



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CIVIL CASE NO. 1715 OF 2007**

**JOSEPH GITAHI GACHAU.....1<sup>ST</sup> PLAINTIFF**

**BEATRICE WANGECHI GITAHI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**PIONEER HOLDINGS (A) LIMITED.....1<sup>ST</sup> DEFENDANT**

**PIONEER ASSURANCE CO. LTD.....2<sup>ND</sup> DEFENDANT**

**EVERLYN WALENGHWA NG'ANG'A.....3<sup>RD</sup> DEFENDANT**

**RULING**

By a ruling delivered by the court on 5<sup>th</sup> February, 2013 the court allowed the 1<sup>st</sup> Defendant's application dated 13<sup>th</sup> June, 2007 that sought inter alia to have the order given on 7<sup>th</sup> December, 2005 and issued on 8<sup>th</sup> March, 2006 discharged, and the Registrar of Titles to cancel entry No. 8 on the Certificate of Title No. I.R 52081 for L.R. No. 14970/49. The plaintiffs being aggrieved by that order have filed a notice of appeal dated 12<sup>th</sup> February, 2013 signifying their intention to lodge an appeal against the said ruling of the court to the court of appeal.

The plaintiffs have filed the Notice of Motion application dated 15<sup>th</sup> February, 2013 before this court under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. The application inter alia seeks the following substantive orders:-

1. That pending the hearing of this application interpartes, the order of the Honourable Court given on 5<sup>th</sup> February 2013 to the effect that the Registrar of Titles do cancel entry No. 8 on the certificate of Title No. IR No. 52081 for L.R No. 14970/49 be stayed.
2. The order of this Honourable Court given on 5<sup>th</sup> February, 2013 to the effect that the Registrar of Titles do cancel entry No. 8 on the certificate of Title No. IR 52081 for L.R No. 14970/49 be stayed pending the hearing and determination of the Appeal from the order of this court given on 5<sup>th</sup> February, 2013.

The application is supported by the grounds set out on the face of the application and the affidavit

sworn in support of the same by the 1<sup>st</sup> Plaintiff on 15<sup>th</sup> February, 2013. The 1<sup>st</sup> and 3<sup>rd</sup> defendants oppose the application by the plaintiff and have filed replying affidavits.

On the court's directions the parties have filed written submissions which the parties counsel highlighted on 2<sup>nd</sup> May, 2013.

The background to the instant application is that the plaintiffs filed this suit contemporaneously with an application seeking an injunction to restrain the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant from effecting the transfer or taking possession of the suit property pending the hearing and determination of the suit. The application for injunction was dismissed by the court but pending the hearing and dismissal of the injunction application the court had on 7<sup>th</sup> December, 2005 directed the parties to observe the status quo that the court had on 23<sup>rd</sup> November, 2005 ordered to be observed by the parties pending the hearing of the application .

The plaintiffs filed a Notice of Appeal to Appeal the ruling/decision of Honourable Lady Justice Ang'awa dismissing the application for injunction to the court of appeal and this appeal to the knowledge of the court is still pending. An application for injunction in the court of appeal, by the plaintiff in this suit pending the hearing and determination of the appeal from the ruling and order of Hon. Justice Ang'awa was dismissed by the Court of Appeal on 3<sup>rd</sup> July, 2009.

The plaintiffs instant application is on the main grounded on the applicants assertion that the transfer of the property to the 3<sup>rd</sup> Defendant will result in substantial loss to the plaintiffs as the property is their only home and they would be rendered destitute and any appeal would be rendered nugatory. The plaintiff further argue that the maintenance of status quo on the property will be sufficient to secure the interests of all parties and the due performance of any order of this court.

The 1<sup>st</sup> Defendant contends the plaintiff's intended appeal against the decision of the court given on 5<sup>th</sup> February, 2013 is hopeless and stands no chance of success. The 1<sup>st</sup> defendant further contends the plaintiffs application is yet another attempt by the plaintiffs to continue misusing the order given in this matter on 7<sup>th</sup> December, 2005 to the extreme prejudice of the 3<sup>rd</sup> Defendant who is an innocent purchaser for value of the suit premises and who has wrongly been prevented for more than 7 years from transferring into the same her name despite having paid the purchase price.

The 3<sup>rd</sup> defendant contends that the plaintiffs have not demonstrated that they would suffer any damage that cannot be compensated for by an award in damages if they are successful in the appeal. The 3<sup>rd</sup> defendant further argue that no application has been filed and/or injunction granted to sustain the order for status quo and further contend the doctrine of '*Lis pendens*' cannot be invoked since two distinct applications for injunction have been decided against the plaintiffs in the High Court and in the Court of Appeal.

An application for stay pending appeal under order 42 of the Civil Procedure Rules should satisfy the following conditions:-

- a. Sufficient cause for the grant of the order must be shown.
- b. Applicant must show the substantial loss he stands to suffer unless the order of stay is granted.
- c. The application must be brought to court without undue delay;
- d. Such security as the court may order for the due performance of the decree or order ought to be provided;
- e. The grant of stay is discretionary.

