



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL NO. 25 OF 2019

SUSAN ANNA KARANJA.....APPELLANT

VERSUS

FRANCIS MUOKA MATHEKA.....1ST RESPONDENT

BENEDICTA SYOMBUA MUSEMBI.....2ND RESPONDENT

CRAWFORD KIOKO MATHEKA.....3RD RESPONDENT

LYDIA MWIKALI MUTHYA.....4TH RESPONDENT

BERITA MBITHE MUANGE.....5TH RESPONDENT

MARTHA MWIKYA MUTISO.....6TH RESPONDENT

RULING

What is before court for determination is the Appellant's Notice of Motion application dated the 7th September, 2021 brought pursuant to Sections 1A, 1B & 3A of the Civil Procedure Act and Order 42 Rule 6(1) of the Civil Procedure Rules. The Appellant seeks the following orders:

1. Spent

2. That there be a stay of execution of the judgement entered on 11th June, 2019 in Machakos CMCC No. 552 of 2013 pending the hearing and determination of this application.

3. That there be a stay of execution of the judgement entered on 11th June, 2019 in Machakos CMCC No. 552 of 2013 pending the hearing and determination of the Appeal filed in the Environment and Land Court of Kenya at Machakos.

4. That the costs of this Application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of the Appellant SUSAN ANNA KARANJA, where she deposes that judgement was delivered by the trial Magistrate in Machakos CMCC No. 552 of 2013 on 11th June, 2019 in favour of the 1st and 2nd Respondents wherein an order was issued for cancellation of her title deed over LR No. Athi River/ Athi River Block 1/ 208 hereinafter referred to as the 'suit land'. She contends that she is the registered proprietor of the suit land and was aggrieved by the whole of the judgement and instructed her Advocates to lodge the current Appeal. She confirms that she immediately filed an Application seeking to stay the execution of the Decree and Judgement at the trial court which application was dismissed. She explains that she later on filed an application for stay of execution dated 20th September, 2019 in this court, which was unopposed but the same was dismissed for non-attendance on 4th February, 2020. Further, she filed another application dated 7th February, 2020 seeking to reinstate the application for stay dated 20th September, 2019 but the application was dismissed by the Court on 30th July, 2021. She avers that there are no orders currently in force and she stands to be greatly prejudiced if her application for stay is not heard and determined on merit. She insists she has a good claim and the Appeal has a high probability of success and will be rendered nugatory unless stay orders are granted. She is apprehensive that the cancellation of her title to the suit land shall be effected unless the orders sought are granted. She reiterates that she is a bona fide purchaser for value and has invested heavily in developing the said suit land. Further, that she stands to suffer substantial loss and damage unless the orders sought are granted. She is willing to abide by any conditions imposed by the Court.

The application is opposed by the 1st and 2nd Respondents who filed a replying affidavit sworn by BENEDICTA SYOMBUA MUSEMBI where she deposes that the said application lacks merit, is an afterthought, misconceived and is otherwise an abuse of the court process. She contends that the Applicant had filed a similar application for stay of execution in the lower court and it was dismissed with a subsequent application to reinstate it, equally dismissed. Further, the Applicant filed yet another application for stay of execution which was dismissed. She insists the instant application is res judicata. Further, the Applicant has not established substantial loss she stands to suffer in the event the orders sought are not granted. She reiterates that the Appeal is not arguable because the purported sale was conducted fraudulently and without knowledge of all the Respondents; the Sale Agreement was not signed by all parties; purported consents included transfer documents were fake and purported payments to the Respondents through cheques were never delivered to them, hence clearly no sale took place. She explains that the lower court matter had been pending since 2013 and the deceased estate remains undistributed to the rightful beneficiaries giving the Appellant including the 3rd to 6th Respondents an opportunity to intermeddle with the said estate to their disadvantage. She states that the suit land will revert to the estate and will be available for distribution to even the Respondents and hence no substantive loss will be suffered. She reaffirms that the title issued to the Appellant, having been obtained through fraud and deceit remains an illegal document and the orders of the Court ought to be implemented.

The Appellant filed a supplementary affidavit reiterating her averments above and insisting the instant application is merited and ought to be allowed. She claims the Applications dated 19th June, 2019 (filed in CMCC No. 552 of 2013) and Application dated 20th September, 2019 in the current Appeal Case No. 25 of 2019 were both dismissed for non- attendance and not heard/ determined on merit. She states that the delay occasioned in bringing the current application was not deliberate. Further, that the 2nd Respondent has already commenced execution of proceedings and is in the process of extracting a Decree.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 7th September, 2021 including the parties' respective affidavits and rivaling submissions, the only issue for determination is whether the Court should grant a stay of execution of the judgement delivered on 11th June, 2019 in Machakos CMCC No. 552 of 2013 pending the outcome of the Appeal.

