



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO. 50 OF 2018

DAVID KIMENGERE WAITITU & DAVID GITONGA

(Suing as the personal representatives of the Estate of the late

BENJAMIN ITHINYAI M'NARANGUI (DECEASED).....1ST & 2ND PLAINTIFFS

JOHN NGOTHO NDURERE & JAMES MUTHAMI NDURERE

(Suing as the personal representatives of the estate

Of the late NDURERE MUHUNYO GATHII (DECEASED).....3RD & 4TH PLAINTIFFS

VERSUS

ANGELA WAIRIMU GETHI.....1ST DEFENDANT

MURUA LIMITED.....2ND DEFENDANT

RULING

1. By a notice of motion dated 31st August, 2020 based upon **Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21), Order 42 Rule 6 (2), Order 51 Rule 1 of the Civil Procedure Rules, 2010 (the Rules), Article 159 of the Constitution of Kenya 2010 and all enabling provisions of the law**, the Plaintiffs sought a stay of execution of the decree dated 12th November, 2019 and amended on 5th May, 2020 pending the hearing and determination of the “appeal” or further orders of the court.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by John Ngotho Ndurere on 31st August, 2000. The Plaintiffs contended that the effect of the said decree was to have them vacate the suit property. They contended that they resided on the suit property as their home and that they depended on it for their daily sustenance. They further contended that they had undertaken massive developments on the suit property over the years and that an eviction would occasion them substantial loss.
3. The Plaintiffs further contended that upon delivery of the judgment they had instructed their previous advocates to appeal against it but that the advocates had failed to execute the instructions and instead closed their office. It was the Plaintiffs’ case that efforts to trace their former advocates were futile and that their phone calls went unanswered. They further stated that the delay in filing the instant application was not unreasonable and that they should not be punished for the mistakes of their previous advocates.
4. The Defendants filed a replying affidavit sworn by Peter Nderitu Gethi on 25th June, 2021 in opposition to the said application. They stated that they were entitled to the fruits of their judgment. They contended that there was no pending appeal against the decree dated 12th November, 2019 and amended on 5th May, 2020 hence there was no basis for an order for stay pending appeal. It was further contended that the Plaintiffs’ intended appeal could not be rendered nugatory since they had neither filed a notice of appeal nor a record of appeal as required by law.
5. The Defendants further contended that the Plaintiffs’ application before the Court of Appeal for extension of time to file a record of appeal out of time had not yet been determined and that this court should not grant any order of stay on speculative basis. The court was consequently urged to dismiss the application and allow the Defendants to enjoy the fruits of their judgment.
6. When the application was listed for *inter partes* hearing on 25th May, 2021, it was directed, with the concurrence of the parties, that the same be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their

respective submissions. The material on record shows that the Plaintiffs filed theirs on 7th October, 2021 whereas the Defendants filed theirs on 6th July, 2021.

7. The court has considered the Plaintiffs' application dated 31st August, 2020, the Defendants' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main issue for determination is whether or not the Plaintiffs have satisfied the requirements for the grant of a stay pending appeal.

8. The Plaintiffs submitted that they had satisfied the requirements for stay in relation to substantial loss and the risk of the appeal being rendered nugatory in the absence of a stay order. They relied upon the following cases in support of their submissions: **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others [2013] eKLR, Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR, Britam General Insurance Company Kenya v Abigail Khasoa Simiyu [2020] eKLR, Charles Kariuki Njuri v Francis Kimaru (suing as the administrator of the estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased) [2020] eKLR.**

9. The Defendants, on the other hand, submitted that the Plaintiffs had failed to satisfy the requirements for stay pending appeal as required under **Order 42 Rule 6 of the Rules**. It was submitted out that there was no pending appeal before the Court of Appeal and that there was no evidence of substantial loss, in any event. The Defendants relied upon the following cases in support of their submissions: **Patrick Njuguna Kariuki v Delmonte Kenya Limited [2020] eKLR, Joackim Ngugi Kiarie v G Z. Ulyate & 6 Others [2014] eKLR; Samuir Trustee Limited v Guardian Bank Ltd [2007] eKLR and Mwaura Karuga t/a Limit Enterprises v Kenya Bus Service Ltd & 4 others [2015] eKLR.**

10. The Plaintiffs' application for stay of execution is essentially based upon **Order 42 Rule 6 (2) of the Rules** which stipulates as follows:

“ 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”.

11. The court has considered the material and submissions on record on the issue of stay pending appeal. It is evident from the material on record that the Plaintiffs have been residing and occupying the suit property for many years. They have undertaken various developments on the suit property. The Defendants did not dispute that the Plaintiffs were in possession. The court is consequently satisfied that the Plaintiffs have demonstrated the risk of substantial loss arising if they were to be removed from the suit property.

10. The court is, however, not satisfied that the Plaintiffs filed the instant application without unreasonable delay. The original judgment was delivered on 12th November, 2019 and subsequently amended on 5th May, 2020. There is no good explanation why the Plaintiffs did not move the court for a stay for nearly one year. The court does not accept as reasonable the Plaintiffs explanation that they were still looking for their advocates who had closed their offices. A diligent litigant should have taken alternative legal representation to protect his interest in the matter instead of waiting for 10 months while facing the risk of execution. There is even no indication that the Plaintiffs sought to trace their advocates through the Law Society of Kenya.

11. It is not necessary for the court to make any comments on the competency of the appeal or other proceedings before the Court of Appeal. It is sufficient for this court to state that the Plaintiffs have failed to satisfy one of the essential requirements for granting stay pending appeal under **Order 42 Rule 6 (2) of the Rules**.

12. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 31st August, 2020. Accordingly the same is hereby dismissed with costs. It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 4TH DAY OF NOVEMBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

IN THE PRESENCE OF:

MS. MURIITHI FOR THE PLAINTIFFS

MR. MAPESA FOR THE DEFENDANTS

CA - CAROL

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Y. M. ANGIMA

JUDGE