Honourable Justice Makhandia (as he then was) had occasion to discuss the above requirements for stay of execution in **HCCC No. 34 of 2010 (Kisii) [2010] eKLR Josphine Moraa vs. Ken Sagini & others.**

The Honourable Judge in his decision in the above case cited the Court of Appeal decision in the case of

**Butt vs. Rent Restriction Tribunal (1982) KLR 417** and stated thus:-

***“..... the power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised not capriciously but in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should that court of appeal reverse the judge’s discretion.***

***The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements and finally that the court in exercising its power under Order XLI Rule 2 (b) of the civil Procedure Rules can order security upon application by either party or on its own motion.....”***

The applicants have brought the instant application for stay of execution without undue delay and thus have satisfied this requirement. On the question whether or not they have shown they stand to suffer substantial loss unless the order of stay is granted I wish to observe as follows:-

- i. That High court after hearing the parties on the application for injunction filed by the plaintiffs dismissed the application on 9<sup>th</sup> May, 2007 with Honourable Lady Justice Ang’awa holding that he plaintiffs remedy was in damages.
- ii. That the plaintiff filed an appeal against the ruling of Honourable Lady Justice Ang’awa being CACA No. 67 of 2008 and pending the determination of the appeal filed in the Court of Appeal Civil Application No. NAI 124 of 2008 under rule 5(2) (b) of the Court of Appeal rules seeking an order that:-

***“Pending the hearing and determination of Nairobi civil Appeal No. 67 of 2008 the respondents whether by themselves, their agents and/or servants or otherwise howsoever be restrained by injunction, from evicting the applicants, taking possession, transferring, or in any other interfering with the applicants. Quiet possession of the premises known as L.R. No. 14970/49 Nairobi”***

The Court of Appeal upon hearing the application for injunction and upon holding the plaintiffs had an arguable appeal on the point whether the appeal would be rendered nugatory unless the interim injunction sought was granted the appeal judges stated in their ruling thus:-

***“... We are satisfied that he same will not be rendered nugatory. However, we recognise the argument put forward by the applicants that the suit property is matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realise that when they charge their matrimonial property to secure a loan they are infact converting that property into a commodity for sale available for purchase by all and sundry if they fail to pay the charge debts or the loans and that no sentimental value or attachment tothe mortgaged property, however great perse, would operate against the exercise of statutory power of sale by the mortgagee.***

***We are also of the view that damages would be an adequate remedy for the party that succeeds ultimately in the appeal...”***

During the hearing of the two applications for injunction the applicants argued the same point that they would suffer irreparable loss and damage in the case of the High Court and substantial loss/damage that would render the appeal nugatory in the case of the Court of Appeal.

In both instances the court did not agree with them. The “*status quo*” that the plaintiffs seeks to be maintained in my view is another form of injunction to the extent that it bars the 1<sup>st</sup> and 3<sup>rd</sup> defendants from doing what the plaintiffs did not obtain pursuant to the injunctions which the defendants successfully opposed.

The 3<sup>rd</sup> defendant in this matter is a purchaser for value of the suit property and paid the purchase price for the property way back in November, 2004 and she is like the plaintiffs entitled to have justice meted

out to her as a litigant and as the saying goes justice looks both ways. The 3<sup>rd</sup> Defendant parted with her money over 8 years ago and is yet to get the benefit of the asset she purchased.

While I cannot express my view at this point as to whether or not the plaintiffs have a good appeal with a probability of success having not seen the grounds for the intended appeal I am in the light of the Court of appeal's ruling in the plaintiffs application for injunction in that court persuaded that the intended appeal cannot be rendered nugatory and that even if the appeal was to be successful damages would be adequate compensation to the plaintiffs in case they succeed in the suit. The plaintiffs on the question of offer of security as a condition for the grant of stay of execution argued that for as long as the status quo order at the Lands Registry remained undisturbed that would constitute adequate security as the property would be available to the successful party as it is protected from being alienated. Quite obviously this argument is selfish on the part of the plaintiffs as it ignores the plight of the 3<sup>rd</sup> defendant who in fact paid the full purchase of the property and was entitled to have the property transferred to her. It cannot be realistic that the plaintiffs remain in occupation and possession of the suit property and at the same time purport to offer the same as the security to satisfy the requirement under Order 42 Rule 6.

Having considered the application by the plaintiffs and the affidavit in support and in opposition and the parties respective submission and the authorities referred to me I am not persuaded the applicants application has any merit and I cannot exercise my discretion in favour of granting a stay of execution. The plaintiffs have not discharged the burden placed on them under Order 42 Rule 6 of the civil Procedure Rules to deserve the discretion of the court and having regard to all the circumstances attendant to this case including the fact that it is not clear as to why the suit before the High Court has never been progressed to trial since the same was filed and since the dismissal of the injunction application. The suit has not been prepared to be ready for trial and seeing how it has progressed over time it could even be another couple of years before it is finalised. There is yet the 3<sup>rd</sup> party who is a purchaser for value who got caught up in the tussle between the plaintiffs and the 1<sup>st</sup> Defendant. In those circumstances the justice of the matter militates against my exercising my discretion to grant an order of stay as prayed by the plaintiffs.

The upshot therefore is that I hold and find the plaintiffs Notice of Motion dated 15<sup>th</sup> February, 2013 to be devoid of any merit and order that the same be dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendants