



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 25 OF 2020

KISIRIRI COMMUNITY

***(Suing Through)* THOMAS LESKE – CHAIRMAN.....1ST APPLICANT/ APPELLANT**

JANE LOWASA – TREASURER.....2ND APPLICANT/APPELLANT

WILSON LELESHAO.....3RD APPLICANT/APPELLANT

-VERSUS-

HARRY GEORGE JENNINGS.....1ST RESPONDENT

LUCY WAMBUI JENNINGS.....2ND RESPONDENT

O.C.S. RUMURUTI POLICE STATION.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

RULING

1. Pursuant to a judgment delivered on the 19th August 2020 in Nanyuki CM ELC No. 47 of 2018, the Applicant/Appellants have now filed the present Application by way of a Notice of Motion dated 20th August 2020 brought under the provisions of Section 1A and 1B of the Civil Procedure Act and Order 50 of the Civil Procedure Rules and where they seek for orders of stay of execution of the judgement and decree pending the hearing and determination of their intended Appeal.
2. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Wilson Leleshao the 3rd Applicant herein, dated the 20th August 2020.
3. On the 25th August 2020, pending the hearing of the Application inter-parties, there were interim orders of temporary stay of execution until the inter-parties hearing.
4. The said Application was opposed vide the 1st and 2nd Respondent's Replying Affidavit dated the 14th September 2020 in which they sought for its dismissal with costs as it lacked merit and was an abuse of the Court process because the Applicants Appeal had no probability of success as they had failed to prove the existence of a suit land and therefore no Appeal would cure the said vagueness.
5. The Application was disposed of by way of written submission wherein the Applicants' submission was to the effect that they were a community based organization who had moved to court to seek redress after experiencing illegal evictions and destruction of their property by the 1st, 2nd and 3rd Respondents. Their redress was not adequately addressed hence to the filing of an Appeal and application hereinafter.
6. That the subject issue herein was a parcel of unregistered land measuring about 800 acres and which land lay immediately after the beacon marking the Jennings Farm, land which they had occupied for a period of over 30 years and had developed the same.
7. That having occupied the said parcel of land for over 30 years and the Respondents having not been registered as the proprietors thereto their interests could not override the Applicants' interest as they were still in occupation of the same.

8. That the trial court in failing to protect the Applicants' equitable interest erred in failing to consider the provisions of Sections 152B to 152I of the Land Act, and therefore the Applicants were apprehensive that should the stay pending the hearing and determination of Appeal not be granted that all of them who numbered about 3,000 in number would be evicted and rendered homeless with no other alternative place to go thus rendering the Appeal nugatory.

9. It was their submission that the Respondents would not suffer any prejudice if they were left in occupation of the land pending the hearing and determination of the Appeal.

10. That further the said application was made timelessly and without any form of delay and since there was no monetary Decree, the community/Applicant was not required to tender to court security for costs. They sought for their application to be allowed.

11. In opposition to the said application, the 1st and 2nd Respondents through their submissions dated the 10th October 2020 submitted that the Jennings Farm being adjacent to the rivers meant that they were the riparian owners with rights *ex jure naturae* to use the water from River Ngare Narok and Pesi River but that the Applicants/Appellants had completely barricaded the river frontage claiming ownership.

12. That the Applicants had not discharged the onus placed on them by virtue of the provisions of Order 42 Rule 6 of the Civil Procedure Rules which are concerned with the stay of execution, and even though the court were to grant stay of execution the same would be a pronouncement in vanity as there was no suit land. That the Appellant/Applicants were in illegal occupation possession and use of riparian reserve and the Jennings Farm.

13. That if the order for stay was granted the 1st and 2nd Respondents would stand to suffer loss of property, threats of life due to the incessant threats made by the Applicants and the court would be sending a negative message inciting and encouraging pastoralists communities to invade private ranches and overrun the ranches which in turn would fuel war between ranchers and pastoralists communities leading to loss of lives and property.

14. That the Appeal had no probability of success as the Appellant/Applicants had failed to prove the existence of the suit land and therefore the Appeal would not cure the fatal vagueness. That there was no subject matter and therefore the Appeal would not be rendered nugatory as there was no subject matter capable of conservation by way of stay of execution.

