



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. E20 OF 2021**

**JULIUS MUNENE KIBUCHI.....APPELLANT/APPLICANT**

**VERSUS**

**ALBERN MUGO GITHINJI..... RESPONDENT**

**RULING**

1. The Applicant moved this court vide a notice of motion dated 14<sup>th</sup> October, 2021 and filed on 15<sup>th</sup> October, 2021 seeking the following orders: -

**a. Spent**

**b. Spent**

**c. Spent**

**d. That pending the hearing and determination of the appeal, this Honourable Court be pleased to stay the execution of the judgment dated 23<sup>rd</sup> September, 2021.**

**e. That costs of this application be provided for.**

2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of the applicant's advocate sworn on 14<sup>th</sup> October, 2021.

3. The respondent opposed the application by way of a Replying Affidavit sworn by the respondent and filed on 3<sup>rd</sup> November, 2021.

4. The applicant also filed a supplementary affidavit sworn by herself on 22<sup>nd</sup> November, 2021.

5. When the application came up for hearing on 4<sup>th</sup> November, 2021, the parties through their advocates on record agreed by consent to have the application canvassed by way of written submissions.

6. The applicant filed her submissions on 24<sup>th</sup> November, 2021 while the Respondent filed his on 6<sup>th</sup> December, 2021.

**APPLICANT'S CASE AND SUBMISSIONS**

7. The applicant's case is that judgment before the trial court was delivered on the 23<sup>rd</sup> September, 2021 whereby it was decreed that the Land District Surveyor rectifies the boundary in dispute between land parcel Nos. Kabare/Njiku/1241 and Kabare/Mutige/567 as per the Plaintiff's claim.

8. The applicant's advocate stated that judgment was delivered without notice and in the absence of the appellants and therefore, he never knew that judgment had been delivered since his advocate on record at the time did not inform him and only became aware of the same on 13<sup>th</sup> October, 2021 when the respondent began putting up the alleged boundary.

9. He stated that unless this Honourable Court intervenes, the Respondent shall proceed to auction his properties thereby causing great loss and suffering to him.

10. He stated that one of his grounds of appeal is whether the trial Court had jurisdiction to hear the matter and that if the respondent executes the decree, the entire appeal will be rendered nugatory and he stands to suffer irreparable loss and damage.

11. The applicant further stated that he has been advised by his advocate which advise he verily believed to be true that the application has met the conditions set out in *Order 42 Rule 6 of the Civil Procedure Rules, 2010*.

12. On the issue of substantial loss, the Applicant relied on the case of **Charles Kariuki Njuri Vs Francis Kimaru Rwara (Suing as Administrator of the Estate of Rwara Kimaru Alias Benson Rwara Kimaru (Deceased) [2020] and James Wanalwa & Another Vs Agnes Naliaka Misc Application No. 42 of 2011 (2012) e K.L.R.**

13. The applicant also submitted that execution of the impugned judgment shall result in substantial loss which cannot be atoned by way of damages as the disputed boundary is where he has built his retirement home. As such, Execution will therefore render the applicant and his family homeless with nowhere else to go.

14. On the issue of delay, he submitted that the application was brought without delay as judgment was delivered on 23<sup>rd</sup> September, 2021 and the application was filed on 15<sup>th</sup> October, 2021. He relied on the case of **MMW Vs JWW & 2 others [2021] e K.L.R.**

15. On the issue of security, the applicant submitted that he is willing and ready to provide security as the Court may direct for the due performance of the decree as may ultimately be binding on him. This is because the decree is not a money decree and doesn't know what security it should give up. He relied on the case of **Tabro Transporters Ltd Vs Absalom Dova Lumbasi (2012) e KLR** and **Focin Motorcycle Co. Ltd Vs Ann Wambui Wangui (2018) e KLR.**

16. He submitted that the appeal is arguable as the trial Court should have taken cognizance of the fact that the boundary dispute was wrongly before it.

17. He prays that the application be allowed.

#### **RESPONDENT'S CASE AND SUBMISSIONS**

18. The respondent's case is that he had been advised by his advocates on record that the application had not met the threshold required for stay of execution.

19. He stated that the applicant had come to court with unclean hands in that the allegations that judgment was delivered without notice was untrue.

20. He stated that the issue of jurisdiction was not raised by the applicant before the trial Court as the applicant never moved the court at any one instance over the same. Further, the respondent stated that the applicant had moved the trial Court seeking to amend his defence raising issues of the boundary between the suit lands.

21. He stated that the applicant through his final submissions, he reiterated on the boundary being re-certified as per the report and cannot now change his mind and allege that the trial Court lacked jurisdiction.

