



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELCA NO 74 OF 2021**

**AMELIA JEPTOO CHESYINA.....APPELLANT/APPLICANT**

**VS**

**CHRISTINE TARGOK CHESYINA.....1<sup>ST</sup> RESPONDENT**

**AMANDA JERUBET CHESYINA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This Ruling is with respect to the Applicant's Application dated the 29/9/2021. The Applicant sought the following orders;

- a. THAT this Application be certified urgent and service thereof be dispensed with in the first instance.
- b. THAT pending hearing and determination of the appeal, this Honourable Court be pleased to grant a stay of execution of the Ruling and orders issued by the Chief Magistrate's Court at Kikuyu (Hon. Onsarigo) dated 21<sup>st</sup> September, 2021.
- c. THAT pending hearing and determination of the appeal, this Honourable Court be pleased to order that the Defendants herein be restrained from evicting the tenants.
- d. THAT the OCS Kabete to enforce the order.
- e. THAT the cost of this Application be provided for.

2. The Application is premised on the grounds enumerated below;

- a. **THAT** on 21<sup>st</sup> September, 2021 the Hon. Onsarigo delivered a Ruling whereas the Learned Magistrate ordered that the Plaintiff be restrained from remaining or entering upon the suit property.
- b. **THAT** being dissatisfied with the whole Court Ruling delivered on 21<sup>st</sup> September, 2021 the Applicant has lodged this Application.
- c. **THAT** the Defendants have proceeded to the suit property and on 28<sup>th</sup> September, 2021 seek to evict the tenant currently in the premises.
- d. **THAT** the Learned Magistrate on the 21<sup>st</sup> of September, 2021 issued other orders to the Defendant whereby the initial orders which are still in force were never reviewed or set aside and still subsist.
- e. **THAT** the orders dated the 01<sup>st</sup> April, 2021 subsist and new orders were given dated 21<sup>st</sup> September, 2021.
- f. **THAT** the learned Magistrate has put all parties in confusion I am advised by my advocate on record **that the Court could not issue the injunctive orders as invited by the Defendants to stop the execution of lawful orders of the same Court which had not been set aside. (emphasis ours).**
- g. **THAT** the Defendants want to execute the orders by Court and before this appeal will be heard will be prejudicial to the Appellant.

3. It is the Applicant's position that she is the registered owner of the land thus entitled to exclusive occupation and possession. That on Application the lower court issued injunctive orders on the 1/4/2021 in her favour and against the Respondents. That the said orders have not been set aside, appealed and or vacated.
4. That to her shock whilst the above injunctive orders are subsisting the said Magistrate on the 21/9/2021 determined an Application in favour of the Respondents restraining the Applicant from interfering with the suit land.
5. That being aggrieved by the said Ruling she filed an appeal in this Court which is pending.
6. That she has rented the premises to a tenant who is in occupation and that the Respondents have threatened to evict the said tenant from the property. A lease dated the 20/1/2021 was referred to. She averred that the lease agreement would amount to substantial loss and she referred this court to the decision of the court in **James Wangalwa & Anor Vs Agnes Naliaka Cheseto [2012] eKLR.**
7. The Applicant has called upon this Court to preserve the subject matter of the dispute and cited the case of **Consolidated Marine Vs Nampijja & Another CA 93 of 1989** where the court held that the purpose of stay of execution pending appeal is to preserve the subject matter in the dispute so that the right of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal is not rendered nugatory.
8. In opposing the Application, the 1<sup>st</sup> Respondent on her own behalf and that of the 2<sup>nd</sup> Respondent vide a Replying Affidavit dated the 22/10/2021 deposed that both the Applicant and the 2<sup>nd</sup> Respondent are her daughters. That her Affidavit dated the 29/9/2021 contains averments that are both misleading and untruths. That the orders issued on the 29/9/2021 considered that the suit land belonged to the estate of Elisha Chebii Chesya, her deceased husband. That the suit land forms part of the asset list of the properties in Succession Cause No 26 of 2020, Nakuru. She averred that the Applicant/Appellant claimed the land in her plaint filed on the 14/12/2020. She averred that the Applicant disclosed no cause of action against her in the plaint. Inter alia, that the suit land was acquired during the subsistence of her marriage with her late husband and that it has remained her matrimonial property for over a decade. That at no time has the Appellant/Applicant owned or possessed the land and only tried to evict the 1<sup>st</sup> Respondent after the demise of her husband.
9. That in early April 2020 the Appellant/Applicant begun harassing the 1<sup>st</sup> Respondent through third parties by blocking entry into the property, purporting to lease the property to third parties and misleading the court.
10. Further that the orders issued on the 1/4/2020 were interim pending the hearing and determination of the Application whilst that of the 21/9/2021 were the final ruling. She sought dismissal of the Application.
11. In a further Replying Affidavit dated the 16/12/2021, the Applicant stated that she acquired the suit land in 2005 when she applied for electricity supply to the property and that the said property is not part of the estate of the late Elisha Chebii Chesya and that the Respondents have not adduced any evidence in support of the ownership of the property. She accused the Respondents of harassing her on social and print media.
12. On the 17/11/2021 the parties elected to dispense the Application by way of written submissions. The Applicant filed written submissions on the 2/12/2021 through the law firm of **Njiru Boniface & Co. Advocates**. The Respondents failed to comply with the directions with respect to filing of the written submissions.
13. As to whether the order of stay of execution pending appeal should be granted, the Applicant relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. That the conditions that must be satisfied are; that substantial loss may result to the Applicant unless the order is made; the Application has been made without unreasonable delay and that such security as the court may order for the due performance of such decree as may ultimately be binding on the Applicant has been given.
14. The Applicant submitted that there are two sets of orders issued by the same court on the 1/4/2020 and that of the 21/9/2021. The former are still in force and opined that the Respondents ought to have sought review orders instead of obtaining new orders. That the orders issued on the 21/9/2021 amounted to mandatory orders which orders were issued in the absence of compelling reasons. The Respondents were also faulted for obtaining orders without disclosing material facts to the Court of the orders of 1/4/2021 that were and are still in force.
15. On the issue of substantial loss the Applicant stated that if her tenant is evicted she stands to suffer irreparable harm. In addition, that she has demonstrated evidence of sale of the property.
16. Having considered the Application, the rival Affidavit evidence and the submissions on record, the key issue for determination is whether the orders of stay of execution can be granted.
17. **Order 42 Rule 6** of the Civil Procedure Rules states thus; -