Determination.

15. I have considered the Applicant's Application for stay of execution of the decree in Nanyuki CM ELC No. 47 of 2018 pending the hearing and determination of his intended Appeal. I have also considered the reasons given for and against the said application.

16. This Application was brought under the provisions of Order 50 of the Civil Procedure Rules whereas the law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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 1st 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 1st Applicant.

17. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which :

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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 find issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

19. The purpose of stay of execution is to preserve the substratum of the case. In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that:-

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

20. What is the status quo on the suit land? The Applicant contends that they would suffer substantial loss if stay is not granted, because they have been in occupation of the said parcel of land for the last 30 years.

21. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

22. I have considered the submission of both the Applicant and the Respondent. I have also gained sight of the orders issued in the impugned judgment to wit that;

‘The plaintiffs have failed to prove the existence of right, over the contested property that is ownership. The court has been informed that the said property is part of a wetland and riparian land and relevant authorities have previously attempted to evict them from the said contested property. This court cannot therefore injunct the eviction of the plaintiffs from the contested property as it amounts to granting them rights over the same which rights do not exist.....

.....I therefore issue an injunction restraining the plaintiffs, their agents, servants, employees or anyone claiming through them from trespassing, entering, remaining, invading, grazing livestock, re-entering or otherwise interfering with the 1st and 2nd defendant’s occupation within their boundaries of the Jennings farm.....’

23. I find that indeed as was held in the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, that it was not enough for the Applicants to state that they lived on the suit land for 30 years and that they would suffer substantial loss. It was obligated of them to go further and show the substantial loss that they stood to suffer if the Respondents executed the decree keeping in mind that they had neither proved the existence of the suit land nor its ownership, the same being riparian land.

24. The Court has to balance the interest of the Applicants who are seeking to preserve the status quo pending the hearing of the Appeal so that their Appeal is not rendered nugatory and the interest of the Respondents who are seeking to enjoy the fruits of their judgment. In other words the Court should not only consider the interest of the Applicants but has also to consider, in all fairness, the interest of the Respondents who has been denied the fruits of their Judgment.

25. It was stated by Kuloba, J in **Machira T/A Machira & Co Advocates** (supra)

“to be obsessed with the protection of an Appellant or intending Appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

26. On the second condition, I find that it was not in dispute that the impugned judgment was delivered on the 19th August 2020 wherein the present application was filed on the 20th August 2020, I thus find that the said application is brought without undue delay.

27. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicants have pledged that since there was no monetary decree, the community/Applicant was not required to tender to court security for costs.

28. In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

29. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.

30. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how discretion should be exercised as follows:

1. *“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.*
2. *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an Appeal may not be rendered nugatory should that Appeal court reverse the judge's discretion.*
3. *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.*
4. *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. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of Appeal.*
5. *The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”*

31. **In the case of Republic v Kenya Anti-Corruption Commission & 2 Others KLR 31**, the Court held:

“The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. in order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him of the order sought if he failed to demonstrate the other limb.”

32. There having been no dispute as to the fact that the land in issue was riparian land and having found that there was no evidence that Appellant/Applicants had applied for grant/allotment of the same and had been granted an occupation permit that proved the existence and/or ownership of the same, the court herein has entertained considerable doubt as to whether the intended Appeal is arguable bearing in mind that an arguable Appeal does not mean one that must succeed, rather, it is one that raises grounds that can sustain a legal argument. See **Kenya Tea Growers Association & Another v. Kenya Planters Agricultural Workers Union, Civil Application No. NAI. 72 of 2001.**

33. As to whether the intended appeal shall be rendered nugatory if the orders sought are not granted, the answer is in the negative. In the event that the applicants succeeds in their intended appeal, then they shall be allowed occupation on the disputed land.

34. Further the two conditions necessary for grant of Orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules having not been met by the Appellant/Applicants and further in regard to the provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this Court is not inclined to grant the Order of stay of execution so sought. The Application dated the 20th August 2020 is herein dismissed with costs.

Dated and delivered at Nakuru this 13th day of January 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE