



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CIVIL APPEAL E2 OF 2020**

**PAULINE CHEMUGE SUGWARA.....APPELLANT**

**VERSUS**

**NAIRUKO ENE MUTARAKWA KIRUTI**

**(Sued in her capacity as the Administrator**

**of the Estate of Mutarakwa Kiruti Lepaso alias**

**Mutaragwa Kiroti and her own).....1<sup>ST</sup> RESPONDENT**

**MOSES ORIKAE MUTARAKWA.....2<sup>ND</sup> RESPONDENT**

**JOHN LESIAN MUTARAKWA.....3<sup>RD</sup> RESPONDENT**

**ADMINISTRATORS OF THE**

**ESTATE OF KIRUTI LEPASO.....4<sup>TH</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Appellant's Notice of Motion application dated the 2<sup>nd</sup> November, 2020 brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules. The Appellant seeks for an order of stay of execution of the Decree arising from the Judgement delivered on 28<sup>th</sup> October, 2020 by Hon. Ruguru N. (SPM) at **Chief Magistrates Court in CM ELC No. 74 of 2018 (Pauline C. Sugwara V Nairuko Ene & 3 Others)** pending hearing and determination of the Appeal filed herein. Further, the Court be pleased to issue an order restraining the Defendants, their servants, agents, employees and or anyone else working under their direction or instructions from further disturbing, trespassing, alienating, claiming ownership as well as interfering with the Appellant's quiet, peaceful possession, enjoyment including ownership of land parcel numbers Kajiado/ Kitengela/ 10624; 10625; 10630 and 10631 hereinafter referred to as the 'suit lands', or any part thereof.

The Application is premised on the grounds on the face of it as well as the supporting affidavit of PAULINE CHEMUGE SUGWARA where she confirms being owner of the suit lands and is in possession thereof. She explains how she acquired the suit lands by highlighting the various transactions she entered into. Further, that she sold some of the parcels of land to a third parties. She claims the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have connived with the police to harass her over the suit lands. Further, that the Respondents have made a turnaround to deny the Sale Agreements and receipt of purchase price. She reiterates that the Respondents have threatened her with eviction although she has occupied the suit lands for 17 years. Further, after delivery of the impugned judgement, they visited her business premises asking her to vacate.

The application is opposed by the Respondents who filed a replying affidavit sworn by NAIRUKO ENE MUTARAKWA KIRUTI who denies having entered into any Sale Agreements in respect to the suit lands, with the Appellant nor receiving any consideration for the same. She denies ever being financially unstable. She confirms her deceased husband MUTARAGWA KIRUTI LEPASO was the first registered owner of the suit lands as he was issued with Certificates of Title on 11<sup>th</sup> February, 2000. Further, that the husband died on 20<sup>th</sup> August, 2002 while land parcel number Kajiado/ Kitengela/ 10624 was transferred to the Appellant on 23<sup>rd</sup> August, 2003 while the remaining three suit lands were transferred to her on 20<sup>th</sup> November, 2003. She contends that she is the sole administrator of her late husband's estate having procured Letters of Administration Intestate on 17<sup>th</sup> September, 2012. Further, she denies being involved in any transaction with her brother in law and insists the Appellant obtained titles through fraud. She avers that the Appellant admitted during cross examination of being aware that the suit lands were in the name of the deceased at the time she purchased them. She explains that she reported the anomaly in the issuance of titles to the Appellant culminating in her being charged in May 2018 at the Ngong Chief Magistrates Court vide Criminal Case

No. 169 of 2018. She denies having trespassed on the Appellant's alleged suit lands. She reiterates that the Appellant's Counsel was served with a Notice of eviction and only Kajiado/ Kitengela/ 10624 is developed. Further, that there is no evidence the Appellant ever went to the Land Control Board.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 2<sup>nd</sup> November, 2020 including the rivalling affidavits and parties' submissions, the following are the issues for determination:

- Whether the Court should grant a stay of execution pending the hearing and determination of the Appeal.
- Whether the Court should grant an injunction pending hearing and determination of the Appeal.

Whether the Court should grant a stay of execution pending the hearing and determination of the Appeal. The Appellant and Respondents in their submissions reiterated their claim. The Appellant submitted that the Appeal has been filed without delay. Further, she was ready to provide security for due performance of the Decree. She claimed she will suffer substantial loss as the appeal is arguable and would be rendered nugatory if the orders sought are not granted. She relied on various decisions which I deem relevant, to support her arguments. The Respondents insisted the Appellant's Appeal is frivolous and is intended to deny them the fruit of the judgement. They have also relied on various authorities which I deem relevant to buttress their averments. The legal provisions governing stay of execution pending Appeal are stipulated in Order 42 Rule 6(2) which stipulates thus: **'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 **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:

- "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.'**

In the current scenario the Appellant seeks a stay of execution which has been vehemently opposed by the Respondents. It is not disputed that the Appellant was the registered owner of the suit lands and has been in occupation of the same for 17 years. Further, that she operates a business thereon. What is in dispute is the Respondents claim that the suit lands were fraudulently acquired by the Appellant after the deceased owner's demise. The Respondents insist the Appeal is frivolous and has no chances of success. On perusal of the proceedings in the lower court as well as the Memorandum of Appeal without delving into the merits or demerits of the Appeal, I note the said Appeal indeed raises triable issues. However, Order 42 Rule 6 is clear that filing an Appeal alone does not operate as a stay of execution. Further, after the impugned judgement, the Appellant's Counsel was served with a Notice of Eviction in execution of the Lower Court's Decree. I opine that since a right of Appeal is a Constitutional right of an aggrieved party and a right to fair hearing can only be guaranteed if stay pending appeal is granted to the intended Appellants. Since the Appellant still holds the title to the suit lands and has been in occupation thereon for 17 years including developed the same, I opine that she is indeed the disadvantaged party herein. Based on the standards set in the above cited case and in applying them to the circumstances at hand, I find that the Appellant has met the threshold for stay of execution pending appeal and will grant her the same.

As to whether the Court should grant an injunction pending hearing and determination of the Appeal.

I note the Appellant has filed a Memorandum of Appeal dated the 29<sup>th</sup> October, 2020 against the Judgement of Hon Ruguru Principal Magistrate, Ngong Law Courts. The principles for granting an injunction are well established in the case of **Giella Vs Cassman Brown (1973) EA 358**. The trial Magistrate had dismissed the Appellant's suit in its entirety. The Appellant claims the Magistrate erred in doing so as she is the registered proprietor of the suit lands and had been in occupation for over 12 years. Further, she erred by entering judgement as per the Counterclaim.

In the case of **Bilha Mideva Bukulu Vs Everlyine Kanyere (2012) eKLR**, it was held that an order of injunction pending Appeal is discretionary and the Court should be guided by the principles set down in **Giella Vs Cassman Brown (1973) EA 358**. From the averments in the affidavits, and perusing the proceedings as well as the Memorandum of Appeal, I find that the Appellant has indeed established a prima facie case to warrant the granting of an order of injunction pending Appeal. I find that since she has been on the suit lands and based on the standards set in the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, her injuries are not speculative and she stands to suffer irreparable harm if the orders sought are not granted. Further, at this juncture I find that the balance of convenience indeed tilts in her favour.

It is against the foregoing that I find the Appellant's Notice of Motion application dated the 2<sup>nd</sup> November, 2020 merited and will allow it. I will proceed to make the following final Orders:

i. That a stay of execution of the Judgment and Decree in Chief Magistrates' Court at Ngong (the Hon. Ruguru PM) dated and delivered on 28<sup>th</sup> October, 2020 in Civil Suit CM ELC No. 74 of 2018, be and is hereby granted pending the hearing and determination of the appeal.

ii. An order of temporary injunction be and is hereby issued restraining the Respondents, their agents, servants and or employees from interfering with the Appellant's occupation of land parcel numbers Kajiado/ Kitengela/ 10624; 10625; 10630 and 10631 pending the hearing and determination of the Appeal.

iii. That the costs will be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF APRIL 2021.**

**CHRISTINE OCHIENG**

**JUDGE**