



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC APPEAL NO. 3 OF 2020

MOSES MEIBAKO NGATUNY.....1ST APPELLANT/APPLICANT

KOIYAGI NGATUNY ALIAS KOIYAGI TOBIKO ATETI.....2ND APPELLANT/APPLICANT

SITONY NGATUNY.....3RD APPELLANT/APPLICANT

VERSUS

PEIPEI OLE MOSOIKO.....RESPONDENT

RULING

1. Before me for determination by a Notice of Motion dated 25th August 2020 brought under the provisions of Order 42 Rule 6(1)(2) & 6 of the Civil Procedure Rules, Sections 1A,B,3A & 63 (e) of the Civil Procedure Act, Sections 7, 13(7), 19 and 26 of the Environment and Land Court, Art 27(1), 47, 48, 50(1), 159 & 162 (2) of the Constitution, Section 73 of the Land Registration Act and all other enabling provisions of the law where the Applicants seeks for orders of stay of execution of the judgement and decree dated the 10th December 2019 and any consequential orders that may led to eviction or their removal from suit land No Trans-Mara/Moita/488 pending the hearing and determination of the Appeal.
2. In the alternative, the Applicants seek orders of interim injunction against the Respondent from entering or taking possession of or interfering with their occupation on the suit land in execution of the said judgement and decree.
3. They also seek that the Respondent be enjoined from undertaking the exhumation of the remains of Moseka Daniel Ngatuny whose body was interred on the suit land, and for prohibitive orders inhibiting any dealings and/or transactions in respect of the suit land in particular subdivision, sale, charge, alienation and/or transaction that may affect or vitiate the title of the suit property, pending the hearing and determination of the Appeal.
4. The application was supported by the grounds thereto as well as the supporting affidavit of the 2nd Applicant herein dated the 25th August 2020.
5. The Respondent filed his Replying Affidavit dated the 22nd September 2020 in response to the Application in which he deponed that the application was res judicata an application made in the trial court, which application had been dismissed. That other than that the application was also sub judice an application filed in the Kilgoris Law courts pursuant to the provisions of Section 34 of the Civil Procedure Act.
6. That there was nothing to be stayed since the suit land had already been transferred into his name. That he had no intensions of exhuming the remains of Moseka Daniel Ngatuny whose body was interred on the suit land.
7. The court delivered itself on the issue of the matter being Res judicata and/ or sub judice, which matter was raised separately by the Respondent in their Preliminary Objection 22nd September 2020, wherein the same was dismissed via the court's ruling of 29th April 2021.
8. The current application was disposed of through written submissions to which I shall summarize as herein under.

Appellant's/Applicants' submissions.

9. The Applicants' submission after summary of the matter in issue was to the effect that being aggrieved by the judgment delivered by the subordinate court in Kilgoris PMCC ELC No. 9 of 2018, they filed an Appeal to this court against the said judgment and now seek orders of stay of execution of the Decree of subordinate court, and/or in the alternative interim injunctive orders against the Respondent enjoining him

from entering or taking possession of or interfering with their occupation on the suit land in execution of the said judgement and decree, pending the hearing and determination of their intended Appeal which was lodged on 3rd February 2020.

10. They framed their issues for determination as follows;

- i. Whether the Appeal herein raises reasonable and arguable points?
- ii. Whether there exists sufficient cause and/or basis to warrant the orders of stay of execution pending Appeal?
- iii. Whether the Appellants/Applicants would suffer substantial loss?
- iv. Whether the Respondent herein shall suffer any prejudice whatsoever?
- v. Whether the instant application was filed and/or mounted without unreasonable delay?
- vi. The issue concerning provision of security?

11. On the first and second issues for determination the Applicants submitted that there having been no Succession Cause proceedings conducted in respect to the estate of Ateti Ole Nembo (deceased), the registered proprietor of the suit property LR No. Trans-Mara/Moita/488, Moseka Daniel Ngatuny (now deceased) and no authority to transfer and register the same in his name as the act was ipso facto illegal and void.

12. That Moseka Daniel Ngatuny (now deceased) not having acquired any lawful and/or legitimate rights over the suit property, could not therefore transfer any legitimate rights to and/or in favour of the Respondent herein.

13. That although the Respondent impleads the doctrine of Bona fide purchaser for value without notice, the said doctrine did not hold sway where the root of the title was replete with irregularities and where the predecessor in title, in this case Moseka Daniel Ngatuny (now deceased), did not have a good title to pass. Reliance was placed on the decided case in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR**. The Applicants submission was that the Appeal mounted before this honorable court espoused very cardinal issues of law which were not appreciated and/or properly appreciated by the trial court thereby vitiating the entirety of the impugned judgment.