22. He submitted that the applicant had not attached any concrete evidence in his affidavit to demonstrate any loss that he will suffer if the orders of stay are not granted. He relied on the case of **ANM V VN (2021) e KLR.**

23. He submitted that the appeal raises no arguable issues and the applicant has lodged his appeal on different issues than what was raised before the trial Magistrate Court.

24. He submitted that though the application was filed without undue delay and the Applicant was willing to provide security, he had not demonstrated that the appeal was arguable and that he would suffer substantial loss as one of the grounds for stay pending appeal.

25. He stated that the application lacked merit and should be dismissed with costs.

#### **ANALYSIS**

26. I have considered the application, the parties' rival affidavits together with their annexures thereto, submissions and the relevant law.

27. This application has been brought under **Section 42 Rule 6 of the Civil Procedure Rules, 2010**, which provides as follows: -

*“ (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

(2) No order for stay of execution shall be made under sub-rule (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...*

28. From the above provision, the conditions that an Applicant has to demonstrate for the court to grant the orders sought are: -

**a. Substantial loss will result to applicant if stay is not granted; and**

**b. Security is given by the Applicant for the due performance of any decree as may eventually become binding on the appellant upon determination of the appeal; and**

**c. The application has been brought without unreasonable delay.**

29. On the issue of substantial loss, the applicant stated that unless the orders sought are granted, the respondent may proceed to auction his goods and that he will suffer substantial loss and suffering and that one of his grounds of appeal is whether the trial Court had jurisdiction to hear the matter and that should the respondent execute the decree herein, the entire appeal will be rendered nugatory and that he stands to suffer irreparable injury loss and damage.

30. The respondent on the other hand stated that the applicant had not attached any concrete evidence in his affidavit to demonstrate any loss that he will suffer if the orders of stay are not granted. He further submitted that the appeal raises no arguable issues and the applicant has moved the appeal on different issues than what was raised before the trial Magistrate.

31. I have looked at the Memorandum of Appeal filed on 15<sup>th</sup> October, 2021 and I am of the view that the applicant/Appellant has raised weighty and arguable grounds of appeal.

32. In particular, the applicant/Appellant has raised the issue whether the trial Magistrate was seized with jurisdiction to entertain a boundary dispute which in my view is a weighty issue. As to whether that is a new issue which ought to have been raised before the trial Court, that in my view is a matter to be determined at the appellate stage.

33. On the second ground whether the appellant has demonstrated substantial injury that cannot be atoned by an award of damages, the applicant in his supplementary Affidavit stated that unless the orders sought are granted, he will suffer substantial injury as the disputed boundary is where he has built his retirement home. Execution will therefore render him and his family homeless.

34. I have looked at the impugned judgment annexed to the supporting affidavit and marked as **AMN-1**. I take Judicial notice that the defendant has indeed developed the land in dispute and may stand to be prejudiced if the orders sought are not granted.

35. I therefore find that the applicant's intended appeal, if successful, would be rendered nugatory. I also note that the respondent has not stated what prejudice he will suffer if this application is allowed.

36. On the issue of unreasonable delay, the impugned judgment was delivered on 23<sup>rd</sup> September, 2021 and this application was filed on 15<sup>th</sup> October, 2021. I find the application was brought without undue delay.

37. On the issue of security, the applicant has stated that she is willing to abide by any terms which the Court may impose. The Applicant's application in my view is made in good faith.

38. In the case of **Nduhiu Gitahi and Another Vs Anna Wambui Warugongo [1988] 2 KAR 621**, the Court of Appeal held that:

*"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial."*

It is trite that an application for stay is a discretionary power to be exercised judicially. The Court exercising that power must balance between the rights of a successful decree holder and that of a judgment debtor. That was the reasoning by the Court in the case of **Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) e K.L.R** where the Court upheld the decision of **M/S Portreitz Maternity Vs James Karanga Kabia, Civil Appeal No. 63 of 1997** and stated:-

*"That right of Appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."*

The applicant has in my view satisfied the principles for the grant of the orders sought.

## **CONCLUSION**

39. In view of the foregoing, I find that the application dated 14<sup>th</sup> October, 2021 is merited and the same is allowed in the following terms:-

**a. An order of stay of execution of the Judgment dated 23<sup>rd</sup> September, 2021 in Kerugoya Chief Magistrate's Court Civil Case No. 215 of 2015 is hereby granted for sixty (60) days pending the hearing and determination of intended Appeal.**

**b. Costs to be in the cause.**

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 4TH DAY OF MARCH, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**IN THE PRESENCE OF:-**

**MS NYANGATI HOLDING BRIEF FOR MRS MAKWORO FOR RESPONDENT**

**MS WAMBUI HOLDING BRIEF FOR MRS MAKWORO KARIUKI FOR APPLICANT**

**KABUTA – COURT CLERK.**