



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 92 OF 2012

LOICE WANJIRU MUGWE.....1ST PLAINTIFF

PERIS NJUHI MUGWE.....2ND PLAINTIFF

VERSUS

EVANSON KIARIE.....1ST DEFENDANT

DAVID KIARIE KAHIRA.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 26th August 2019 brought under rule 3(2) of Part 1 of the High Court (Practice and Procedure) Rules made under section 10 of the Judicature Act, Cap 8, Order 42 and 43 of the Civil Procedure Rules, section 1A, 1B, 3A and 63 of the Civil Procedure Rules 2010 and article 40 of the Constitution and all other enabling provisions of the law.
2. It seeks orders:-
 - (a) *Spent.*
 - (b) *Spent.*
 - (c) *That pending the hearing and determination of the appeal there be a stay of execution of the Judgment and Decree delivered on 21st February 2019. That is to say, a temporary injunction do issue restraining the Defendants and their servants from demolishing, evicting or in any way whatsoever interfering with the Plaintiffs' peaceful occupation of land parcel No. Dagoretti/Kangemi/631.*
 - (d) *That costs of this application be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs (1) to (7).
4. The application is supported by the affidavit of Peris Njuhi Mugwe, the 2nd Plaintiff/Applicant sworn on the 26th August 2019 and a supplementary affidavit sworn on the 11th June 2020.
5. The application is opposed. There is replying affidavit sworn by Evanson Kahira Kiarie, the 1st Defendant/Respondent on 23rd October 2019. There is also a notice of preliminary objection dated 24th October 2019.
6. On the 19th December 2019, the court directed that the preliminary objection and notice of motion be heard together. The court also directed that parties do file and exchange written submissions.
7. The Plaintiffs/Applicants submissions are dated 19th May 2020. It is their submissions that they have demonstrated sufficient cause to warrant the stay of execution pending the hearing and determination of the Appeal. Further that the application has been brought without unreasonable delay owing to the circumstances of this matter.
8. It is their submission that the 1st Defendant/Respondent has proceeded to evict them from the suit property by demolishing their

properties. That they are likely to suffer loss that cannot be adequately compensated by damages.

9. That the suit property in question hosts their (Plaintiffs) matrimonial home and other houses leased to tenants hence the loss cannot be valued or quantified in monetary terms. They have also submitted that the Appeal will be rendered nugatory if stay is not granted.

10. It is further their submission that since the decree herein was not a monetary one there would be no need to furnish security. They pray that the application be allowed.

11. The 1st Defendants'/Respondents' submissions are dated 28th October 2021. It is his submission that the notice of Appeal was served out of time. Further that the suit property is registered in the name of the 2nd Defendant/Respondent and charged to Housing Finance Company Limited which was not joined in the suit.

12. He further submitted that the application has been overtaken by events as the 2nd Defendant has taken possession of the suit property. They pray that the application be dismissed with costs.

13. I have considered the notice of motion and the preliminary objection dated 24th October 2019. It is the 1st Defendant/Respondent's contention that he was not served with the notice of Appeal.

14. In answer to that the 1st Plaintiff swore a supplementary affidavit on the 11th June 2020. She has annexed on the Notice of Appeal dated 22nd February 2019. It confirms that the firm of Onsando Ongongi & Tiego Advocates were served on the 5th March 2019. For this reason, I find no merit in the preliminary objection and the same is dismissed.

15. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

16. **Order 42 rule 6(2)** of the Civil Procedure provides that:-

“(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.”

17. Judgment on this matter was delivered on 21st February 2019. This application is dated on 26th August 2019 almost seven (7) months later. The delay has not been explained. I find that the same has been brought after an inordinate delay.

18. The second issue I need to consider is that of substantial loss. It is the Plaintiffs/Applicants' case that they stand to suffer substantially if their structures are demolished.

In its judgment of 21st February 2019 this court found:-

“29...the plaintiffs have failed to prove that the original plaintiff contributed towards the purchase of the suit property so as to entitle them to half share of the same. in view of this finding the issue of cancellation of the title does not arise”

19. From the above findings, it is clear that there is nothing for the Plaintiffs to protect. In the case of **Peter Samoei vs Isaac K. Ruto [2012] eKLR** Munyao Sila J stated thus:-

“It will be discerned that for an application of stay of execution pending appeal in the court of appeal, one has to first demonstrate that he has a good appeal with chances of success and secondly that the appeal may be rendered nugatory if the stay is not granted. These are not the same considerations under order 42 rule 6 which as I had set out earlier, only require that the applicant demonstrate that he has filed the application without unreasonable delay, that the applicant will suffer substantial loss, and an offer of security. Strictly, in determining an application under order 42 rule 6, one need not be satisfied that the appeal is not frivolous. My concern is that there is a danger that a wholly unmeritorious appeal may end up satisfying the provisions of order 42 rule 6 thereby causing unnecessary hardship and delay to the successful litigant. I do not see the rationale for a different test to be applied in the court of appeal and a different one to the high court or courts of the status of the high court. It is my considered view that the test for stay pending appeal ought to be the same for all courts”.

I find that the Plaintiffs/Applicants have not demonstrated that they will suffer substantial loss if these orders are not granted.

20. It is also the Plaintiffs'/Applicants' submissions that the Appeal will be rendered nugatory if these orders are not granted.

I find that the Plaintiffs/Applicants have failed to demonstrate that the Appeal has high chances of success. In any event no material was placed before this court to confirm that there exists an appeal in the Court of Appeal three (3) years after the Judgment.

21. The Plaintiffs/Applicants have also not stated that they are willing to furnish any security as per the third condition.

22. In conclusion, I find no merit in this application and the same is dismissed with costs to the Defendants/Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 10TH DAY OF MARCH 2022.

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L. KOMINGOI

JUDGE

IN THE PRESENCE OF:-

MR. J. M. NJENGO FOR THE PLAINTIFFS

MR. ONSANDO FOR THE DEFENDANTS

STEVE - COURT ASSISTANT