14. On the third issue for determination it was the Applicants' submission that pursuant to the registration of the suit land in his name, the Respondent herein had now filed an application dated 3rd August 2020, in the trial court seeking orders of eviction against them and Moseka Daniel Ngatuny's widow who resides and/or is in occupation of the suit property. That there was no gainsaying that the Respondent who was now the registered proprietor of the suit property could very well proceed to sale, alienate, mortgage, change and/or in any other way dispose of the title and render the Appeal nugatory and/or an exercise in futility as the suit property would be placed beyond the reach of the Applicants.

15. That the kind of loss to be suffered in the event that they were evicted would be substantial in nature and therefore there was need to avert and/or abate the said loss especially during the pendency of the Appeal. Reliance was placed on the decided case of **RWW vs EKW [2019] eKLR**.

16. They submitted that the order of temporary injunction would therefore restrain the elimination, disposition and/or transfer of the suit property and to preserve the occupation/possession and use of the same by the Respondents.

17. The Appellants/Applicants further submitted that the jurisdiction of the court to grant orders of injunction pending Appeal was granted by virtue of the provisions of Order 42 rule 6(6) of the Civil Procedure Rules and Section 13(7) of the Environment and Land Court Act.

18. On the fourth issue for determination, the Applicants submitted that despite entering into the land sale agreement with Moseka Daniel Ngatuny the Respondents did not obtain vacant possession of the suit land. On the contrary, had been Moseka Daniel Ngatuny's widow who remains in occupation of the suit property, and therefore the Respondent could not contend that he will suffer any loss and/or prejudice if the orders sought were granted. Further that the Respondent was now the title holder of the suit property and therefore the Applicants could not alienate and/or dispose of the suit property. That if anything, were the Respondent to succeed on Appeal he would take possession and/or occupation of the suit land without interference and he could also be compensated with costs.

19. On the fifth issue for determination, the Applicant submitted that pursuant to delivery of the decision of the subordinate court on 10th December 2019 they had amounted and filed their Appeal on the 3rd February 2020 and an application for stay of execution pending the hearing and determination of the same before the subordinate court on the 4th February 2020. That upon dismissal of the application before the subordinate court, they had filed the current application for stay of execution before this court on 7th September 2020 which was 14 days following the dismissal. That the Respondents had filed their preliminary objection to the application which was dismissed by the court's ruling of 29th April 2021. The application herein was therefore filed without unreasonable delay.

20. Lastly the Applicant submitted that it was the honorable court to determine the provision of security, the nature and kind of security to be decreed after taking into account the circumstance of the case and thereafter to balance the interest of the parties. But keeping in mind the circumstance under which the Respondent procured and obtained title to suit property, the Applicants sought for the court to exercise its discretion to grant the orders sought without decreeing the provision of security, or in the alternative that they file an undertaking to pay the costs arising from the subject of the Appeal as well as the suit before the subordinate court. Reliance was placed on the decided case in **HGE**

vs SM [2010] eKLR.

The Respondent's submission.

21. The Respondent framed their issue for determination as being;

- i. Whether this Applicant's application is res judicata.
- ii. Whether the Applicant satisfies the conditions for grant of stay of execution
- iii. Who should bear the cost of the suit.

22. On the first issue for determination it was the Respondents submission that the Applicants had filed a similar application before the trial court which was heard and determined in favour of the Respondents and therefore the current application was res judicata as the matter had already been determined by a court of competent jurisdiction. Reliance was placed on the provisions of Section 7 of the Civil Procedure Act as well as on the decided case in **Kungu Ngethe vs George Kibati [2018] eKLR**.

23. On the second issue of determination as to whether the Applicant had satisfied the conditions for grant of stay of execution, the Respondent relied on the provisions of Order 42 rule 6 of the Civil Procedure Rules to submit that the application was brought in bad faith and geared to delay the enjoyment of the fruits of the successful litigant. That the Applicant had not demonstrated the substantial loss he was likely to suffer should the prayers not be granted and therefore the Appeal could not be rendered nugatory. reliance was placed on the decided case in **Macharia T/A Macharia & Co Advocates vs. East African Standard (No. 2) [202] KLR 63**

24. That further there were a plethora of decided cases on the issue of grant of stay of execution pending Appeal to which it was clear that the Applicant had not satisfied the set down conditions for grant of the orders so sought. That the Applicant failed to prove on how they stood to suffer substantial loss if the stay was not granted in the event that the Appeal succeeded and further that the issue of security had not been addressed.

25. On the last issue in regard to who would bear the cost of the suit, it was the Respondent's submission that the successful party in litigation was entitled to fruits of litigation. That the Applicants' application was bound to fail and therefore they were entitled to costs. That although the power to grant an application was discretionary yet that the court needed to balance the interest of the Applicant with those of the Respondent. He sought for the Applicants' application to be dismissed with costs.

Determination.

26. I have considered the Applicant's Application for stay of execution of the judgement in Kilgoris PMCC ELC No. 9 of 2018, delivered on the 10th December 2019, in favour of the Respondent herein, pending the hearing and determination of the Appeal. I have also considered the authorities, as well as the reasons given for and against the said Application.

27. To begin with I have to deal with the issue herein raised by the Respondent that the current application is res judicata the ruling of the trial Court dismissing the Applicant's application for stay of execution.

28. The provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules provide as follows:

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from subordinate Court or tribunal has been complied with.

29. I therefore find that the court is clothed with jurisdiction to grant an injunction only when exercising its appellate jurisdiction and therefore the present application filed to this court, as an appellate court, is not res-judicata the trial court's ruling.

30. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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.

(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 .

31. There are three conditions for granting of stay Order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is Ordered;
- ii. The Application is brought without undue delay and
- iii. 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.

32. I find two issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What Orders this Court should make

33. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the Applicants to demonstrate what kind of substantial loss they will suffer if the stay order was not made in their favour.

34. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

35. The Applicants contended that since they were in possession and occupation of the suit land, they would suffer irreparable loss if they were not granted stay of execution as the Respondent vide his application dated 3rd August 2020, in the trial court had sought for orders of eviction against them since the suit property is registered in the name of the Respondent. That on the other hand the Respondent would not suffer any loss and/or prejudice if the orders sought are granted as he was not in occupation of the suit land and he would take possession and/or occupation of the suit land without interference and that he could be compensated with costs if the Applicants lost the Appeal.

36. I find that indeed as was held in the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, that it was not enough for the Applicants to state that they lived on the suit land and that they would suffer substantial loss. It was obligated of them to go further and show the substantial loss that they stood to suffer if the Respondent executed the decree keeping in mind that they had proved its ownership.

37. The Court has to balance the interest of the Applicants who are seeking to preserve the status quo pending the hearing of the Appeal so that their Appeal is not rendered nugatory and the interest of the Respondents who are seeking to enjoy the fruits of their judgment. In other words the Court should not only consider the interest of the Applicants but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of his Judgment. See **Machira T/A Machira & Co Advocates** (supra)

38. On the second condition, I find that it was not in dispute that the impugned judgment was delivered on the 10th December 2019. An application for stay of execution pending the hearing and determination of the same before the subordinate court was made on the 4th February 2020 and dismissed. The Applicant’s submission is that the present application was filed on the 7th September 2020 which was 14 days after the dismissal of the initial application. I thus find that the said application is brought without undue delay.

39. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicants have not pledged any security but have sought to file an undertaking to pay the costs arising from the subject of the Appeal as well as the suit before the subordinate court.

40. In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates** the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

41. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.

42. Given that the grant or refusal to grant orders of stay of execution is discretionary, the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how discretion should be exercised as follows:

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, 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.*

5. *The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

43. The two conditions necessary for grant of Orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules having not been met by the Appellant/Applicants and further in regard to the provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this Court is not inclined to grant the Order of stay of execution so sought.

44. Now turning onto the alternative prayer, this court appreciated that an injunction can be granted pending an Appeal so as to prevent the Appeal being rendered nugatory in the event the Appeal is successful. The Applicants have demonstrated that the ownership of the suit land is challengeable within the provisions of the law as the same was acquired through a null and void process. The Applicants have further demonstrated that the Respondent would not suffer any loss and/or prejudice if an injunction is granted as he was not in occupation of the suit land and he would take possession and/or occupation of the suit land without interference. That further he could be compensated with costs if the Applicants lost the Appeal.

45. I therefore hold that the intended Appeal is arguable or, in other words, not frivolous, and it is not necessary or desirable that I go into any detail as to the reasons for this view at this stage lest I prejudice the intended Appeal.

46. Given that the court has jurisdiction to grant temporary injunctive orders as per the provisions of Order 42 Rule 6(6) of the Civil Procedure Rules, I make the following orders:

i. There shall be temporary injunctive orders against the Respondents who are enjoined from entering or taking possession, subdividing, selling, charging, alienating and/or transacting on the suit land, No Trans-Mara/Moita/488, that may affect or vitiate the title of the suit property, pending the hearing and determination of the Appeal.

ii. That the Applicants/Appellants shall within 45 days from the date of this ruling, compile, file and serve upon the Respondent a complete record of Appeal in default the interim orders herein shall lapse automatically.

iii. The Deputy Registrar is directed to call for the proceedings of the lower Court record for admission of this Appeal to hearing expeditiously.

iv. Costs to abide as per the outcome of the Appeal.

It is so ordered.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 4TH DAY OF NOVEMBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE