



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 4275 OF 1994

NICHOLAS RUTHIRU GATOTO ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NDARUGU MERCHANTS ::::::::::::::::::::::::::::::::::::::: 1ST DEFENDANT

STEPHEN BORO GITIHA ::::::::::::::::::::::::::::::::::::::: 2ND DEFENDANT

RURAL URBAN CREDIT FINANCE

(undere receivership) ::::::::::::::::::::::::::::::::::::::: 3RD DEFENDANT

R U L I N G

1. The **Notice of Motion** application dated **28th January, 2014**. The application seeks the following orders namely:-
 1. *(spent)*
 2. *(spent)*
 3. *That the Honourable Court do issue an order for stay of execution of the Judgement of the court delivered on 23rd day of January 2014 by the Honourable Mr. Justice Ogola pending the hearing and determination of the appeal lodged in the Court of Appeal against the judgement aforesaid.*
 4. *That the Honourable Court do issue an order it may deem fit and appropriate.*
2. The application is premised on the grounds that:-
 1. *That the suit herein relates to Land Parcel LR No. KIGANJO/KIAMWANGI/208 in which the Applicant resides at his matrimonial property;*
 2. *That pursuant to the Judgement of the Hon. Mr. Justice Ogola delivered on the 2nd day of January 2014 the Applicant and his family faces the real likelihood of being evicted from the suit premises unless an Order for stay of execution is granted.*
 3. *That the Applicant has already lodged an Appeal against the said Judgement.*
 4. *That the Applicant stands to suffer extensive loss unless an order for stay of execution is granted;*
 5. *That the application herein has been brought without any delay whatsoever;*
 6. *That if an order for stay of execution is not grated, the appeal shall be rendered nugatory and the Applicant stands to suffer irreparable damage and loss.*

3. The application is supported by affidavit of **STEPHEN BORO GITHIA** (*the 2nd Defendant herein*) dated and filed in court on **28th January 2014** and a further affidavit of the same person dated and filed in court on 19th March 2014.
4. The application is opposed through a Replying Affidavit of **NICHOLAS RUTHIRU GATOTO** (*the Plaintiff herein*) dated **7th March 2014**.
5. Parties filed written submissions which submissions were highlighted before me in court on **1st April 2014**.
6. The brief history of the application is that by the Judgement of this court delivered on 23rd January 2014, in favour of the Plaintiff the court made the following orders:-
 - a. ***That the sale of LR No. KIGANJO/KIAMWANGI/208 by the 1st and 3rd Defendants to the 2nd Defendant and the transfer together with the title deed issued pursuant thereto was illegal and a nullity in law and the same is herewith cancelled.***
 - b. ***The original charge in respect of the suit property in favour of the 3rd Defendant by the Plaintiff is hereby restored.***
 - c. ***That the Plaintiff has the option to redeem the said property in terms of the said charge.***
 - d. ***The Plaintiff's costs for this suit shall be paid by the 3rd Defendant. the rest of the parties to bear their own costs.***

It is these orders that the current application by the 2nd Defendant seeks to stay to enable the 2nd Defendant appeal the said Judgement. It is noted that the 2nd Defendant was affected by the said Judgement as the suit property was sold to him by the 3rd Defendant in the said illegal auction.

7. The Applicant avers in his affidavit that the suit land has been his matrimonial home since 1994 where his many wives and married children and their families live. He further avers that he has developed the land and planted over 4,000 coffee bushes, established a dairy farming as well as engaging in subsistence farming for food crops e.g. maize, beans, arrow roots etc, and that he has no other source of income except from the suit land. The Applicant states that he has since charged the property to Co-operative Bank Thika Branch for Kshs.1,000,000/=, and that he is a sick man aged over 80 years. The Applicant has annexed to his affidavits medical treatment notes and pictures showing the farming activities on the land. The photographs annexed to the further affidavit show the farming activities going on in the property. However, the same do not clearly show whether or not the Applicant resides in the land with his alleged big family. There is only one house which may qualify to be a dwelling house. The rest appear to be farmhouses and the coffee bushes.
8. In her submission on behalf of the Applicant M/s Betty Rashid states that the Applicant is in full occupation of the suit property and has been in such occupation for 20 years and has developed the properties having bought the same as an innocent purchaser for value. He has lodged appeal, and yet the Respondent is about to evict the Applicant. If that happens the subject matter of the appeal will be negated.
9. In response Mr. Thuku for the Respondent submitted that the application does not meet the test set out under Order 42 Rule 2 (a) of the Civil Procedure Rules 2010, in that the 2nd Defendant will not suffer substantial loss if stay of execution is not granted. He further submitted that the intended appeal has no chance of success and lastly that the application is based on outright lies.
10. In his replying affidavit, at paragraph 4, the Respondent states that he is 92 years old and that the suit property is a consolidation of many parcels of land bought around the years 1944 and 1954 which parcels were consolidated around 1958 to give rise to the suit property. He started living in the suit property in 1948 and planted 3,500 coffee trees in 1994. He lived in the farm with his family and buried his son Paul Chege Nicholas on 9th July 1994 aged 45 years on the suit property. He has sentimental value attached to the property. Before his property was sold he lived in it for 46 years. The Respondent denies that the Applicant lives in the suit property or that the Applicant has planted coffee tree on the suit property. The Respondent states that the Applicant

