



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 70 OF 2012

**GEORGE GATEMBO (suing as the legal representative of the
estate of JOSEPH MUGUNA (deceased)PLAINTIFF/RESPONDENT**

VERSUS

ELIJAH MUTEGI M'RWITO & 10 OTHERS.....DEFENDANTS/APPLICANTS

RULING

1. This ruling relates to 3 applications before me; the 1st application dated 4.11.2019 is filed by the 4th, 6th, 9th, 10th and 11th defendants, the 2nd application dated 25.11.2019 is filed by the 5th defendant. These two applications are generally seeking a stay of the judgment of this court dated 31.10.2019. The 3rd application dated 22.1.2020 is filed by the legal representatives of the 2nd defendant.

2. This court has already determined the main suit, where judgment was delivered 31.10.2019. The court directed that the aforementioned applications be heard and determined together, where parties were to file and serve their submissions on the same. From the time when the first application was filed to 17.3.2021 when the court gave a date for this ruling, this court has given various directions and rulings.

3. Of particular importance are the directions given on 16.1.2020 requiring the plaintiff/respondent to file his replying affidavits by 30.1.2020 of which documents filed outside the given timelines were to stand as expunged. It follows that the grounds of opposition dated 25.2.2021 in respect of the two applications of 4.11.2019 and 25.11.2019 stand as expunged. Similarly, the two list of authorities filed by the plaintiff on 9.3.2021 in respect of the aforementioned two applications are also disregarded. It is noted that the plaintiff also did not file submissions as directed by the court in respect of the three applications.

4. However, for the application dated 22.1.2020, it appears that the same was swallowed up in the maze of these proceedings such that no proper directions were given regarding its prosecution. In that regard, this court will admit the replying affidavit filed on 12.3.2020 as well as the grounds of opposition filed on 25.2.2020 by the plaintiff in respect of the application dated 22.1.2020.

The 1st Application dated 4.11.2019

5. This application is brought pursuant to the provisions of Section 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 42 rule 6 and Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules 2010 and Articles 10, 25(c) and 159 of the Constitution of Kenya; The applicants are seeking the following orders;

1) Spent

2) Spent

3) Spent

4) That pending the hearing and determination of the intended appeal in the Court of Appeal, an order be issued, maintaining and preserving the status quo obtaining in respect of the suit premises to wit L.R NOS. NTIMA/IGOKI/2601, 2602, 5471 and 5472 as at the time of delivery of judgment herein, on 31/10/2019.

5) That in the alternative to prayer 4 above, pending the hearing and determination of the intended appeal in the Court of Appeal Nyeri, an order be issued staying execution of the judgment dated 24/10/2019 but delivered herein on 31/10/2019 and the consequential decree flowing therefrom

6) Cost of the application be in the intended appeal.

6. The application is premised on the grounds on the face of it and on the supporting affidavit sworn by the applicants who pray for maintenance of status quo or a stay of the aforementioned judgment. The applicants contend that after the delivery of the judgment, the plaintiff/respondent has already confronted tenants as well as the 9th defendant/applicant and his family in the permanent commercial and residential rental premises and vowed to forcibly evict them therefrom if they failed to willingly vacate the same.

7. The applicants aver that it is not in dispute that they are the registered owners of the suit lands, the matter is very sensitive and emotive and they have attached great economic and pecuniary consideration as they have owned and exclusively utilized the suit land since 1975. Unless the relief sought is granted they will suffer substantial loss. On the other hand, the plaintiff will suffer no prejudice as he has never utilized the suit land. The applicants further contend that this application has been brought at the earliest opportunity, and they have duly filed a notice of appeal and are willing to offer any reasonable security as the court deems fit.

8. It was submitted for the 2nd, 4th, 6th, 9th, 10th and 11th defendants that they have ably met the criteria to warrant the issuance of orders relating to maintenance of status quo. In particular the applicants laid great emphasize on the issue of substantial loss, where they urged the court to note that the suit land consists of commercial and residential developments. They are willing to offer reasonable security.