The Appellant in her submissions insists the instant application is not res judicata as the previous application was not determined on merit. She further submitted that the Appeal herein will be rendered nugatory if an order of stay of execution is not granted. Further, that she had shown sufficient cause to warrant the orders sought. She reiterates that the delay occasioned in bringing the current application was not deliberate and she stands to suffer substantial loss if the orders sought are not granted. She avers that the Respondents have not demonstrated the means on how they will be able to return the suit land if they proceed with execution. She seeks for the Court to make an order to furnish security. To support her arguments, she relied on the following decisions: **NIC Bank Kenya PLC Vs Joshua Onani Ogembo (2018) eKLR; Paul Kipsigei Rono V Johana Kipkemoi Rono (2014) eKLR; CFC Stanbic Bank Limited Vs John Kun'gu Kiarie & Another Civil Appeal (Application) No. 62 of 2016 and Nickson Muthoka Mutavi V Kenya Agricultural Research Institute Civil Appeal No. 92 of 2012.**

The 1st and 2nd Respondents insist the instant application is res judicata as the prayers sought had already been dealt with by a court of competent jurisdiction. They contend that the Appellant has not met conditions set in Order 42 Rule 6 of the Civil Procedure Rules. Further, she has not established substantial loss and shown how the suit land should be preserved. To support their arguments, they have relied on the following decisions: **Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others (2017) eKLR; Kenya Shell Ltd V Kibiru C A No. 197 of 1986 and City Hopper Ltd V Thomas Jeremiah Kivuva HCCA No. 2016 of 2018.**

The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates inter alia: **'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.'**

In the current scenario, judgement was delivered on 11th June, 2019 and the trial Court made an order for cancellation of the Appellant's title. The Appellant being dissatisfied with the whole of the said judgement filed a Memorandum of Appeal on 21st June, 2019. The Appellant claims the Respondents are in the process of executing the Decree, wherein the title to the suit land will be cancelled to her detriment. She argues that a stay of execution pending appeal should be allowed so as to preserve the suit land to ensure the Appeal is not rendered nugatory. She insists that the Respondents have not demonstrated whether they have capacity to return the suit land in case the Appeal is successful. She contends that the suit land should be preserved to ensure neither party is prejudiced. The 1st and 2nd Respondents insist the Appellant has failed to demonstrate how she will be prejudiced if the orders sought are not granted.

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while dealing with an application for stay of execution pending appeal held that the Court has discretionary power to grant it. Further, a stay must be granted so that an appeal may not be rendered nugatory and Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

While in **James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR** the Court of Appeal held that: **'an Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party.'**

From a perusal of the lower court judgement, it emerged in evidence that the suit land which belonged to a deceased person's estate wherein the Respondents' are beneficiaries, was transferred to the Appellant and registered in her name. Further, the Appellant claimed to have paid the purchase price to some of the Respondents but did not deal with the 2nd Respondent, yet she was one of the representatives of the

deceased estate. The 1st and 2nd Respondents contend that there has been a delay in the distribution of the deceased estate due to the dispute herein. They insist the suit land would revert to the deceased estate. I note the Appellant's application for stay pending appeal was dismissed by the lower court. Further, this court declined to set aside orders dismissing the application for stay pending appeal. I further note that the judgement in the lower court was delivered almost three years ago and this application was filed after an inordinate delay. It seems to me the Appellant has filed several applications seeking stay pending appeal instead of focusing on the substantive appeal. Based on the facts before me while associating myself with the decisions I have cited, it is my considered view that the Appellant has not demonstrated what substantial loss she stands to suffer if the stay order was declined. I opine that the Appellant's filing of myriad of applications has contributed to the delay in this Appeal which was filed on 19th June 2019. Further, she has failed to demonstrate why she has failed to set down the Appeal for hearing since the 19th June, 2019 when she filed her Memorandum of Appeal.

It is against the foregoing, while relying on the legal provisions cited above and associating myself with the decisions quoted, that I find the Appellant has failed to meet the **threshold set for granting stay of execution pending appeal and will decline to grant the orders as sought.**

In the circumstance, I find the Appellant's Notice of Motion application dated the 7th September, 2021 unmerited and will dismiss it.

Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF APRIL, 2022

CHRISTINE OCHIENG

JUDGE