



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 34 OF 2019

NDINGURI MACHARIA.....1ST APPLICANT

WAMUGI MACHARIA.....2ND APPLICANT

KAHIGA MACHARIA.....3RD APPLICANT

GITONGA MACHARIA.....4TH APPLICANT

VERSUS

GEORGE MWANGI KABONGO.....1ST RESPONDENT

CHRISTOPHER NJUNJI NDERI.....2ND RESPONDENT

WILLIAM MUNYAKA MAKIRI.....3RD RESPONDENT

RULING

1. By this Notice of Motion application dated 6th April, 2021, Ndinguri Macharia, Kahiga Macharia, Wamugi Macharia and Gitonga Macharia (*the Appellants*) pray for an order that there be a stay of execution of the Judgment and decree of the Nyeri Chief Magistrate's Court dated 29th November, 2019 in Nyeri CMCC 247 of 2018 pending the hearing and determination of the Appeal filed herein.

2. The application which is supported by an affidavit sworn by the 3rd Appellant is premised on the grounds *inter alia*, that:

(i) *The present appeal has realistic chances of success;*

(ii) *The Respondents have commenced executing the subject judgment.*

(iii) *The Appellants stand to suffer irreparably if the subject Judgment is executed and this appeal succeeds; and*

(iv) *The Appeal may otherwise be rendered nugatory.*

3. The three Respondents – George Mwangi Kabango, William Munyaka Kamiri and Christopher Njunji Nderi are however opposed to the application. In their Replying Affidavit jointly sworn and filed herein on 11th May, 2021, they aver that the Appellants have not stated which parcel of land they are complaining about.

4. The Respondents aver that land parcel number Nyeri/Mweiga/299 was previously registered in the name of Francis Macharia Kanungu and that the same was closed and ceased to exist on sub-division on 14th November, 1984 when parcel numbers Nyeri/Mweiga/533 and Nyeri/Mweiga/520 were created. The Respondents assert that the Appellants instead reside on a parcel of land known

As Nyeri/Mweiga/2440 which was a sub-division of a different parcel of land created in 2014 being Nyeri/Mweiga/802 previously registered in the name of one Margaret Wangari Macharia.

5. The Respondent accuse the Appellants of continuously ignoring a court order issued in case No. 247 of 2018 on 4th February, 2021 by continuing to cultivate and plant crops in the Respondents parcels of land and urge the court to dismiss their application.

6. I have taken careful consideration of the application and the response thereto. I have equally considered the submissions and authorities placed before me by both parties.

7. The Appellants have urged this court to grant a stay of execution of the Judgment and decree of the Nyeri Chief Magistrate the Honourable Wendy Kagendo delivered on 29th November, 2019 in Nyeri CMCC No. 247 of 2018. It is their case that the said court has decreed their eviction from the suit property and that they stand to suffer irreparably unless the orders of stay are granted pending the hearing and determination of the Appeal they have filed herein.

8. **Rule 6 (2) of Order 42 of the Civil Procedure Rules** gives the guiding principles on the grant of a stay of execution pending appeal 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 as may ultimately be binding on him has been given by the applicant.

9. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellants who are exercising their undoubted right of appeal are safe guarded and that the appeal if successful, is not rendered nugatory. However, in so doing, the court must weigh this right against those of the successful litigant who should not be deprived of the fruits of his/her Judgment. Accordingly the court when considering an application such as this must balance the interest of the Appellants with those of the Respondents.

10. As to whether the Appellants stand to suffer substantial loss, I am reminded of the sentiments of Gikonyo J in **James Wangalwa and Another –vs- Agnes Naliaka Cheseto (2012) eKLR** where the Learned Judge observed thus:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein –vs- Chesoni (2002) 1 KLR 867, and also in the case of Mukuma –vs- Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in granting stay of execution, under Order 42 of the Civil Procedure Rules and Rule 5 (2) (b) of the Court of Appeal Rules respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. A perusal of the pleadings and the material placed before me as well as the Judgment appealed from reveals that the Appellants herein were the Defendants in the matter in the subordinate court which was instituted way back on 12th May, 2008. The Respondents who were the Plaintiffs in the lower court had accused the Defendants of invading and damaging their property and sought a perpetual injunction to restrain the Appellants from entering their properties and committing various acts of waste thereon.

12. It is apparent that the Appellants who are the sons of one Francis Macharia Kanyungu were disputing the Respondents’ claim that they had bought their parcels of land from their deceased father Francis Macharia Kanyungu and sought to continue to cultivate the land and graze their animals thereon.

13. It is also clear that the Appellants generally denied the Respondents accusations and that the 3rd Appellant filed a counterclaim as the Administrator of the Estate of Francis Macharia Kanyungu seeking to have the Respondents titles to the disputed properties cancelled and to have the same revert to the name of their father.

14. Having perused through the pleadings and the Judgment, I did not see anywhere wherein the Appellants claimed to be residing on the suit properties as they now purport. What the Magistrates’ Court did was to restrain them from trespassing into and committing acts of waste on the suit properties and I am not persuaded that those orders will cause them any substantial loss as alleged in the application before me.

15. In the result, I did not find any merit in Appellants’ Motion dated 4th April, 2021. The costs of the application shall be in the Appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF NOVEMBER, 2021.

In the presence of:

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J. O. OLOLA

JUDGE