9. In support of their arguments, the applicants herein relied on the following authorities;

- **County Government of Kwale vs Saumu Said Nyanya & 3 others (2017) eKLR.**
- **Rose Njiru (acting as the legal representative of M’Ncheeri M’Rutere vs John Nicholas Muthuri Meru ELC 136 of 2017.**
- **Loise Nkatha Muthuri vs Silas Kiogora Mburugu and another, Meru ELC 23 of 2013.**
- **Waweru Mwaura vs Mary Wanjiru Njenga (2016) eKLR.**
- **Amal Hauliers Limited vs Abdulnasir Hassan (2017) eKLR.**

10. This application stands as unopposed since the responses by the plaintiff were disregarded.

The 2nd application dated 25.11.2019

11. This application is also brought under Order 42 rule 6 and Order 51 Rules 1 - 3 of the Civil Procedure Rules where the 5th defendant/applicant is seeking the following orders;

- 1) *Spent*
- 2) *Spent*
- 3) *Spent*
- 4) *That this Honorable Court be pleased to stay execution of the judgment delivered on 31/10/2019 pending lodging and determination of an appeal against the said judgment.*
- 5) *Cost of the application be provided for.*

12. The application is premised on the grounds on the face of it and on the supporting affidavit of the 5th defendant who avers that being aggrieved by the said judgment he filed a notice of appeal dated 6/11/2019. He fears that if the judgment is executed, his title will be canceled, his right of appeal will be rendered nugatory and he stands to suffer substantial loss. He contends that no prejudice will be suffered by the plaintiff as the latter has not been in possession of the property for the last 36 years.

13. The 5th defendant vide submissions dated 15/02/2021 stated that the court has jurisdiction to preserve the subject matter of the intended appeal through the injunction sought. Through his intended appeal, he is exercising his right under Article 48 of the Constitution to access justice at the Court of Appeal as he has an automatic right of appeal against the judgment which has been delivered against him. He added that there was no unreasonable delay in filing this application and the process of preparing the appeal has commenced.

14. In support of his case, the 5th defendant relied on the following authorities;

- **Madhupaper International Ltd vs Kerr (1985) KLR 840.**
- **Emma Muthoni Wambaa and another vs Joseph Kibaara Kariuki, Mombasa HCC No. 274 of 2009.**
- **Anthony Raymond Cordeiro & 2 others vs Andrian Noel Carvalho & 5 others, Nairobi Commercial & Admiralty civil suit no. 627/2012.**
- **Purity Gathoni Githae vs Ocean Freight Transport Company, Bankruptcy cause no. 25 and 26 of 2009.**

- **E. Muiru Kamau and another vs National Bank of Kenya Ltd (2009) eKLR.**
- **Ernie Campbell & Co. Ltd vs Githunguri Dairy plant Co. Ltd & another (2009) eKLR.**
- **Butt vs Rent restriction Tribunal (1982) KLR, 417**
- **James Wangalwa and another vs Agnes Naliaka Cheseto (2012)eKLR.**
- **Awal Limited vs commissioner of Investigations and Enforcement (2020) eKLR.**

15. The 2nd, 4th, 6th, 9th, 10th and 11th defendants did not oppose this application of the 5th defendant. Thus this application too stands as unopposed.

The 3rd application dated 22.1.2020

16. This application is brought pursuant to the provisions of Order 24 rule 4 of the Civil Procedure Rules 2010, sections 13 and 19 of the Environment and Land Court Act and Articles 10, 25(c), 48, 50(1), 159 and 162 (2)(b) of the Constitution of Kenya. The applicants who are the legal representatives of the 2nd defendant are seeking the following orders;

a) *That the applicants MARETE MAINGI WA MUGAMBI and MUGAMBI MURITHI MAINGI, be enjoined herein to substitute the late 2nd defendant one M'MUGAMBI M'MARETE.*

b) *Cost of the application be in the cause.*

17. The application is based on the grounds on the face of it and on the supporting affidavit of the advocate on record who avers, that the applicants are the sons and the legal representatives of the estate of the 2nd defendant (deceased). They intend to join the other aggrieved defendants to pursue an appeal at Nyeri Court of Appeal as the judgment herein deprives the estate of the late 2nd defendant. The beneficiaries thereof attach great economic and sentimental value in the suit land and have no personal interest herein in conflict with those of the late 2nd defendant. The instant application has been brought in the interest of justice and has merits and no party shall suffer prejudice.

18. It was submitted for the applicants that they have a limited grant and the subject matter and dispute survives the deceased (2nd defendant). They implore the court to allow the substitution to prevent prejudice and injustice to the estate of the 2nd defendant. They also contend that the substitution will not occasion any prejudice to the plaintiff. The applicants relied on the case of **Bailey Oluoch Okun Orinda vs. Ayub Muthee M'Igweta & 2 Others (2014) eKLR.**

19. As stated earlier, the court has considered the replying affidavit and grounds of opposition filed by the plaintiff in opposition to this particular application for substitution. The plaintiff contends that the court became functus officio on 31.10.2019 when judgment was delivered, that the application is incompetent and an abuse of the court's process and that the only avenue the applicants have is to ventilate their issues at the court of appeal. It is further averred that the 2nd defendant passed on, on 3.11.2017, hence the applicants should have moved the court during the pendency of the suit.

