



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 156 OF 2010

MARGARET NDUTA KAMITHI.....1ST PLAINTIFF/RESPONDENT

GEORGE NJENGA KIMATHI.....2ND PLAINTIFF/RESPONDENT

=VERSUS=

ANNUCIATA WAITHIRA KIBUE.....1ST DEFENDANT/APPLICANT

PAUL KIMARI KIBUE.....2ND DEFENDANT/APPLICANT

SUSAN NJERI KIBUE.....3RD DEFENANT/APPLICANT

RULING

1. This is the notice of motion dated 30th October 2010 brought under order 42 rule 6, order 51 (rule 1) of the Civil Procedure Rules (2010) Section 1A, 1B and 3A of the Civil Procedure Act, Cap 63, Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. Spent.

3. That execution of the judgment of this honourable court delivered on 30th September 2020 and the decree thereto issued on 27th October 2020 by stayed pending the hearing and determination of the defendants/applicants appeal at the Court of Appeal.

4. That the costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraph (1) to (3).

4. The application is in support by the affidavit of Annunciata Waithira Kibue, the 1st defendant/applicant herein, sworn on the 30th October 2020 and a further affidavit sworn on the 11th December 2020.

5. The applications is opposed. There is a replying affidavit sworn by Margaret Nduta Kamithi the 1st plaintiff/respondent sworn on the 8th December 2020. There are also grounds of opposition filed by the plaintiffs/respondents dated 18th November 2020.

6. On the 19th November 2020, the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

The Defendants'/Applicants' Submissions

7. They are dated 11th December 2020. They set out one issue for determination; whether the judgment delivered by Hon. Lady Justice Komingoi on 30th September 2020 ought to be stayed pending the hearing and determination of the defendants/applicants Civil Appeal No. E444 of 2020 filed at the Court of Appeal in Nairobi.

They have put forward the case of **Butt vs Rent Restriction Tribunal [1979] eKLR**.

8. The purpose of stay of execution pending appeal is to preserve the subject matter. They have put forward the cases of **Consolidated Marine vs Nampijja & Another, Civil App. No 93 of 1989 (Nairobi); Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR; HGE vs SM [2020] eKLR; James Wangalwa & Another vs Agnes Naliaka Cheseto Bungoma HC Misc. Application No 42 of 2011**.

The defendants/applicants have strong appeal with high chances of success at the Court of Appeal.

9. The Defendants/applicants have satisfied all the three conditions set out in order 42 rule 6(2) of the Civil Procedure Rules, 2010. Completing the transaction and effecting the transfers would render the appeal nugatory hence status quo needs to be preserved as was held in **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR**.

10. The application has been made without unreasonable delay. Judgment was delivered on 30th September 2020. The Notice of Appeal was filed on 7th October 2020 and this application filed on 3rd November 2020. The suit plots are still intact and thus there is no need to furnish any security. The defendants'/applicants' have developed some sections of LR No 5819/14 and thus do not have any motivation to part with the suit land. They pray that the application be allowed with no orders as to costs.

The Plaintiffs'/Respondents' Submissions

11. They are dated 9th December 2020. The defendants/applicants application is fatally defective given that their advocates on record M/S Wanyoike & Macharia Advocates have failed to comply with section 23(2A) of the Advocates Act (Cap 16 Laws of Kenya) and Order 51 rule 13(2) of the Civil Procedure Rules, 2010.

12. They have set out one issue for determination: whether the defendants' application is meritorious. They have put forward order 42 rule 6 of the Civil Procedure Rules, 2010 and the case of **John Odongo vs Joyce Irungu Muhatia [2019] eKLR**.

13. As to whether the defendants'/applicants' have demonstrated that their appeal is arguable they have put forward the case of **Nairobi Women's Hospital vs Purity Kemunto [2018] eKLR**.

The defendants/applicants have failed to demonstrate that their intended appeal is arguable.

14. Having delivered a judgement on 30th September 2020, this court is *functus officio*. They have put forward the case of **Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited [2014] eKLR**.

