



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 34A OF 2020**

**JOSIAH JOB IRUNGU NGECHU.....1<sup>ST</sup> APPELLANT/APPLICANT**

**KENNETH MUNGAI NGANGA .....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**MICHAEL KAHARE WAICHINGA.....1<sup>ST</sup> RESPONDENT**

**JENIFFER MUTHONI KAHARE.....2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU.....3<sup>RD</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**NATIONAL CONSTRUCTION AUTHORITY.....5<sup>TH</sup> RESPONDENT**

*(Being and appeal from a judgement by the Senior Principal Magistrate Court in Ruiru*

*Hon. C.A OTIENO-OMONDI dated 31<sup>st</sup> August 2020 in MCLE Case No. 166 of 2019).*

**RULING**

By a Notice of Motion Application dated 16<sup>th</sup> September 2020, expressed to be bought under Section 13(3)(4)(7-a)14, 16 and 19 of Environment and Land Act, Section 5 (1) Judicature Act, Order 40 Rule 1,2,3,4 & 6, Order 42 R 6(1) and Order 51 R 1 of the Civil Procedure Rules, Sections 1A, 1B 3A and 63(e) of Civil Procedure Act and Articles 19, 22, 23, 31, 42, 159(1), 165 of the Constitution, the Appellants/Applicants sought the following orders;

**1. THAT an order of temporary Injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents their agents, proxies, employees, workers undertaking or whomsoever acting under their instructions from undertaking, proceeding and or/ continuing with the construction works and development of multi dwelling apartment on their parcel of land known as L.R NO. RUIRU WEST BLOCK 3/2542, pending the hearing and determination of this application inter-parties.**

**2. THAT the Honorable Court be pleased to issue an order of stay of execution of the judgement and decree in RUIRU SPMC ELC NO 166 OF 2019 delivered by Hon. C.A OTIENO-OMONDI dated 31<sup>st</sup> August 2020, pending the hearing and determination of this Appeal.**

**3. THAT an Order of temporary Injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents their agents, proxies, employees, workers undertaking or whomsoever acting under their instructions from undertaking, proceeding and or/ continuing with the construction works and development of multi dwelling apartment on their parcel of land known as L.R NO. RUIRU WEST BLOCK 3/2542, pending the hearing and determination of this appeal.**

**4. THAT an Order of temporary Injunction do issue restraining the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from issuing approvals, permits and licenses to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for development of multi dwelling apartment erected on L.R NO. RUIRU WEST BLOCK 3/2542, pending the hearing and determination of this appeal.**

**5. THAT the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein MICHAEL KAHARE WAICHINGA and JENIFFER MUTHONI KAHARE, be cited for contempt of the Court order/decreed issued on 31<sup>st</sup> August 2020 for disobedience of lawful Court order by continuing with construction on L.R NO. RUIRU WEST BLOCK 3/2542 and be committed to civil jail or pay a fine or both for deliberate disobedience of a Court decree dated 31<sup>st</sup> August 2020.**

**6. THAT the Sub County Commander Ruiru Police Station do ensure compliance with the Court orders.**

**7. THAT the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do pay for the costs of this application**

The application is supported Affidavit sworn by **KENNETH MUNGAI NGANGA through the Law Firm of BENSON NJUGUNA & CO ADVOCATES**. He averred that he is the registered owner of **LR RUIRU WEST BLOCK 3/2544**, while the 1<sup>st</sup> Appellant/Applicant is the registered owner of **LR RUIRU WEST BLOCK 3/2543**, within **Membley Estate** while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the registered owners of **RUIRU WEST BLOCK 3/2542**, and adjacent to their properties where they reside and share a fence. He deponed that the 1<sup>st</sup> Appellant and him had always enjoyed peace and tranquility on their properties until when the 1<sup>st</sup> and 2<sup>nd</sup> Respondents begun constructing a multi dwelling apartments on their property being **RUIRU WEST BLOCK 3/2542**, next to their properties in the year 2017, without obtaining necessary approvals from the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents. He further deponed that on **14<sup>th</sup> August 2019**, and **7<sup>th</sup> January 2020**, officers from the 3<sup>rd</sup> and 5<sup>th</sup> Respondents visited the construction site, stopped the construction and marked the building as not being approved (Exhibit KMN-4A & 8 are photographs of the development). That despite the construction being halted by the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued with the construction prompting the 3<sup>rd</sup> Respondent to arrest and charge their construction workers (copy of the charge sheet was marked as exhibit KMN-5). He contended that the lower Court in **RUIRU SPM ELC NO. 166/2019** issued an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from continuing with the development pending the hearing of the case. He annexed a copy of Court order as exhibit KMN-6. He further contended that the trial Court directed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to demolish any structure that was beyond the eight units which is part of the decision they intend to challenge via the appeal herein. That in blatant disregard of the of the said Court Order, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued with construction of the multi dwelling. apartment. He is advised by his advocates on record which advice he believes to be true, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not appealed the said judgement or applied for setting aside or reviewed of the orders issued on **31<sup>st</sup> august 2020**. He averred that it is just and equitable for the Orders to be granted as they stand to suffer substantial loss.

