



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 14 OF 2017

(FORMERLY NAKURU ELC 102 OF 2012)

HANAH NJERI KOGI (suing as a legal

Representative of Elijah Kogi Gichaga Deceased).....1st PLAINTIFF/APPLICANT

LABAN MWANGI GICHAGA.....2nd PLAINTIFF/APPLICANT

VERSUS

SAMUEL MUNYUA GICHAGA.....RESPONDENT

RULING

1. Before me for determination is an Application by way of a the Notice of Motion dated 6th November 2019 where the Applicant seeks for orders of stay of execution of the judgement delivered in this Court on the 29th October 2019, pending the hearing and determination of an Appeal.
2. The said application is supported by the grounds set on its face as well as on the supporting affidavit of Elijah Kogi Gichaga (deceased) and 1st Applicant herein.
3. The Application was opposed vide the Respondent's Replying Affidavit dated the 15th November 2019 in which he sought for the said Application be dismissed with costs for reason that the no substantial loss would be occasioned to the 1st Applicant who had another parcel of land where his family lived. That the 2nd Applicant was evicted from the suit land in the year 2010 and was not therefore in occupation anymore.
4. By consent, parties agreed to dispose the Application through written submissions.
5. It was while the matter was pending confirmation of the filing of submissions that Counsel for the Applicant filed another Application dated the 3rd March 2020 seeking to substitute the original 1st Applicant, who had passed away during the pendency of the matter, with his wife. The Application was not opposed.
6. The Applicant's submission to the main Application was to the effect that the orders of stay were discretionary and should be issued judiciously. That the grounds to be considered in such an application included the following;
 - i. That Applicant/Appellant must demonstrate that they have an arguable Appeal with a high chance of success.
 - ii. The Applicant/Appellant must also show that the execution of the judgment will lendedered (sic) the Appeal nugatory and
 - iii. That in the event of the Appeal succeeds, the Respondent will not be an able to compensate them for the loss.
7. On the first condition, it was their submission that the Appellant had a good Appeal with a very high chance of success. That the Appellant had established through evidence the existence of a trust on the subject piece of land and having stayed therein since the land was allocated and having shared the same equally with the Respondent. That the Applicant had satisfied the principles required to prove a trust in land.
8. On the second ground of their application, the Applicant submitted that the subject suit had sentimental value to the parties and their family wherein they had buried their mother. That the Respondent had sold 90% of his share of land and if allowed to execute the judgment

before the Appeal was heard, there would be no land to litigate about as the subject matter of the Appeal will be extinguished thereby rendering the Appeal nugatory.

9. That the Respondent, had been on his defined piece of land for fifty years and there would be no damage suffered in the event the stay was granted.

10. That the Applicants were submitting themselves to reasonable conditions that maybe given by the Court on maintaining the status quo as the Appeal was pressed and bend (sic). The Applicant relied on the decided case in **Bashir Godana vs Fatuma Godana Tupi [2018] eKLR** to buttress their submission.

11. The Respondent, in their written submission opposed the said Application submitting that the 2nd Respondent had already vacated the suit land while the matter was still pending and the only occupant therein was the 1st Applicant and the Respondent herein.

12. That despite the orders being in place, the original 1st Applicant who is now deceased was buried on the suit parcel of land. That being the case, the 1st Applicant being the party to whom the orders applied to was now deceased and the orders of stay may therefore not be applicable in the circumstance.

13. That the Application dated the 6th November 2019 was defective as it did not include the Applicable law under which it had been brought. That the provisions of Order 42 Rule 6 of the Civil Procedure Rules were clear and no substantial loss would occasion the 1st Applicant for reasons that;

i. The 1st Applicant to whom the Court orders applied to was now deceased. Despite being buried on the suit parcel of land, no loss would result to him.

ii. The 2nd Applicant had long, vacated the suit land and the Court orders did not apply to him and as such, no loss will be suffered by him if orders of stay were not granted.

14. The Respondent relied in the decided case in **Tropical Commodity Suppliers Limited** (sic) where the Court had held that:

'Substantial loss did not represent any particular mathematical formula. Rather it was a qualitative concept that referred to any loss great or small that was of real worth or value as distinguished from a loss without value or loss that was merely nominal'.

15. They also relied on the case in **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** to complement their submission and submitted that the Application herein had been overtaken by events and would serve no purpose as was held in the case of **Jane Jeptoo Sawe vs Estate of Sylvester Kimagut Sang [2016] eKLR** cases which are distinguishable to the present case in respect to the 1st Applicant.

Determination.

16. It is worth noting the 2nd Applicant had long left the said suit land therefore these proceedings do not concern him. The 1st Applicant on the other hand passed away during the pendency of this application wherein his wife was issued letters of Administration ad litem for purpose of this suit amongst others. I have considered the Application for stay of execution of the judgement in this matter which was delivered on the 29th October 2019, pending the hearing and determination of the Appeal. I have also considered the reasons given for and against the said application.

17. 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 1st 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 1st Applicant.

18. 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 1st 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 Applicants.

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

i. Whether the 1st Applicant had satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this court should make

20. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2)

The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.

21. While under section 1B some of the aims of the said objective are;

The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

22. It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

23. Thus vide its Judgment of 29th October 2019, the Court had issued an order of mandatory and permanent injunction against both the Applicants herein directing that they vacate the parcel of land within 90 days of the delivery of the Judgment. I have considered the application herein and the various positions urged on behalf of the parties.

24. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the 1st Applicant to demonstrate the kind of substantial loss he would suffer if the stay order was not made in his favour.

25. 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

26. In the application before me, the 1st Applicant seems not to have grasped the conditions to be satisfied in this kind of application. I have also noted that he did not indicate under what provisions of the law he had filed the said application, but I shall invoke the provisions of Article 159(2)(d) of the Constitution to cushion his application.

27. The 1st Applicant seems to contend that he would suffer irreparable loss if he is not granted stay of execution as the Respondent had sold 90% of his share of land and if allowed to execute the judgment before the Appeal was heard, there would be no land to litigate, as the subject matter of the Appeal would be extinguished thereby rendering the Appeal nugatory. No evidence was however provided as proof that the Respondent had disposed of 90% of his share of land and/or that he was bent on disposing off the suit land. Further, no evidence had been advanced on the kind of irreparable loss he would suffer if the order of stay was not granted. The Applicants' application fails on this ground.

28. On the second condition, this Court finds that the Applicant filed the present application for stay of execution on the 6th November 2019 almost 1 week after delivery of the Judgment on the 29th October 2019, which judgment was being appealed from. I find that the said Application is brought without undue delay.

29. On the last condition as to provision of security, the Applicant in the present Application has not indicated his willingness to furnish security for a grant of the order for stay of execution.

30. Having found that the conditions necessary for grant of orders for stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Applicants and further, having regard to the provisions of the law as stipulated under Section 1A, 1B and 3A of the Civil Procedure Act, I find that this court is not inclined to grant the order of stay of execution so sought. In the circumstance, Applicants' Notice of Motion dated 6th November 2019 is hereby denied and dismissed with costs to the Respondent.

Dated and delivered at Nyahururu this 6th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE