



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 724 OF 2017**

**(Formerly MILIMANI ELC CASE NO. 1564 OF 2014)**

**PRESBYTERIAN FOUNDATION (A COMPANY LIMITED BY GUARANTEE)....PLAINTIFF**

**VERSUS**

**BERNARD OLE MEREU.....1<sup>ST</sup> DEFENDANT**

**FRED GITHINJI.....2<sup>ND</sup> DEFENDANT**

**SAMUEL NASIB.....3<sup>RD</sup> DEFENDANT**

**PETER KARANI.....4<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 15<sup>th</sup> September, 2020 brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 of the Civil Procedure Rules and Articles 50 and 159 of the Constitution. The Plaintiff seeks the following orders:

1. Spent
2. That the Law Firm of Mbigi Njuguna & Co. Advocates be granted leave to come on record in place of PK Mbabu & Co. Advocates.
3. That stay of execution which lapses on 21<sup>st</sup> September, 2020 be extended pending the hearing and determination of this application.
4. That stay of execution of the judgment and decree herein be granted pending hearing and determination of the Appeal.
5. That this Honourable Court grants any other alternative orders it deems fit.
6. That costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of HENRY THUO GITAU, the Session Clerk of Kibiko Parish (PCEA Church) where he deposes that this suit was determined on 22<sup>nd</sup> June, 2020 and judgement entered in favour of the 1<sup>st</sup> and 4<sup>th</sup> Defendants and a stay of execution of Ninety (90) days granted. He confirms that the Plaintiff being dissatisfied with the said Judgement filed a Notice of Appeal on 1<sup>st</sup> July, 2020. He explains that the Plaintiff applied for certified copies of the Decree, proceedings and judgement and copied the Attorney General. Further, that the stay of execution of ninety (90) days will lapse on 21<sup>st</sup> September, 2020. He contends that on the suit land, the Applicant has a Church and other institutions whose existence will be in jeopardy if the Decree is executed and both the title and property are allowed to change hands. He explains that the Appeal has high chances of success. Further, that the judgement was delivered during COVID 19 pandemic when movement was restricted hence it took quite a while to arrange meetings especially at the head office so as to decide on the Appeal and the subsequent action. He reiterates that the Plaintiff stands to suffer substantial loss because execution will issue and the Plaintiff will lose property being title no. Ngong/ Ngong/ 66 thereby rendering the

appeal nugatory. Further, the Applicant has changed advocates and wish to henceforth be represented by the law firm of Mbigi Njuguna & Co. Advocates.

To oppose the Application, the 1<sup>st</sup> and 4<sup>th</sup> Defendants'/ Respondents' filed a Notice of Preliminary objection dated the 15<sup>th</sup> September, 2020 based on the following grounds: the application has been overtaken by events; the Applicant's advocate need to regularize its position post judgement before seeking to move the court for stay; there is no proper Notice of Appeal on record for the court to grant stay; delay has not been explained and there is nothing to stay.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 15<sup>th</sup> September, 2020 including the supporting affidavit, Notice of Preliminary Objection and rivalling submissions, the following are the issues for determination:

- Whether the Court should grant a stay of execution pending the determination of the intended Appeal.
- Who should bear the costs of the application

Before I deal with the two issues, I note the firm of Messrs. Mbigi Njuguna & Co. Advocates entered into a consent with the firm of P K Mbaabu & Company Advocates to take over the conduct of this matter on behalf of the Plaintiff/ Applicant in accordance with Order 9, rule 9 of the Civil Procedure Rules.