The application is opposed by **MICHAEL KAHARE WAICHINGA, who has the authority to swear the affidavit on behalf of the 2<sup>nd</sup> Respondent drawn by the Law Firm of LILIAN & KOECH ADVOCATES LLP, averred that contrary to the allegations contained in the application, the NEMA license issued by the 4<sup>th</sup> Respondent was obtained regularly and lawfully and that they have complied with the judgement and decree issued by the Court in RUIRU SPM ELC NO. 166/2019**, delivered by Hon. C.A Otieno on **31<sup>st</sup> August 2020**. He deponed that there were already a number of multi storey commercial and multi dwelling units along the highway and the changes of user have been granted by the County Government of Kiambu and his specifically, was granted in the year 2017. He attached copies of photographs as exhibit MKW2 and change of user as MKW4. He further deponed that he was issued with a construction permit and applied for regularization of the plans and the said regularization was approved on **18<sup>th</sup> December 2019** and he continued with the construction and a certificate of compliance from the 5<sup>th</sup> Respondent was issued. The said land parcel was assessed by NEMA officials and they issued a certificate which he attached as MKW10. He contends that they have received all the necessary documentations and approvals from all the relevant authorities and converted from the single dwelling plot to multi dwelling apartments through all lawful processes. He finally contends that they are in the process of complying with the lower Court Order delivered by **Hon C. A Omondi**. That the Appeal would be nugatory as they have already demolished the extra residential units as ordered and he is advised by his advocates which advice he believes to be true that the application falls short of the threshold for grant of mandatory and temporary injunctions.

The 5<sup>th</sup> Respondent filed his Replying Affidavit on **2<sup>nd</sup> November 2020**, deponed by **STEPHEN MWILU**, the Manager compliance of the 5<sup>th</sup> Respondent drawn by **CAROL KORIR ADVOCATE**. He averred that on their records, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had complied and provided with the requisite approvals therein. He deponed that he received the 1<sup>st</sup> and 2<sup>nd</sup> Appellant's Memorandum of Appeal on **28<sup>th</sup> September 2020**, and proceeded to visit the site on **22<sup>nd</sup> October 2020**, and established that the project was already complete and ready for occupation. He further averred that the requisite approvals were issued based on the complimentary role played by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents herein.

The Court has considered the application, the Replying Affidavits, the Written Submissions as well as the authorities relied upon. The key question to be determined in this application dated **16<sup>th</sup> September 2020** is whether the Applicant has satisfied the criteria upon which the Courts exercise the discretionary and equitable jurisdiction to grant the prayers in the application. The Court notes that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had not filed any pleadings with regard to the application.

It is evident that the Applicants have brought this application under **Order 40 Rule 1** which provides that:-

**Where in any suit it is proved by affidavit or otherwise—**

**(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders”.**

Further the application is anchored under **Section 3A** of the **Civil Procedure Act** which grants the Court the power to issue any orders that are necessary for the end of justice to be met or to prevent abuse of the Court process.

Since the Applicants' application is anchored under the above **Order 40** of the **Civil Procedure Rules**, it is incumbent upon the said Applicants to establish that their properties are in danger of being **wasted, damaged** or **alienated** by the Defendants/Respondents. Upon such prove, then the Court would proceed to issue any necessary order to prevent such **wastage, damage, alienation, sale** or **disposal** for the end of justice to be met. See the case of **Noormohammed Jan Mohammed...Vs...Kassam Ali Virji (1953) 20 LRK 8**, where the Court held that:-

**“To justify temporary injunction there must be evidence of immediate danger to property or sale or other disposition.”**

In the instant suit, there is no doubt that the Applicants herein are the registered owners of **LR. RUIRU WEST BLOCK 3/2544** and **LR RUIRU WEST BLOCK 3/2543**, within **Membley Estate** while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the registered owners of **RUIRU WEST BLOCK 3/2542**, and adjacent to their properties where they reside and share a fence. The Applicants contention is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents construction have detrimental effects on the Appellants/Applicants because of enormous noise and dust from the site and thus violating their constitutional right to clean and safe environment. That in blatant disregard of the Court order delivered by Hon. C.A OTIENO-OMONDI dated **31<sup>st</sup> August 2020**, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents continued with construction of the multi dwelling apartment.

On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have denied the said allegations and averred that they have received all the necessary documentations and approvals from all the relevant authorities and converted from the single dwelling plot to multi dwelling apartment through all lawful processes.

