



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 211 OF 2014

LOISE MABUTI.....PLAINTIFF/APPLICANT

VERSUS

NANCY WAMBUI.....1<sup>ST</sup> DEFENDANT/RESPONDENT

HESBON KIAMBATI.....2<sup>ND</sup> DEFENDANT/RESPONDENT

RULING

### **Introduction**

The Applicant vide a Notice of Motion dated 2nd December 2020 brought under certificate of urgency sought the following orders:-

1. Spent.
2. That the firm of M/S Wanjiru Waweru & Co. Advocates be granted leave to come on record on behalf of the firm of M/S Ikahu Nganga & Co. Advocates as appearing for the Plaintiff.
3. That this Honourable Court be pleased to stay execution of the judgment delivered on 23rd October 2020 pending the hearing and determination of this application.
4. That this Honourable Court be pleased to stay execution of the judgment delivered on 23rd October 2020 pending the hearing and determination of the intended appeal.
5. That costs of the application be provided for.

The application is supported by five grounds shown on the face of the application and the affidavit of the applicant sworn the same date. The application is opposed with a replying affidavit sworn by Hesbon Kiambati on 7th December 2020.

### **Summary of Facts**

The applicant deponed that this Honourable Court delivered judgment in respect of the suit case on 23rd October 2002 and that she was aggrieved by the same and preferred an appeal at the Court of Appeal at Nyeri. She annexed a copy of the Notice of Appeal marked "LM 1". The applicant also stated that since her case was dismissed with costs, the defendants/respondents might start calculating their bill of costs any time from now. She also argued that the defendants have started threatening to evict her from the suit land and that should they make real their threats, she will suffer irreparable loss since her brother-in law's estate will not go to the rightful beneficiaries but will go to the hands of fraudsters and her appeal will be rendered nugatory.

The applicant also averred that she has made various developments on the land and that the defendants have never been in occupation of the suit land.

The respondent on the other hand stated that the application herein is bad in law, inept, ambiguous and hopelessly defective and cannot be cured and the same should be dismissed. The respondent stated that he has been advised by his advocate which information she verily believes to be true that there are no orders capable of being stayed since the Court only dismissed the applicant's case and therefore the orders issued are negative in nature. He stated that the applicant's averment that she risks being evicted is misleading and misplaced because she is in occupation of land parcel No. NGARIAMA/NGIRIAMBU/1036 and that she is not interested in the said parcel of land.

**Legal Analysis**

I have considered the Notice of Motion dated 2nd December 2020 and the supporting affidavit. I have also considered the replying affidavit by the 2nd respondent sworn on 7th December 2020. It is trite that a party seeking stay of execution pending appeal under **Order 42 Rule 6 CPR** must satisfy the Court on the following grounds:-

1. That he will suffer substantial loss unless the orders are granted.
2. The application has been filed without unreasonable delay
3. Security has been given for the due performance of the decree.

The respondent has given a new dimension to the application arguing that the order given by the Court is incapable of being executed being a negative order. This Court delivered judgment which is the subject of the application herein on 23rd October 2020 whereby the plaintiff/applicant’s suit was dismissed with costs. An order of dismissal is a negative order which is incapable of being executed except for costs.

In the case of **Western College Farts and Applied Sciences Vs Oranga & Others (1976) K.L.R 63**, the Court of Appeal considered whether an order of stay can be granted in respect of a negative order and stated:-

“But what is there to be executed under the judgment, the subject of the intended appeal, the High Court has merely dismissed the suit with costs. an execution can only be in respect of costs .....

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or refrain by injunction”.

Similarly, in **Republic Vs Kenya Wildlife Services & 2 Others (C.A. No. 12 of 2007 (Nairobi) (U.R)**, the Court of Appeal also rendered itself as follows:-

“It would appear to us that we have no jurisdiction to grant any order for injunction or stay on the terms sought or at all, for the reason that Aluoch J, neither granted or refused the application for stay. The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the Superior Court which can be the subject of the application for injunction or stay”.

I agree with the decision by the Court of Appeal which is binding on me. The judgment of this Court issued on 23rd October 2020 did not order the plaintiff/applicant to do anything or refrain from doing anything. As such, there is therefore no positive and enforceable order made by this Court capable of being enforced and subject to the application for stay. In view of the matters aforementioned, I find no proper and competent application for consideration before me and that being the case, there is therefore no useful purposes determining whether the threshold for the grant of stay pending Appeal under **Order 42 Rule 6** can be gone into. As regards the second prayer by the firm of M/S Wanjiru Waweru & Co. Advocates to come on record for the plaintiff in place of the firm of Ikahu Nganga & Co. Advocates, the rules of practice demands that the previous firm who was acting for the applicant be served with the application and if there is no objection, a consent by the previous advocate be filed in Court indicating he has no objection to the new advocate coming on record. There is no affidavit of service or consent by the firm of Ikahu Ngangah & Co. Advocates giving no objection to the firm of Wanjiru Waweru & Co. Advocates to come on record.

In view of my analysis above, I find the Notice of Motion dated 2nd December 2020 incompetent, frivolous and lacking in merit. The same is hereby dismissed with costs to the respondent.

**READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 19<sup>TH</sup> DAY OF MARCH, 2021.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Makazi holding brief for Andande
2. Ms Wanjiru Waweru
3. Kabuta – Court clerk.