



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
IN THE ENVIRONMENT AND LAND COURT
CIVIL APPEAL NO. 9 OF 2012

JACKSON MWANGI GATHUNA1ST
APPLICANT

JIMMY HUMPREY GATHUNA 2ND
APPLICANT

VERSUS

SCHEME MANAGER MWEA SETTLEMENT
SCHEMERESPONDENT

(BEING AN APPEAL FROM RULING OF THE LEARNED PRINCIPAL MAGISTRATE HON. B.M. OCHOI DATED 23RD OCTOBER, 2012 IN WANG'URU CIVIL SUIT NO. 92 OF 2012)

RULING

This is in respect of the appellant/applicant's Notice of Motion dated 20th December 2012 seeking the following orders:-

1. *Spent*
2. *That this Court do stay further proceedings in Wanguru Civil Case No. 92 of 2012 until this appeal is determined*
3. *That this Court do order that pending the hearing and determination of the appeal herein, the status quo regarding rice holding No. 2032 A and 2032 B be maintained and the same do remain in the names of the appellants/applicants*
4. *Costs of the application be provided for.*

The application is supported by the affidavit of JACKSON N. MWANGI GATHUNA the 1st appellant/applicant herein in which he depones, inter alia, that he is the licensee of rice holding No. 2032 A since 18th February 2011 and learnt that the respondent was in the process of canceling the said licence and when he sought an order for injunction in Wanguru P.M.C.C No. 92 of 2012, the same was dismissed hence this appeal.

JIMMY HUMPREY GATHUNA the 2nd appellant/applicant also swore a similar affidavit in respect of rice holding No. 2032 B.

The application is opposed and in the grounds of opposition, it is stated that there are no reasons for granting a stay and that this application is only meant to delay the trial of the case in the lower Court.

Counsels for both parties have filed submissions which I have considered together with the application and supporting affidavit.

This application is founded under **Order 42 Rule 6 (1) and (b) of the Civil Procedure Rules**. That provision provides for a stay of execution and also for temporary injunction pending appeal. The order sought to be stayed herein is the one dated 29th June 2012 wherein the trial magistrate in Wanguru Civil Case No. 92 of 2012 dismissed the appellants/applicants' application for injunction. **Order 42 Rule 6 (1) of the Civil Procedure Rules** reads as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from ----- “

Under that provision, the Court has a discretion to grant a stay pending appeal if it is satisfied that:-

- a. ***Substantial loss may result unless the order sought is granted***
- b. ***The application has been made without un-reasonable delay***
- c. ***Such security as the Court orders for the due performance of the decree or order appealed from has been given by the applicant.***

The above conditions which are the essence of **Order 42 Rule 6 of the Civil Procedure Rules** share an inextricable bond such that absence of one will affect the exercise of the discretion the Court in granting stay. This was reinforced by the Court of Appeal in **MUKUMA VS ABUOGA 1988 K.L.R.** Substantial loss is the cornerstone of an application under **Order 42 Rule 6 of the Civil Procedure Rules**. Nowhere in their supporting affidavits have the applicants demonstrated what substantial loss if any, they will suffer if the Court does not grant the orders sought. There is only a mention that they stand to lose their land. However, the land in question is a rice holding and it is a fact that under the **Irrigation Act Cap 347 Laws of Kenya**, the land in a designated Irrigation Scheme belongs to the National Irrigation Board and not to any individual who is only a licensee. The applicants have therefore not demonstrated that they will suffer any substantial loss if the Court does not grant the orders sought.

Further, the order of the lower Court only refused an application for injunction. That was a negative order and there can be no need to stay such an order. In **SONALUX LTD & ANOR. VS BARCLAYS BANK OF KENYA C.A CIVIL APPLICATION NO. 219 OF 2007 (NBI)**, the Court of Appeal declined to stay orders as there was nothing to be stayed as the superior Court had in that case dismissed an application for injunction which essentially meant it was a negative order.

There is really no evidence placed before me to warrant this Court staying the proceedings in Wanguru Civil Case No. 92 of 2012 or to make any orders of status quo regarding rice holding No. 2032 A and

2032 B. The up-shot of the above is that the appellants/applicants' Notice of Motion dated 20th December 2012 is dismissed with costs. For avoidance of doubt, the Ex-parte orders granted on 16th March 2013 are hereby discharged.

B.N. OLAO

JUDGE

9TH SEPTEMBER, 2013

9/9/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Ms Mukono for Thungu for Appellants – present

Ms Kiragu for Ombachi for Respondent – present

COURT: Ruling delivered this 9th day of September, 2013 in open Court.

B.N. OLAO

JUDGE

9TH SEPTEMBER, 2013