A site visit to the *locus quo* would also be important to ascertain the issues raised by the 5<sup>th</sup> Respondent. However, and notably so, the Applicants having sought for injunctive orders is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

**“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.**

In determining whether to grant or not to grant the orders sought, the Court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, which are:-

**“The conditions for granting a temporary injunction in East Africa are well known and these are: *First*, the Applicant must show a *prima facie* case with a probability of success. *Secondly*, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. *Thirdly*, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries ..Vs...Trufoods (1972) EA 420.*”**

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success. It is very clear that *prima-facie* case was described in the case of of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

**“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

It was the duty of the Applicants herein to establish that they have a *prima-facie* case. Though the Court would require evidence to confirm whether the construction of the apartments was or is being done, the Court finds that the evidence of the Judgement and Decree issued on **31<sup>st</sup> August 2020**, that established that the multi dwelling apartments were erected illegally for want of approvals and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents went ahead and constructed the said apartments is *prima facie* proof that the substratum of the suit property would be interfered with. Additionally, the lower Court found that the approvals issued were null and void. Thus, this Court finds and holds that the Applicants have established that they have a *prima facie* case with probability of success at the trial.

If the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are allowed to proceed and construct the multi dwelling apartments, then if the Applicants become successful litigants at the end of the main trial, then they would have suffered an irreparable loss or damages which might not sufficiently be compensated by an award of damages. See the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, where the Court held that:-

**“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.**

On the balance of convenience, the Court finds that it tilts in favour of maintaining the **status quo** and the **status quo** herein is not to allow any construction until the suit is heard and determined. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

**“The general principle which has been applied by this Court is where there are serious conflicts of facts, the trial Court should maintain the status quo until the dispute has been decided on a trial.”**

On the prayer for Stay of Execution, provisions of **Order 42 Rule 6(2)** are very clear on the said issue of Stay of Execution pending Appeal. The above provisions of law 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 plethora of decided cases on the issue of grant of Stay

of Execution pending Appeal. See 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”.**

This Court will then proceed to determine whether the Appellant/Applicant herein satisfied the required standard for grant of Stay of Execution Orders pending Appeal.

It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. 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”.**

Firstly, the Applicant must satisfy that he will **suffer substantial loss**, unless the orders sought are issued. From the Judgment of the subordinate Court, it is clear that the Applicants have submitted that if the construction of the multi dwelling apartments was to proceed and allow tenants to occupy, the same will cause irreparable damage due to the violation of their rights to live in clean and healthy environment.

The Applicants must also satisfy the Court that the application was made without **unreasonable delay**. The Court noted that the **Memorandum of Appeal** was filed on **15<sup>th</sup> September 2020**, and an application for stay was filed on **16<sup>th</sup> September 2020**. *The lower Court matter and was determined on the 31<sup>st</sup> August 2020*. Therefore, the Court finds that there was no inordinate delay in filing this Application. On the issue of security of costs, the Applicants are silent on the same.

On the prayer for contempt of Court, the Court finds that the material

presented before Court is not sufficient to prove a case of contempt. It is evident that contempt of Court is a *quasi* criminal act and the same should be strictly proved. See the case of Mary Wamaita Makumi ..Vs..Phylis Nduta Ngugi, civil App. No.62 of 1988, where the Court held that:

**“Therefore Contempt of Court being a kin to criminal offence leading to penal consequences, ie committal to Civil Jail or Imprisonment, wherein the person loses his personal liberty, then the standard of proof is beyond reasonable doubt.... The individual must have knowledge and the intention to disobey the Court Order and proceeds wantonly, recklessly and deliberately to do so.”**

This Court finds that the material and facts presented before it are not sufficient to prove a case of contempt of Court on the part of the Respondents. Therefore **prayer number 6** of the instant application fails.

Having carefully considered the instant **Notice of Motion** Application dated **16<sup>th</sup> September 2020**, the Court finds it is **merited** and the

same is allowed entirely in terms of prayers **No.1, 3, 4, 5, and 7** with costs to the Applicants. However, the Court **disallows prayer No. 6.**

Further, the Court directs the parties to prepare the Appeal for hearing expeditiously. For that reason, the Court directs the Appellants to file and serve the Records of Appeal within the next **30 days** from the date hereof and then cause the matter to be listed before the Judge for directions under **Section 79B** of the **Civil Procedure Act.**

It is so ordered.

**Dated, signed and Delivered at Thika this 22nd day of April 2021.**

**L. GACHERU**

**JUDGE**

**22/4/2021**

**Court Assistant - Phyllis**

**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 **15<sup>th</sup> 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**

**Mr. Kahare for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants**

**Mr. Lilan Koech for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**No appearance for the 3<sup>rd</sup> Respondent**

**No appearance for the 4<sup>th</sup> Respondent**

**L. GACHERU**

**JUDGE**

**22/4/2021**