and his family live in his Thegi Farm in Kigaa Sub location, Mutate Location, Kiganjo Division in Gatundu District. This assertion has not been challenged by the Applicant, who merely states that he lives in the farm but does not show evidence of the same. The Respondent states that the coffee trees in the farm were planted by him but were inherited by the Applicant after he illegally bought the farm. He further states that the Applicant has nothing to lose in the suit property. The court order directed that the money the Applicant paid for the suit property shall be refunded to the Applicant. The Respondent has stated that he has pursued justice for 20 years and that he should be allowed to enjoy the fruit of his judgement, and that in any event, he has already taken possession of the suit property as per paragraphs marked “GN 7” in his replying affidavit.

11. I have carefully considered the application and opposition to it together with the submissions of the parties. The only issue which I raise for determination in this matter is whether the Applicant will suffer substantial loss if the stay is not granted.

In this regard, I must note from the outset that the Applicant claims to have stayed in the suit property for 20 years and even buried an issue there. This is to be contrasted by the Respondent’s submission that he had stayed in the farm with his family for 46 years and also buried an issue there. So, as for as developing close affinity to the suit property both parties have reasonable claim.

12. The other issue is that I am satisfied that the Applicant does not stay in the suit property either alone, or with his large family as alleged. If that were so he could have shown the photos of family houses. The photos he has shown only reveal the farmhouse and coffee bushes. There is nothing to show that a large family including children and grandchildren stay in the property. Further, the Respondent cogently gave the current residence of the Applicant which was traced to Gatundu District. That assertion has not been denied by the Applicant. I am satisfied that there are coffee bushes in the farm but that the Applicant does not live there as alleged. The question is therefore whether the Applicant will suffer substantial loss which cannot be compensated by an award of damages. The law is that a party who has secured a Judgement in his favour should not be delayed from enjoying the fruits of the Judgement, unless the ends of justice demand the same. The Respondent has secured a Judgement after 20 years of search for the same. The Respondent is also now aged 92 years old. Before his property was taken from him he had lived there for 46 years and planted his coffee trees. Justice for this old man would demand that he enjoys the fruits of his Judgement when he is still alive. He states that he has already taken possession of the suit property. That is his right awarded to him by this court. I will not stop him from enjoying the Judgement.

13. In so far as substantial loss is concerned, it was stated in **HCCC No. 187 of 1994 KPLC – VS – NJILUS MOTORS LIMITED** that a substantial loss was that loss which cannot be made good by monetary compensation and a party should show what such loss is and why an award of damages will not be sufficient compensation. The Applicant has not shown me what loss he will suffer apart from saying he has invested in the property and that he is living on it. Further, he has not shown how such loss may not be compensated by an award of damages. It is now clear that once land has been offered as security for loan, it becomes a commodity whose value can be ascertained. The land is valued (*see paragraph 5 of replying affidavit*) and monetary compensation is possible. However, and more importantly, I have made a finding, *obiter*, in the judgement of this court that the 3rd Defendant should refund the Applicant the money he used in purchasing the suit property plus the value of the development thereon. It means that the Applicant’s interest have been secured and he is not likely to suffer any or any substantial loss which cannot be compensated for by damages.

14. Lastly, the Judgement of the court which is sought to be stayed involved also other parties which may have acted on the same. For instance, the Judgement reinstated the charge, and gave the Plaintiff the option to redeem the same from the 3rd Defendant. In short, there are other parties to be affected by the Judgement of the court, and I am not satisfied that the interest of justice would admit the application for stay of execution.

15. In the upshot, the Notice of Motion application dated 28th January 2014 is herewith dismissed with costs to the Plaintiff/Respondent.

DATED, READ AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Gathua holding brief for Thuku for Plaintiff

No appearance for Defendants

Teresia – Court Clerk