As to whether there should be a stay of execution of the Judgement delivered on the 22<sup>nd</sup> June, 2020. The Plaintiff/Applicant has sought for a stay of execution of the Judgment pending the determination of the intended appeal, which application is opposed by the 1<sup>st</sup> and 4<sup>th</sup> Defendants/ Respondents. In its submissions it contends that the delay in filing this application is satisfactorily explained. It avers that the Appeal has high chances of success and disallowing the stay will render the Appeal nugatory. To buttress its averments, it relied on the case of **Butt V Rent Restriction Tribunal (1982) KLR 417** as cited in the case of **Amal Hauliers Limited V Abdulnasir Abukar Hassan (2017) eKLR**. It further submitted that dismissal of this application would occasion it substantial loss and relied on the case of **Masisi Muita V Damaris Wanjiku Njeri Muranga Civil Appeal No. 107 of 2015 (2016) eKLR**. It explained that it had invested heavily on the suit land and if title to the said property changes hands at this juncture, it will occasion them irreparable harm as possibly there will be demolition or eviction therefrom. It insists the 1<sup>st</sup> and 4<sup>th</sup> Respondents have not invested on the suit land. To buttress these averments, it relied on the case of **Victory Construction V B M (a minor suing through next friend one PMM) (2019) eKLR**. Further, that it had satisfactorily explained the delay in filing the instant application as it had to seek instructions from the client. To support this argument, it relied on the case of **Gahir Engineering Works Ltd V Rapid Kate Services & Another (2015) eKLR**.

The 1<sup>st</sup> to 4<sup>th</sup> Respondents in their submissions insist the orders sought have been overtaken by events as they already acquired title to the suit land in favour of Government of Kenya and the same has been handed over to the Principal Secretary, Treasury to hold in trust for the said Government. To support their arguments, they relied on the decisions of **Masisi Muita V Damaris Wanjiku Njeri Muranga Civil Appeal No. 107 of 2015 (2016) eKLR**; **Stephen Wanjohi Vs Central Glass Industries Limited, Nairobi HCC No. 6726 of 1991**. They insist no proper Notice of Appeal was served upon them and the instant application is premised on a Notice of Appeal filed and served. Further, that the Applicant has not demonstrated upon which ground of Appeal it intends to rely on, for the court to deduce there is indeed any arguable ground. They reiterate that the Applicant's failure to serve them with the Notice of Appeal is mischievous and aimed at covering up the fact that the prayers sought in the instant Application are overtaken by events. Further, that the Applicant has failed to prove any substantial loss it will suffer. They explain that the suit property will remain an education facility and the Respondents do not intend to alter or dispose of the said land.

Order 42 Rule 6(2) of the Civil Procedure Rules provides instances when a party can seek for stay of execution and stipulates that: **' No order for stay of execution shall be made under subrule (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.'**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal gave parameters on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stipulated as follow:'

- "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, a 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.'**

See also the case of **Masisi Muita V Damaris Wanjiku Njeri Muranga Civil Appeal No. 107 of 2015 (2016) eKLR.**

**While Rule 5 (b) of the Appellate Jurisdiction Act provides that' ..... in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.'**

In this instance, the Applicant lodged a Notice of Appeal which is annexed to its supporting affidavit. The Respondents have insisted there is no valid Notice of Appeal lodged. However, from the Court records, I note a Notice of Appeal was filed on 1<sup>st</sup> July, 2020. Upon delivery of the judgement, this court had initially granted the Applicant, ninety (90) days stay of execution which it now seeks to extend. The Respondents contend that the Appeal has been overtaken by events as the Title to the suit land has since been transferred to the PS Treasury to hold in trust for the Government of Kenya. They reaffirm that they do not intend to dispose or alter the suit land as it will remain an education facility. I note the Applicant filed this application almost three months down the line and I find the explanation for the delay not plausible. I further note that the Applicant has not offered any security in the event the stay of execution is granted pending Appeal. I opine that the Applicant has not fully demonstrated the prejudice its stands to suffer if the extension of the order of stay of execution is not granted. I find that the application has been overtaken by events since the Certificate of Title to the suit land is now registered in the name of the PS Treasury to hold in trust for the Government of Kenya. Based on the facts as presented while relying on Rule 5 (b) of the Appellate Jurisdiction Act cited above and associating myself with the quoted decisions, I find that the Applicant has failed to meet the **threshold set for granting and or extending the stay of execution pending Appeal and will decline to grant the said orders as sought.**

**It is against the foregoing that I find the Plaintiff's** Notice of Motion application dated the 15<sup>th</sup> September, 2020 unmerited and will proceed to dismiss it with costs.

**Dated Signed and Delivered at Kajiado virtually this 23<sup>rd</sup> Day of February, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**