15. The plaintiffs/respondents have not taken any steps to enforce the said judgment against the defendants/applicants and as such the present application is premature and has been filed contrary to the doctrine of ripeness. They have put forward the case of **Okiya Omutata Okioti vs Communication Authority of Kenya & 8 Others [2018] eKLR**.

16. It is trite law that a successful party is prima facie entitled to the fruits of the judgment hence the consequence of the said judgment is that it has defined the rights to the plaintiffs/respondents herein with definitive conclusion. They have put forward the case of **Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR**.

17. The defendants/applicants have not established what substantial loss and damage they shall suffer if stay of execution is not granted and that in the circumstances, their intended appeal would be rendered nugatory if it succeeded. This is because the subject matter of the suit and that of the defendants/applicants application is a fixed asset being Plot Nos 1, 2 and 19 situate on LR No 5989/14 Nairobi. They have put forward the case of **Victory Construction vs B M (a minor suing through next friend one PMM) [2019] eKLR**.

18. The conduct of the defendants/applicants does not commend itself to the orders sought in this honourable court noting that the same requires the exercise of the court's discretion. A billboard announcing plots for sale has recently been put up adjacent to the suit property.

19. The defendants/applicants have failed to approach this court of equity with clean hands noting that there is a real and imminent danger that the defendants/applicants shall exploit any stay of execution order to the prejudice of the plaintiffs/respondents. They have put forward the cases of **Star Transport Co. Ltd vs Ali Mwinyi Mvita [2016] eKLR; Elizabeth Jerono Yator vs Consolidated Bank of Kenya Limited & Another [2019] eKLR**. They pray that the application be found to be unmeritorious and be dismissed with costs.

20. I have considered the notice of motion, the affidavits in support and the annexures, I have also considered the replying affidavit and the grounds of opposition. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) *Whether the defendants/applicants meet the threshold for grant of orders of stay of execution pending appeal.*

(ii) *Who should bear costs?*

21. The principles guiding the grant of order 2 of stay of execution pending appeal are well settled. **Order 42 rule 6(2)** of the Civil Procedure Rules, 2010 provides 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.

22. It is clear from the above provisions that for an order of stay of execution pending appeal to be granted specific conditions must be met by the applicants.

23. I have considered the notice of motion herein and I find that it has been brought without undue delay.

24. It is the defendants'/applicants' contention that their appeal has high chances of success. That completing the transaction and effecting transfer of the plots to the plaintiffs/respondents will irreparably affect the very core of their appeal hence effecting the transfers would render the appeal nugatory. They have relied on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR** where the court held that:

“The applicant must establish other facts which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would intact”.

25. The plaintiffs/respondents on the other hand contend that the subject of matter of the suit is immovable property which shall still be available regardless of the outcome of the defendants/applicants intended appeal.

26. I have considered the oral arguments above. I find that the defendants/applicants have made out a good case for grant of the orders sought. In the case of **Samvir Trustee Limited vs Guardian Bank [2007] eKLR**, the court held that:-

“It is my humble view that for the applicant to obtain a stay of execution it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention.....”.

27. I am satisfied that the defendants/applicants have demonstrated that they will suffer substantial loss if these orders are not granted.

28. I need to mention something about the preliminary point raised by the plaintiffs/respondents that this application is fatally defective for failure to comply with section 23(2A) of the Advocates Act, and order 51 rule 13 (2) of the Civil Procedure, 2010. Article 159 (2) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities.

29. I am guided by the above provisions in finding that the omission is so insignificant that it does not affect the substance of the application.

30. In conclusion I find merit in this application, and I grant the orders sought namely:-

(a) That an order for stay of execution of the decree emanating from the judgment delivered on 30th September 2020 is hereby granted pending the hearing and determination of the intended appeal on condition that the defendants/applicants do deposit a sum of Kshs.1,000,000/- being security for costs in a joint interest earning account in the name of the plaintiffs' counsel and the defendants counsel within forty five (45) days from the date of this ruling. In default the orders of stay shall lapse.

(b) That the costs of this application be borne by the defendants/applicants.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11TH DAY OF MARCH 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Omamo for the Plaintiffs

Mr. Nganga for the Defendants

Phyllis – Court Assistant