



REPUBLIC OF KENYA

IN THE ENVIRONMENT LAND COURT

AT THIKA

ELC APPEAL NO. 14 OF 2020

BONIFACE WANAINA NDUNGU.....APPELLANT/APPLICANT

VERSUS

MARY WANJIKU MUIGUA.....RESPONDENT

RULING

By a Notice of Motion Application dated **3rd March 2020**, the Appellant/ Applicant sought for the following orders;

- 1. That an order be issued for Stay of Execution of the Judgment and Decree of the trial Court dated 19th September 2019 and 20th September 2019 respectively pending the hearing of this appeal.***
- 2. That an order be issued to be registered against the parcels of land titles No. Ruiru/Ruiru East Block 2/19482, 19483, 19484, 198485, 198486, 19487, 19488, 19489, 19490, 19491, 19492, 19493, 19494, 19495, 19496, 19497 subdivided from Ruiru/ Ruiru East Block 2/3456 prohibiting the transfer, charge, mortgage, subdivision, development or in any way interfering with the land.***
- 3. That the OCS Juja Police Station assist in the enforcement of the orders of this Court.***
- 4. That the costs of this Application be in the cause***

The Application is premised on the grounds that the Magistrates Court at Thika in **CMCC 61 of 2016**, delivered a Judgment on **19th September 2019**, in favour of the Respondent who extracted a Decree to enforce against the Appellant/ Applicant the following day. That all this took place in the absence of the Appellant/ Applicant, who did not take part in the hearing because the Law Firm of **Nyasani E.N & Co Advocate** did not notify him of the proceedings despite accepting service. Further that the suit was also a nullity as it had been filed while the lower court had no jurisdiction to hear it. That the Appellant/ Applicant filed a suit at the Environment & Land Court to wit **ELC Case No. 145 of 2018**.

Being dissatisfied with the action of the Court, the Respondent filed an Application for review which Application, the trial Court dismissed without good cause. That the Appellant has filed an Appeal in this Court seeking justice for the wrong that was done to him. That the Respondent has already hired unknown people to go to the suit property to put up beacons on the suit land and she intends to enforce the Judgment and Decree of the lower Court to the Appellant's/ Applicant's detriment.

That the Appellant/Applicant has enough evidence proving his ownership of the suit land and that the Respondent's title is not genuine and was acquired through fraud. That the Respondent rushed to subdivide the land into **16 portions** and secretly transferred the same to a third party who is free to deal with the land unhindered. That the transfer was done while the Respondent and the transferee knew that the land was disputed as there was a **Church** constructed on the suit land belonging to **Patmos Church**. Further that the Appellant/Applicant had previously been able to prevent interference with the suit Land, but the trial Court's Decree deliberately ties his hands and will render him unable to do so. It was contended that if the suit land is not preserved, it would fall into the wrong hands and would defeat the purpose of instituting the Appeal. That the suit land belong to the Appellant/ Applicant and his family and it has sentimental value and losing this land would cause him great loss and torments, especially under circumstances in which he was never granted a fair hearing.

In his Supporting Affidavit, the applicant **Boniface Wainaina Ndungu** averred that **L.R Ruiru/Ruiru East Block 2/3456**, is his family land which he purchased from the original owner **Wambui Muhia** for value in **2001**. That the said **Wambui Muhia**, acquired the said land from **Nyakinyua Investment Limited**, and that the said Company only grants Share Certificates to women and therefore his wife **Ann Wanjiru Wainaina** was given the share Certificate instead of the applicant. He immediately took possession and hived off a Section of the land and sold it to **PATMOS Church**, who constructed a church thereon. Further that in **2016**, the Respondent instituted **Thika CMCC 61 of**

2016, against him and **PATMOS Church and the applicant**. That the Court declared itself to be without jurisdiction to hear the matter and directed the Respondent to file the case in a Court with requisite jurisdiction and on that basis, the case was rendered a nullity and could therefore not be revived.

That in the suit, he disputed the validity of the Respondent's title because it was acquired through fraud. Further, after the Respondent failed to follow the trial Court's jurisdiction Order, he filed another suit. That in **October 2019**, he was served with a Decree, and his Advocate in the Environment & Land Court matter followed up the matter in the lower Court and discovered that the Respondent had proceeded with the lower Court's case to its conclusion and acquired a Judgment and Decree. The Applicant was not aware of the said proceedings as he did not take part and after conducting a search at the Lands Registry, he discovered that the Respondent had managed to subdivide the suit land into 16 portions and transferred the same to a 3rd Party, whom he has no control over as the said 3rd party was not a party to the suit.

That he attempted to file a caution but the Lands Registry demanded a Court order. That he applied for the order and the typed proceedings in the lower Court, which he is pursuing to ensure the Appeal is heard expeditiously. He urged the Court to allow the Application as the fate of the Church constructed on the suit property would remain under speculation.