Determination

Application dated 22/01/2020

20. I do note from the grant of letters of administration attached to this application that indeed the 2nd defendant died on 3/12/2017 and the succession cause was filed sometime in 2019 with the grant being issued on 31/10/2019. The Procedure in case of death of a party to a suit is provided for under Order 24 of the Civil Procedure Rules. The question is, is there any suit before this court? I find that there is no suit pending determination before this court. What is ongoing in this court are execution proceedings.

21. In the case of **Mueni Kiamba v Mbithi Kimeu Kimolo [2017] eKLR**, the court stated as follows on the issue;

“The provisions of Order 23 Rule 11 of the Old Civil Procedure Rules and now Order 24 Rule 10 of the New Rules provide expressly that substitution and abatement of suits shall not apply to execution of orders (emphasize added). In the case of AGNES WANJIKU WANGONDU VS UCHUMI SUPERMARKET LTD - NBI HCCA NO. 137 OF 2002, it was held that a suit could not abate at execution stage but that it was optional for a party to seek to substitute”.

22. The applicants are certainly not seeking to execute any decree, but they are trying to oppose the same. I would think that the same scenario applies to the applicants as much as it applies to a decree holder. Further, it is noted that the subject of contest in respect of the current application relates to the proposed applicants, whether they can at this stage be substituted in place of the defendant. The court is not dealing with the issue of the validity of the judgment and decree on account of the death of the 2nd defendant.

23. **I find that the application dated 22.1.2020 is merited and the same is hereby allowed. Each party to bear their own costs of the application.**

Applications dated 4/11/2019 and 25/11/2019

24. It is noted that the two applications for stay of execution are not opposed. Should the court proceed to allow the same on that basis? Certainly not. It is not automatic that for any unopposed application, the same should be allowed. It behooves the Court to be satisfied that the application is meritorious- See Supreme Court of Kenya case of **Tulloo Oil PLC & 3 others v PS Ministry of Energy & 15 others [2020] eKLR**.

25. The above applications are anchored on **Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010**, which provides thus: -

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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."

26. **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010**, provides : -

"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".

27. In the case of **Elena D. Korir vs Kenyatta University (2014) eKLR**, the court had this to say on principles guiding the court in exercise of its discretion to allow an application for stay pending appeal:

"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another vs Thornton and Turpin Ltd where the court of Appeal (Gicheru JA, Chesoni JA, 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....".

28. I find that judgment was delivered on 31/10/2019, while the applications were filed in less than a month's time thereafter on 4/11/2019 and 25/11/2019 respectively. Thus there was no delay in the institution of the two applications.

29. As to the issue of substantial loss, I make reference to the case of **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 E.A. 331**, where it was stated that;

"Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

30. The applicants argued that they would suffer substantial loss as they have owned the suit land for many years. The applicants in the application of 4.11.2019 contend that they have been on the suit land since 1975, while the 5th defendant has been on land no. Ntima Igoki/2209 since 1993. They have building thereon both commercial and residential and there are tenants on the land. These averments have not in any way been rebutted by the plaintiff. I am inclined to believe that the applicants in the two applications have met the criteria relating to substantial loss.

31. On the issue of security, I find that the applicants in the application of 4.11.2019 are willing to offer reasonable security, while the applicant in the application of 25.11.2019 has already given a security of Kshs.300,000.

32. As I conclude, I do note that though the applicants had apparently filed their respective notices of appeal, there is nothing to indicate that the appeals were ever lodged more than one and a half years from the time the judgment was delivered in October 2019. To this end, I must strike a middle ground and balance the competing interests of the parties. If the applicants are desirous of challenging the judgment of this court, then they ought to demonstrate vigilance in pursuing the appeal. To this end, the court will grant a conditional stay of execution in the following terms;

1) The application dated 4.11.2019 is allowed in terms of prayer no.4 on condition that the applicants deposit a total sum of Ksh. 500 000 in court within a period of 30 days from the date of delivery of this ruling.

2) The application dated 25.11.2019 is allowed in terms of prayer no. 4.

3) The stay of execution orders given in both applications of 4.11.2019 and 25.11.2019 are to remain in force for a period of 10 (TEN) MONTHS ONLY.

4) Each party is to bear their own costs of the applications.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

C.P Mbaabu for 4th, 6th, 9th, 10th and 11th defendants

Mwanzia for plaintiff

Ndungu for 5th defendant

HON. LUCY. N. MBUGUA

ELC JUDGE