



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO. 52 OF 2018

WANJIRU MWAURAPLAINTIFF/RESPONDENT

VERSUS

RUTH WAMBUI KEIGI.....DEFENDANT/ APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **11th August 2020**, by the Defendant/ Applicant seeking for orders that;

- 1. That the Honourable court be pleased to grant leave to the Law Firm of Laichena Mugambi & Ayieko Advocates LLP to come on record for the Defendant in place of the Law Firm of Muturi Njoroge & Co Advocates.**
- 2. The Honourable Court be pleased to stay execution of the Judgment and Decree of the Honourable Court made on 30th July 2020 pending the hearing and determination of the intended Appeal to the Court of Appeal.**
- 3. That the Costs of this Application be provided for.**

The Application is premised on the grounds that on **30th July 2020**, the Court delivered Judgment allowing the Plaintiff's/ Respondent's suit in respect of prayers b and c which has adversely affected the Applicant's proprietary rights and interests in **L.R Komothai/Kiratina / 1060**. That the Applicant being aggrieved by the said Order intends to Appeal against the said Judgment and Decree to the Court of Appeal and has filed the Notice of Appeal to that effect. Further that the said Judgment and Decree has exposed the Defendant/ Applicant to the risk of losing her development and mega investment on the suit property and thus giving the Respondent unfair and unjust enrichment. That the intended Appeal raises weight and arguable legal issues, with high probability of success, That the Plaintiff/ Respondent is on the verge of executing the impugned Judgment and Decree and unless stopped by an order of this Court, the Applicant will suffer irreparable loss and prejudice which cannot be compensated by way of Damages.

In her Supporting Affidavit **Ruth Wambui Keigi** averred that the Court delivered Judgment in favour of the Plaintiff/ Respondent ordering the Land Registrar to rectify the registration of **L.R Komothai/Kiratina/1060**, currently registered in her name and further the cancellation of the registration of **L.R Ruiru/Ruiru East 3/308** registered in the Plaintiff's/ Respondent's name. That she has developed **L.R 1060** by planting cash crops which are due for harvesting on or before **April 2021**, and the impugned Judgment has given the Plaintiff/ Respondent an unfair advantage. That it is only fair and just that the orders sought are granted. That she is willing and ready to abide by any condition on security for costs as may be directed. That she has instructed the Law Firm of **Laichena Mugambi & Ayieko Advocates LLP**, to act for her in the suit in place of **Muturi Njoroge & Co Advocates**, which Advocates have given their consent. That the Application has been made without delay.

The Application is opposed and the Plaintiff/Respondent **Wanjiku Mwaura**, filed a Replying Affidavit sworn on **16th October 2020**, and averred that the Law Firm of **Laichena Mugambi & Ayieko** are not properly on record having purportedly taken over from **Muturi Njoroge & Company Advocates** without filing the **consent** between the outgoing Advocate and the proposed incoming Advocate and therefore any documents filed by them are null and void ab initio.

That the Court rendered its Judgment on **30th July 2020**, and she extracted the Decree on **16th September 2020**, and through her Advocates she was issued with a Decree duly signed by the Deputy Registrar. Further that on **18th September 2020**, the said Decree was served upon the Land Registrar, Kiambu Lands Office for purpose of its execution and the process has already begun. She averred that she has been advised by her Advocates which advice she believes to be true that the Notice of Appeal relied upon by the Defendant/ Applicant is not valid and competent in law as it has been lodged in the High Court of Kenya at Nairobi which neither heard nor determined the suit. Further that the Notice of Appeal as served upon her Advocates on **21st September 2020**, long after she had served the **Land Registrar**,

Kiambu with the Decree and the Execution commenced. That due to the incompetence of the Notice of Appeal, the Defendant's/ Applicant's Appeal can therefore not be relied upon by this Court to stay the Judgment.

She averred that there are no Mega Developments on **L.R 1060**, other than few coffee and banana crops planted thereon. Further that the draft Memorandum of Appeal annexed to the Application which has not been filed in the Court of Appeal does not raise any arguable legal issues with high chances of success. That the present Application and the subsequent Appeal have been overtaken by events as the Decree has already been served and the Execution process began. That the Application and the intended Appeal are a ploy to delay her from repossessing her land that is rightfully hers and deprive her of her right to property. That the Defendant/ Applicant has not only unreasonably delayed in filing the instant Application, but has also failed to demonstrate how she will suffer substantial loss if she is not granted the orders sought. Further that even if the Defendant/ Applicant is to be granted the orders sought, the same shall be in vain as the Execution has already begun.

The Plaintiff/ Applicant further filed grounds of opposition dated **16th October 2020**, to the Application on the grounds that the current Advocates are not properly on record as no consent was either filed nor a court order obtained to that effect. That the said change is violating **Order 9, Rule 9** of the **Civil Procedure rules 2010**, the Notice of Appeal annexed to the Application was lodged in the High Court of Kenya at Nairobi which did not hear nor determine the matter contrary to **Rule 75 of the Court of Appeal Rules 2010**, the Defendant/ Applicant has not met the requirement of **Order 42 Rule 6 of the Civil Procedure Rules**.

