



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 397 OF 2017

MARGARET WANGUI KARUGU.....PLAINTIFF

VERSUS

JOHN NJENGA KARUGU.....1ST DEFENDANT

MARY NJERI NJENGA2ND DEFENDANT

ELIUD KARUGU GATAMBIA3RD DEFENDANT

ESTHER NYATUGA MURIITHI 4TH DEFENDANT

DISTRICT LAND REGISTRAR KIAMBU5TH DEFENDANT

RULING

1. The plaintiff who is a wife to the 1st defendant initiated this suit through an originating summons dated 17/12/2014, in which she sought the following orders against the defendants:

- i. That this application be certified as urgent and that service of the same be dispensed with in the first instance.*
- ii. That injunctive order do issue against any alienation, sub-division, allocation and sale of all that Land Title Number Muguga/ Kahuho/ 470 to the 2nd defendant or any person pending the hearing and determination of this application.*
- iii. That a declaration that there exists a beneficial interest over Land Title Number Muguga/Kahuho/470 in favour of the plaintiff.*
- iv. That a declaration that John Njenga Karugu (the 1st defendant) who is the registered owner of the Land Title Number Muguga/ Kahuho/ 470 Nairobi holds the subject parcel of land in trust for his lawful children.*
- v. That a declaration that John Njenga Karugu (the 1st defendant) who is the registered owner of the Land Title Number Muguga/Kahuho/470 Nairobi does not hold the subject parcel of land in trust for the 2nd defendant or any other person under the Succession Act.*
- vi. That the defendants do bear the costs of this application.*

2. Trial proceeded before Gacheru J and on 9/12/2021, the court rendered a judgment in which it made a finding to the effect that the 1st defendant was registered as proprietor of the suit property, Muguga/Kahuho/470, to hold it in trust for himself and for his siblings [the 2nd defendant and the late Alice Nyakio]. Consequently, the court dismissed the originating summons for lack of merit and directed that the trust be broken by dividing the suit property and have it shared amongst the three siblings in equal shares.

3. Subsequently, on or about 16/12/2021, the plaintiff brought a notice of motion dated 16/12/2021, seeking a stay of the judgment. The said application is the subject of this ruling.

4. The application was supported by the plaintiff's affidavit sworn on 16/12/2021. The plaintiff deposed that she was dissatisfied with the judgment and she had taken steps to lodge an appeal against the judgement. She added that if the stay order was not granted, she stood to suffer irreparable prejudice and the appeal would be rendered nugatory and academic as the respondents were likely to subdivide and dispose

the suit property.

5. Through written submissions dated 27/1/2022, filed through *M/s Kimathi Wanjohi Muli Advocates*, counsel for the plaintiff argued that the plaintiff stood to suffer substantial loss because the suit property formed part of the plaintiff's matrimonial home. Counsel added that the application had been brought without unreasonable delay. Counsel urged the court not to impose any condition relating to security on the plaintiff.

6. The respondents opposed the application through grounds of opposition dated 10/1/2021. They contended that the plaintiff did not deserve the order of stay of execution because she was unwilling to provide security. They added that there were no positive orders in the judgment capable of attracting a stay order.

7. Through written submissions dated 11/2/2022, filed through the firm of *Ongoya & Wambola Advocates*, counsel for the 1st - 4th respondents. Counsel submitted that the suit property was one of the four sub divisions that were parceled out land that belong to the 1st defendant's father. He added that upon subdivision, each of the four houses of the 1st defendant's father was allocated a portion which was registered in the name of the eldest son in the house, to hold in trust for the house. Citing section 6(2) of the Matrimonial Property Act, counsel submitted that the suit property was not matrimonial property because it was held in trust.

8. On whether or not the plaintiff stood to suffer substantial loss, counsel urged the court to consider the interests of all the parties.

9. I have considered the application together with the response thereto and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the question falling for determination in the application. The single question falling for determination in the application is whether the applicant/plaintiff has satisfied the criteria upon which an order of stay pending appeal is granted.

10. The exercise of jurisdiction to grant an order of stay pending appeal is guided by the framework in **Order 42 rule 6(2)** of the **Civil Procedure Rules** which provides as follows :

“(2) 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.”

11. In the present application, the applicant is a wife to the 1st respondent. She claimed that the 1st respondent held the suit property in trust for her and her children. After taking evidence, the court found that the suit property was previously owned by the 1st respondent's late father who had four wives. The mother title was subdivided into four parcels and the four subdivisions were registered in the names of the eldest sons in each of the four houses to hold the parcels in trust for the respective members of the four houses. It is in that capacity that the 1st defendant held the suit property for his own benefit and for the benefit of his two siblings. The court dismissed the plaintiff's originating summons and ordered that the trust involving the 1st defendant and his two siblings be broken.

12. The plaintiff does not want that to happen. She is particularly aggrieved because there was no express prayer for the breaking of the trust. She contends that if the subdivision is allowed to proceed, the respondents will dispose the suit property.

13. The view I take upon considering the circumstances of this application is that I should allow the enforcement of the judgment of the court to proceed up to the stage of subdividing the suit property and titling the three subdivisions into the names of the 1st defendant, the 2nd defendant and the estate of the late Alice Nyakio. Once the subdivision registers are opened and the three titles issued, there will be no dealings in the three registers for a period of twelve (12) months from today. The three subdivisions will not be sold nor charged during the period of twelve (12) months. The plaintiff will be expected to process and prosecute her appeal and procure a determination by the Court of Appeal within the period of twelve (12) months from today. Those are the disposal orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF MARCH 2022

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MS NJUNGE FOR THE PLAINTIFF

MS NG'ANIA FOR THE RESPONDENTS

COURT ASSISTANT: LUCY MUTHONI