The Application is opposed and the Respondent **Mary Wanjiku**

Muigua, swore a Replying Affidavit on **7th July 2020**, and averred that the entire Application is bad in law, fatally defective and should be struck out. That she has been advised by her Advocate which she believes to be true that the trial Court had all necessary jurisdiction to try and determine the matter subject of the Appeal. That the trial Court afforded the Appellant/ Applicant all the opportunity to present his case, but despite several Notices, the Appellant/ Applicant did not show up for pretrial mentions nor for the hearing of the main suit, which was adjourned on several occasions. That the Applicant is seeking to re-open the concluded case at the subordinate Court and re argue at this Application stage as the Judgment was rendered on **20th September 2019**.

That the basis for the instant Application is a regurgitation of the Appellant's/ Applicant's Defence in the lower Court which was dismissed while granting her the orders of vacant possession. That even prior to the subordinate's Court Judgment, she had taken charge of the suit property and dealt with it including subdivision of the same and titles in respect of the subdivided parcels issued. That although the Appellant/Applicant knew of her whereabouts, he filed **Thika ELC No. 145 of 2018**, where she is named as the 1st Defendant but only learnt of the same when she read the Appellant's / Applicant's Application in the lower Court and she has since filed a Defence.

It was her contention that the Appellant/ Applicant has no proprietary interests in the suit property as can be discerned from his pleadings in the lower Court. She further averred that **L.R Ruiru / Ruiru East / Block 2/3456**, formed the basis of the suit property and was not a secret as she had disclosed in her pleadings that she was in the process of subdivision. That the Appellant/ Applicant is raising issues unrelated to the suit at the subordinate Court. Further that the Application came late in the day as the Appellant/ Applicant sat on his rights to defend the instant suit. That the Application should be disallowed since she would be prejudiced having waited for more than three years for the Decree being challenged. That the Appellant/ Applicant has not demonstrated to Court what steps he took in trying to know the progress of the case at the subordinate Court from his previous Counsel as the case belongs to him and not his Advocate. That the prayer for stay of execution is a prayer to be allowed to illegally trespass on her land.

The Appellant/ Applicant filed a further Affidavit sworn on **1st October 2020**, and averred that he seeks prohibitory orders and stay of execution of the Decree of the lower court and the same should be granted as it is essential if the suit land is to be preserved pending Appeal. That the orders would ensure that this Appeal would not be for nothing as he has evidence and cause for a successful Appeal. That the issues raised in the Replying Affidavit can only be canvassed during the hearing of the main Appeal.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The court finds that the issue for determination is **whether the Appellant/ Applicant is entitled to the orders sought**.

The Orders sought are for stay of Execution pending the hearing and determination of the Appeal. The Court has also considered the whole proceedings and the said Judgment issued by the Subordinate Court and the provisions of **Order 42 Rule 6(2)** of the Civil Procedure Rules which set 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.”

There are also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. In **Civil Appeal No. 107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR**, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other.”

The decision on whether or not to grant stay of execution is discretionary and the Court must exercise the said discretion judiciously. See the case of Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised.”

One of the principle that an Applicant has to meet before the Court can grant stay of Execution pending appeal is that the Appellant/Applicant must show that there is sufficient cause and he will suffer substantial loss if the orders sought are not granted. Further the Appellant needs to satisfy the Court that the Appeal would be rendered nugatory, if the stay of Execution is not granted.

From the Memorandum of Appeal dated **2nd March 2020** it is not in doubt that the Appellant/ Applicant has Appealed against the Ruling and order of the Court delivered on **25th February 2020**. However, the Appellant/ Applicant is seeking for stay of Execution of the **Judgment** and **Decree** of the trial Court dated **19th September 2019** and **20th September 2019**. It is thus clear that the Appellant/ Applicant has not Appealed against the Judgment of the Court dated **19th September 2019** and nothing would be rendered nugatory as there is no Appeal. There being no Appeal against the said Judgment, this Court has no jurisdiction to grant stay of those orders. See the case Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR where the Court stated;

“In Nairobi City Council VS Resley (2002) EA 494 this Court at page 494 stated.

“There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision.

And later in the same decision:

“It is trite law that without a notice of appeal against particular orders we would have no Jurisdiction to grant a stay of those orders and we cannot, therefore, accept Mr. Oduol’s argument to the effect that the notice of appeal against the ruling of 11th April, 2002, entitles him to apply for a stay of execution of orders made on 11th March, 2002.

27. In this matter, the notice of appeal relates to the decision of the High Court given on 2nd December, 2010 dismissing the application for review. The order for stay that is sought is in relation to the Judgment delivered on 2nd December, 2009. No appeal has been preferred against that Judgment. In the case of John N. Liboyi versus the Board of Governors of St. John College Civil Application No. Nai 13 of 2009 (UR 92/2009) to which we were referred, this Court held:

“The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the jurisdiction to grant an order of stay, an injunction or a stay of further proceedings that is clear enough from the wording of the Rule”

Having carefully considered the instant Notice of Motion dated **3rd March, 2020**, the Court finds it **not merited** and the same is dismissed entirely with costs to the Respondent herein.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 11TH DAY OF MARCH, 2021

L. GACHERU

JUDGE

11/3/2021

Lucy - Court Assistant

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 the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. 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

Mr. Tumu for the Respondent

No appearance for the Applicant.

L. GACHERU

JUDGE

11/3/2021