Further that the photographs annexed to the Application do not give a clear picture of the alleged crops grown on the suit land. That the Court being an Environment and Land Court has the requisite jurisdiction to render the Judgment. That the Draft Memorandum of Appeal does not raise any arguable legal points with high chances of success in the Court of Appeal. That the Contract Act as well as **Section 38(1) (a) and (b)** of the Land Act mandatorily require all agreements relating to land to be in writing.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also considered the Application, the affidavits and the annexures thereto and finds that the issues for determination are;

1. Whether the Applicant's Advocates are properly on record

2. Whether the Applicant is entitled to the orders sought

1. Whether the Applicants Advocates are properly on record

The Defendant's/Applicant's Advocate has sought for leave to come

on record. It is the Plaintiff's/ Respondent's contention that the said

Advocates are not properly on record and therefore the Application is defective. It is not in doubt that the said Advocates came on record after the delivery of Judgment and needed to seek leave of Court as per the provisions of **Order 9 Rule 9 of the Civil Procedure Rules, 2010** provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

In the case of **S.K. Tarwadi ...Vs... Veronica Muehlemann [2019] eKLR**, the Court held that;

“In my view, the essence of Order 9 Rule 9 of the CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

The Court is called upon to determine the question of leave first. The Law Firm of Laichena Mugambi Advocates have sought for leave, and the Court has seen the consent dated **7th August 2020** between **Laichena Mugambi & Ayieko Advocates LLP** and **Muturi Njoroge & Co Advocates**. The provisions of **Order 9** allows the Court to grant leave when a consent is filed and **Rule 10**, allows the said prayer seeking leave to be brought together with other prayers. As there is a consent on record, there would be no reason for the Court not to grant the leave sought.

Having granted the leave and given that the Rules allow the said prayer to be brought together with other prayers, the Court finds and holds that the said Advocates are properly on record and the Application is thus not defective.

2. Whether the Defendant/Applicant is entitled to the orders sought

The Defendant/ Applicant has sought for Orders of Stay of execution, pending the hearing and determination of the Appeal.

Order 42 Rule 6(2) of the Civil Procedure Act sets out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

“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 Kenya Women Microfinance Ltd ...Vs...Martha Wangari Kamau [2020] eKLR, the Court cited the case of Samvir Trustee Limited ...Vs... Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 where the Court held that;

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

From the above decisions, it is clear that for the Court to grant stay of execution of the Judgment the Applicant needs to satisfy the Court that she will suffer substantial loss. In the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 the court stated:-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.

The court has to balance the interest of the applicant who is seeking to preserve the status quo *pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.*”

Further in the case of RWW ...Vs.... EKW [2019] eKLR, the Court held that;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

With the above in mind, the Court must then determine whether the Applicant has established that she will suffer substantial loss and or has presented special circumstances that will warrant the Court to exercise its discretion and grant stay of Execution.

It is the Defendant’s/ Applicant averment that she will suffer substantial loss if stay of execution is not granted as the Court in its Judgment ordered the Land Registrar to cancel her title to **L.R Komothai/ Kiratina/1060** registered in her name. She further averred that she had developed the land and had grown crops which are due in **April 2021**. The Plaintiff/ Respondent has acknowledged that there are indeed crops that have been grown on the said property. The Plaintiff/ Respondent has also acknowledged that she has embarked on the process of executing the said Decree and has even served the Land Registrar with the said Decree. However, it is clear that at this juncture

there is no evidence that the title has already been cancelled.

Though, the Plaintiff/ Respondent has submitted that there is no Appeal as the Notice of Appeal filed by the Defendant/ Applicant is defective given that it had been lodged in the High Court at Nairobi which neither heard nor determined the matter. A close look at the Notice of Appeal, the Court notes that the same has been filed before this Court and signed by the Deputy Registrar of this Court and the provisions of **Article 159** of the Constitution can not allow this Court to strike out the said Notice just because of an error of Nairobi as opposed to Thika.

Having found that there is a proper Appeal on record, and the fact that the Court has ordered for the cancellation of the Defendant/ Applicant's title, the Court finds that if the Decree is executed and the title deed in favour of the Defendant/ Applicant is cancelled before the Appeal is heard and determined, and the same is registered in favour of the Plaintiff/ Respondent, then the Plaintiff/ Respondent would be at liberty to deal with the said suit property as she wishes such as disposing off the same, charging it, subdividing it and developing the same.

Further if the cancellation takes place and the Plaintiff/ Respondent deals with the suit property in any manner set out above, it would mean that the Appeal would be rendered nugatory and the Defendant/ Applicant if successful would have suffered substantial loss and therefore, the Appeal would have been an academic exercise and of no purpose.

The essence of stay of execution is to preserve the subject matter. For the Court to ensure the preservation of the said property in order to allow for the fair adjudication of the said dispute as the Appellant has every right to appeal, then it is imperative that the Court grants the stay of Execution pending Appeal.

This is a land matter which matters are very emotive in this entire area and a litigant should be allowed to exhaust all the Judicial processes. The Appellant/Applicant herein can be assured of exhaustion of such Judicial processes if stay of execution is allowed and cancellation of his title deed halted in the meantime.

The Applicant/Appellant must also satisfy the Court that the application was made without unreasonable delay. The instant application was filed on **11th August 2020**, and the Judgement had been delivered on **30th July 2020**. Indeed, there was no inordinate delay in filing of this application.

In the spirit of fairness and so as to ensure that the Court is not seen to be protecting the Defendant/ Applicant and not allowing the successful party to enjoy the fruits of their Judgment, the Court finds that as the Defendant/ Applicant has averred that she is ready to abide by any conditions of this Court, then it is prudent that she provides security of costs which the Court accesses at **Kshs. 200,000/=**

Having now carefully considered the instant **Notice of Motion Application** dated **11th August 2020**, the Court finds it **merited** and the same is allowed entirely with costs being in cause, The Court further orders the Defendant/ Applicant to deposit **Kshs.200,000/=** as security for costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 25TH DAY OF MARCH 2021

L. GACHERU

JUDGE

25/3/2021

Court Assistant - Dominic

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Majune for the Plaintiff/Respondent

Mr. Ayieko for the Defendant/Applicant

L. GACHERU

JUDGE

