



Gathogo (Suing as legal representative of the Estate of Elijah Gathogo Kamaku (Deceased) v Kimotho & 4 others (Environment & Land Case 127 "B' of 2014) [2022] KEELC 15701 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEELC 15701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 127 "B' OF 2014
EC CHERONO, J
SEPTEMBER 23, 2022**

BETWEEN

JAMES MUTHII GATHOGO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ELIJAH GATHOGO KAMAKU (DECEASED) PLAINTIFF

AND

**KARIUKI KAMAKU KIMOTHO 1ST DEFENDANT
REBECCA NJOKI KARIUKI 2ND DEFENDANT
SIMON MAINA KARIUKI 3RD DEFENDANT
GEORGE NJOGU KARIUKI 4TH DEFENDANT
DAVID WACHIRA KARIUKI 5TH DEFENDANT**

RULING

1. By a Notice of Motion dated March 1, 2022 the defendants/applicants seek the following orders;
 1. (Spent)
 2. That the Honourable court be pleased to issue stay of execution of the judgment made by the Honourable court on December 3, 2021 until hearing and final determination of the application interparties.
 3. That the Honourable court be pleased to issue stay of execution of the judgment made by the Honourable court on December 3, 2021 until hearing and final determination of the appeal filed before the court of appeal in Nyeri.
 4. That and or *status quo* be maintained as it existed before judgment



5. That the costs of this application be in the cause.
2. The application is based on grounds apparent on the face of the said application supported by the affidavit of Rebecca Njoki Kariuki sworn on even date.
3. The said application is opposed with a Replying affidavit sworn by James Muthii Gathogo sworn on June 3, 2022

Defendants' summary of facts

4. According to the applicants/defendants, they were dissatisfied by the judgment of this Honourable court delivered on December 3, 2021 and filed a Notice of appeal on 6th December, 2021. They averred that they also applied for proceedings and were supplied with a certified copy of the same on January 4, 2022.
5. The applicants further stated that after judgment was delivered, the 1st defendant got confused on what to do with the plaintiff whom he had allocated on acre out of his land, got very sick and was pronounced dead after spending more than three weeks in hospital and has since been buried. They averred that they are desirous of pursuing the appeal hence need for stay of execution so as not to render the appeal nugatory.
6. The applicants further contend that the orders sought will not prejudice the respondent as they will continue to utilize the area they have been utilizing and they have high chances of success.

Respondent's Summary of facts

7. The application is opposed by the respondent vide a replying affidavit sworn on June 3, 2022 in which he stated that the registration of his share in the suit land will not cause any substantial loss as the registration is a reversible process which he undertook not to pass the interest to third parties upon registration until the hearing and determination of the intended appeal.
8. The respondent further stated that the intended appeal has no grounds or Memorandum of Appeal has been filed so far to show whether intended appeal is arguable or not.
9. The respondent also contends that if an order of stay is granted, it will deprive him the fruits of his judgment which he is entitled to enjoy without hindrance

Applicants Written Submissions

10. The applicants through the firm of Munene Muriuki & Co. Advocates submitted that that substantial loss will occur if the application is not allowed since they have developed the subject matter of this suit extensively and that should execution is done, such loss will never be recovered especially if the subject matter passes to third parties.
11. The applicants further submitted that the application is brought without unreasonable delay save a slight delay caused by the demise of the original 1st defendant which necessitated the parties to move the court to obtain limited letters of Administration
12. In conclusion, the applicants submitted that they are ready and willing to give such security as the court may require



Respondent's Written Submissions

13. The Respondent through the firm of Gathara Mahinda & Company Advocates also filed his submissions in further opposition to the application on July 4, 2022. In his submission, the respondent averred that before granting an order for stay of execution of a decree, an applicant must establish the triple principles to wit;
 - a. The appeal is arguable and not a frivolous one
 - b. If stay is not granted the intended appeal I successful will be rendered nugatory.
 - c. If stay is not granted, one will be occasioned to suffer substantial loss, a fulfilment of the provision of order 42 Rule 6(2) of the [CPR](#).
14. On whether or not substantial loss may result to the applicant if the order of stay of execution is not made, the respondent submitted that the applicants have not shown that he would be unable to surrender back the entitled share of the land if the intended appeal succeed. He averred that there is no prove of substantial loss proved by the applicants that he will dispose of his share and that he will not be able to surrender the same if the appeal succeed.
15. The respondent contends that the applicants have not proved that the intended appeal ill be rendered nugatory and that the same is only intended to delay the enjoyment of the fruits of judgment in his favour and to inflict him further pain in litigation and costs. He cited the case of [Masisi Mwita-v-Damaris Wanjiku Njeri](#), Hcca No. 107 of 2015 (2016) e KLR.

Legal Analysis And Determination

16. I have considered the Notice of motion application dated 1st March 2022, the supporting affidavit, and submissions by the applicants. I have also considered the replying affidavit by the respondent and the rival submissions. Before an application for stay of execution pending appeal is granted under Order 42 Rule 6(2) [CPR](#), an applicant must satisfy the following conditions;
 - a. The application has been brought without unreasonable delay
 - b. The applicant will suffer substantial loss unless the application is granted and
 - c. Security for the due performance of the decree as may ultimately be binding on him has been given by the applicant.
17. On the first issue, the impugned judgment was delivered on December 3, 2021. By a Notice of Motion dated January 17, 2022, the applicant filed an application for stay pending appeal which was subsequently withdrawn on March 1, 2022 and replaced with the current application. The applicants have explained that the slight delay was due to the demise of the original 1st defendant which necessitated them to seek and obtain limited grant of letters of Administration. I find the explanation given by the applicants for the slight delay excusable.
18. The second principle which is the cornerstone for the grant of stay pending appeal is substantial loss. Substantial loss in its various forms is defined as any action done or likely to be done by a party, in this case the respondent which, if allowed, would create a state of affairs that will negate the very essential core of the applicant's right as a successful party in the intended appeal. The court as an arbiter is to ensure that an aggrieved party who has exercised his undoubted right of appeal does not reap a barren judgment. In trying to balance between the competing rights, the court must satisfy itself that the rights of the decree holder which has crystalized are not denied unless substantial loss would occur



to the applicant. To that end, the applicant must establish, by empirical evidence that the enjoyment of the fruits of the judgment by the decree holder must of necessity be delayed pending hearing and determination of the intended appeal.

19. In this case, the applicants have not demonstrated how the intended appeal will be rendered nugatory unless the application is allowed. They have not alleged that the respondent will dispose of his share of the suit property to third parties in the event the intended appeal succeed thereby rendering the intended appeal nugatory. Execution of a judgment/decre is a lawful process and cannot amount to substantial loss. It behoves the applicant how execution can create a state of affairs that that can affect the essential core of the applicant as a successful party in the intended appeal.
20. Since the applicants have failed to establish substantial loss which cornerstone of stay pending appeal, the Notice of Motion dated March 1, 2022 fails and the same is hereby dismissed with costs. It is so ordered.

READ, SIGNED AND DELIVERED VIA E-MAIL THIS 23RD SEPTEMBER, 2022.

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HON. E.C CHERONO
ELC JUDGE