#### **6. Stay in case of appeal [Order 42, rule 6.]**

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

18. I shall now analyse the Application applying the above procedural legal guidelines. The impugned orders were issued on the 21/9/2021 while this Application was made on the 30/9/2021 therefore the Application was made without any delay.

19. In the case of **Butt vs. Rent Restriction Tribunal (1982) KLR 417** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -

a. The power of the court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

c. A 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.

d. The court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.

20. With respect to substantial loss, it is trite that the Applicant must lead evidence to demonstrate the substantial loss that she is likely to suffer if the Application is not granted.

21. According to the arguments of the Applicant there were two Rulings emanating from two Applications from the parties on record. The 1<sup>st</sup> Application was filed by the Applicant on the **10/9/2020** which Application was determined in favour of the Applicant on **1/4/2020** in the following terms;

#### **ORDER**

**'THIS MATTER COMING** up for Ruling on a Notice of Motion dated **10<sup>th</sup> September 2020**, under Section 63E of the Civil Procedure Act before Hon. G. Onsarigo, Senior Resident Magistrate by way of zoom in the presence of M/s Muriuki holding brief for Njiru for Plaintiff-

#### **IT IS HEREBY ORDERED**

a. **THAT** the Injunctive Order is hereby granted restraining the Respondents by themselves, servants, employment agents or any other persons acting under their instructions or their interest from entering, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as **L.R. No. 12948/67** in Mountain View Estate this suit is heard and determined.

b. **THAT** the Police Officers to provide security to ensure there is Law and Order.

**GIVEN** under my hand and **SEAL** of Kikuyu Court this **1<sup>st</sup> Day of APRIL, 2021**.

**HON. G. ONSARIGO**

**SENIOR RESIDENT MAGISTRATE**

22. The second set of orders emanated from the Application dated the **24/5/2021** filed by the Respondents in the same court. The Ruling in this Application was delivered on the **21/9/2021** as follows;

#### **ORDERS**

**This matter coming up for hearing of Notice of Motion Application under the certificate of urgency dated the 24/5/2021 before Hon Onsarigo , SRM**

a. **THAT** pending the hearing and determination of this suit, the Plaintiff/Respondent, their servants and/or agents or otherwise howsoever be and are hereby restrained from being or remaining or entering upon all that piece of property situated in Mountain View Estate Nairobi and known as **L.R. No. 12948** ("the suit property").

b. **THAT** pending the hearing and determination of this suit, the Plaintiff/Respondent, their servants and/or agents or otherwise howsoever be and are hereby restrained from interfering howsoever with the Defendant/Applicant's quiet enjoyment, possession and occupation of the suit property.

c. **THAT IN THE ALTERNATIVE** pending the hearing and determination of this suit, the Plaintiff/Respondent, their servants and/or agents or otherwise howsoever be and are hereby restrained from misusing, damaging, wasting and destroying or in any other manner howsoever, degrading the suit property together with the 1<sup>st</sup> Defendant's house hold items which are in her matrimonial home.

23. I have perused the above orders and it is clear that the orders of the 1/4/2021 restrained the Respondents from interfering with the suit property pending the hearing and determination of the suit while the orders of 21/9/2021 restrained the Applicant from entering into the property pending the hearing and determination of the suit. The Respondents have argued that the orders of the 1/4/2021 were interim in nature while the orders of 21/9/2021 were final orders pending the hearing and determination of the suit. That is farther from the truth. It is evident from the way the two set of orders emanate from two different Applications and are both issued pending the hearing and determination of the suit. It is unfortunate that none of the parties annexed the Applications for the court to form its opinions on them.

24. It is noted that the suit lands are described as **L R No 12948/67** in the orders of 1/4/2020 and as **L. R No 12948** in the orders issued on the 21/9/2021. The Plaint filed in the lower Court describes the suit land as **LR No 12948/67**. Having perused the record it is common knowledge amongst the parties that the suit land however described is the same on the ground. Nothing therefore turns on the land reference of the suit land.

25. It is also not in dispute that the orders of the 1/4/2021 are not subject to any dispute. They remain in force undisturbed the same having not been appealed, set aside and or vacated.

26. Given my observation in the preceding paragraph, it is in the interest of justice and good order that the orders of 21/9/2021 be stayed pending the hearing and determination of the appeal. The contrary position will portend confusion amongst the parties and ridicule the authority of the Court given that two conflicting orders shall be subsisting on the same suit land.

27. In the circumstances I hereby exercise my discretion and allow the Application.

28. The costs shall be in the cause.

29. I order the Appellant to file and serve the Record of Appeal within a period of **60 days** in default the Memorandum of Appeal filed on the 30/9/2021 shall stand dismissed.

30. Orders accordingly.

**DELIVERED, SIGNED & DATED AT THIKA THIS 25<sup>TH</sup> DAY OF APRIL 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Njiru for Appellant

Mukoya for 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Court Assistant: Phyllis