
8. With leave parties filed written submissions dated 17.11.2021 for applicant and 11.11.2021 for the respondents.
9. The applicants submit that she has satisfied the threshold of **Order 42 Rule 6 Civil procedure Rules**. Reliance is placed on *Charles Kariuki Njuri –vs- Francis Kimaru [2020] eKLR, Mukuma –vs- Abuoga (1988) KLR 645, Butt –vs- Rent Restriction Tribunal [1982] KLR 417.*
10. On the other hand, the respondents submit the application falls short of the threshold set in **Order 42 Rule 6 Civil Procedure Rules**. They rely on *Vishram Ravji Halai –vs- Thornton and Turpin [1990] KLR 365, Century Oil Trading Co. Ltd –vs- Kenya Shell Ltd, Samvir Trustee Ltd –vs- Guardian Bank Ltd [2007] eKLR, Machira T/A Machira & Co. Advocates –vs- East African Standard [2002] KLR 63.*
11. **Order 42 Rule 6 Civil procedure Rules** provides that a party seeking for stay of execution must demonstrate sufficient cause there would be substantial loss, the application is made timeously and lastly must offer security for the due satisfaction of the decree should the appeal fails.

12. Expounding on the purpose of stay pending appeal, the court in *Stanley Kiplagat Rono & another –vs- William Kiprotich Cherus [2021] eKLR* held, it was to preserve the substratum of the appeal especially in land matters where the character of the suit property may be changed while the appeal was pending. **See also *Mukuma –vs- Abuoga [1988] KLR 645*.**

13. The applicant alleges the respondent is likely to dispose the suit property to third parties which facts are denied by the respondent who maintains she has been in occupation for over 20 years unlike the applicant whose testimony was found wanting hence the reason she was found to have proved her case for the entitlement of a portion of the suit land.

14. The applicant's second reason is that she resides with her family on the suit land hence the likelihood of suffering substantial and irreparable loss.

15. Substantial loss has to be demonstrated with cogent and tangible evidence. It is not enough to make an assertion without proof. The applicant has not attached any photographs and or valuation report to demonstrate the loss likely to be occasioned if the stay is not granted.

16. Further, the decree was issued on 16.9.202. The applicant has not indicated if the respondent has initiated the process of the execution before the land registrar for Laikipia County. In absence of any demonstration of what substantial loss the applicant is likely to incur, I find the applicant to have failed on that ground. **See *Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another [1986] eKLR*.**

17. The 2nd reason given by the applicant is that the appeal shall be rendered nugatory if there is no order of stay. Nugatory has been defined to mean whether or not what is sought to be stayed if allowed to happen will be reversible or irreversible and either way if damages will reasonably compensate the party. **See *Multimedia University & Another –vs- Professor Gitile N. Naituli [2014] eKLR*.**

18. The decree of the court had ordered the 1st defendant/applicant to sign all the consents and documents to effect transfer of the parcels in favour of the 2nd plaintiff in default of which the Executive Officer to execute them.

19. The process of transfer in my considered view would be reversible if the Court of Appeal were to find the appeal with merits. The defendants would only be ordered to retransfer the suit land back to the applicant.

20. The 1st respondent is a decree holder and has rights in the decree which are not inferior to the rights of the applicant to prefer an appeal.

21. On whether or not to grant a stay, the court would be balancing the two competing rights hence the reason why the applicant has the higher burden to show any special circumstances why the court should suspend one constitutional right in favour of the other. A party who has labored through trial to attain a certain right must not be driven from enjoying that right without reasons or grounds. **See *Mohammed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat [2013] eKLR*.**

22. In the instant case, the applicant had the burden to prove substantial loss, there has been no unreasonable delay in seeking for stay and lastly offer security for the due performance of the decree.

23. There is no offer for any security given in the application. **See *Visram Ravji Halai and Another –vs- Thornton Turpin (1963) Ltd. and Mwaure Karuga T/A Limit Enterprises Ltd. –vs- Kenya Bus Services Ltd & 4 Others [2015] eKLR*.**

24. The applicant has not offered to surrender the original title deed in court and hence I find it would not be in the interest of justice to grant any stay orders in line with sections 1A and 1B and Article 159 of the Constitution.

25. In the premises, I find the application lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

In presence of:

Kaunyangi holding brief for Kaumbi for 2nd plaintiff

Gitonga for 1st defendant

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE