



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO. 18 OF 2018

MARY MUMBI NJOROGE (Suing as Legal Representative of

NJOROGE MWANGI

JEREMIAH MAINA KIHUNYU)

STANLEY NGANGA KAMAU

JOHANA MATHENGE NJOROGE

JANE WANJIKU KIRAGU.....APPELLANTS

VERSUS

ELIZABETH WAMBUI MWAURA

(SUBSTITUTED FOR MWAURA KAHIGA).....RESPONDENT

RULING

(Application for stay pending appeal; judgment already given and affirmed on appeal; plaintiff moving to execute the judgment and orders given; applicant filing appeal and seeking stay; stay denied; court being of opinion that granting stay in the circumstances would be an injustice; court not bound by the 3 conditions laid down in the rules; application dismissed).

1. The appellant has filed an appeal against the order of the Honourable E. Kimilu, Principal Magistrate, issued in Naivasha CMCC No. 59 of 1985. What is now before me is an application seeking orders of stay of the said ruling pending the hearing and determination of this appeal. The application is opposed.

2. Having looked at the contents of the supporting affidavit and the replying affidavit, and the annexed documents, I have gathered that the dispute herein arose around the year 1985 or thereabouts when the case Naivasha CMCC No. 59 of 1985 was filed. The plaintiff in that case was one Mwaura Kahiga (deceased) now represented by Elizabeth Wambui Mwaura his legal representative, while the defendant was one Mwangi Njoroge, also deceased, and now represented by Mary Mumbi Njoroge, his legal representative, who is the appellant/applicant. The dispute was over the ownership of the land parcel Nyandarua/Ol Aragwai/914 which the plaintiff claimed to have purchased but which was registered in the name of the defendant. The matter was referred to arbitration which decided in favour of the plaintiff and judgment was thus entered for the plaintiff on 14 January 2004. The judgment has however not been executed owing to one application after another. Of significance is a ruling delivered by Honourable N.N Njagi, Principal Magistrate, on 22 April 2010, where the Honourable Magistrate was faced with two applications, one by the respondent seeking orders to execute the judgment, and another by the appellant, seeking to stop its execution. The learned Honourable Magistrate dismissed the appellant's application and upheld that of the respondent. The appellant was aggrieved and filed an appeal being Nakuru ELC, Appeal No. 107 of 2010. The appeal was heard and decided on 20 June 2018 by Ohungo J, who did not find merit in the appeal and upheld the ruling of the Honourable Magistrate. The parties then went back to the Magistrate's Court to execute the judgment. However, it turned out that the land parcel Nyandarua/Ol Aragwai/914 had been subdivided by the appellant into the land parcels Nyandarua/Ol Aragwai/7847, 7848, 7849 and 7850 ostensibly distributing the estate of Njoroge Mwangi pursuant to Nairobi High Court Succession Cause No. 898 of 2008. The respondent then filed an application dated 7 November 2018 seeking orders to have the beneficiaries of the subdivisions enjoined as interested party and for their titles to be cancelled so that the land may revert back to the original parcel No. 914 and the judgment be executed. The application was heard by Honourable Kimilu Principal Magistrate, who allowed it. It is that ruling which has provoked this appeal, and pending the hearing of the appeal, the appellant has filed this application seeking a stay of execution.

3. There are 12 grounds of appeal, but I need not list all of them, the gist being that the learned Magistrate erred because the land had been subdivided pursuant to a grant. In response, the respondent has pointed out that she has judgment in her favour and her view is that the applicant has continuously been frustrating her from executing the judgment.

4. The application before me is for stay pending appeal, and the provisions of Order 42 Rule 6 apply. The said law provides as follows at sub-rule 2:-

(2) 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.

5. From the above, it will be seen that the applicant needs to satisfy three requirements, that is :-

(a) Show that he has filed his application without unreasonable delay;

(b) Show that he stands to suffer substantial loss;

(c) Provide security for the due performance of the decree.

6. It should however be appreciated that the grant of an order of stay pending appeal is a discretionary remedy of the court. I do not think that in all instances where a person ticks all the above boxes, grant of stay would be automatic. I think the court in exercise of its discretionary powers, may go beyond the above requirements in order to ensure that justice is done in the circumstances of the case. Where it is clear that the applicant is attempting to seek a stay of execution pending appeal in order to perpetuate a mischief and steal a march on the respondent, or to benefit from an injustice, I do not think that the court is only going to look into the three points above, and close its eyes and ears to everything else.

7. I do note that this case has been pending for a long time, since the year 1985. There is already judgment in favour of the respondent which judgment has never been set aside. That being the case, the only pending issue is execution of the decree. The judgment provided that the respondent does get land from the land parcel Nyandarua/Ol Aragawi/ 914 which means that unless the decree is set aside, it ought to be executed. It is apparent that the appellant has through a succession cause distributed the estate to the persons who were named as interested party in the application under appeal, but I wonder how she did this since, there was already a judgment in favour of the respondent for the same land. That land was therefore never available for distribution and it is obvious to me that the use of the succession case is a mischievous attempt by the appellant to circumvent the judgment in this case and the decree herein. The issue of whether or not the decree should be executed was already the subject of ELC Appeal No. 107 of 2010 where Ohungo J, held that the decree should be executed. I am not thus convinced that the conduct of the appellant would invite me to grant a stay of execution pending the hearing of this appeal. To me, the applicant simply wants to delay the execution of the judgment, and nothing more, using one technicality after another. I refuse to be drawn into these technicalities and in fact I am persuaded that I will be perpetuating an injustice if I grant the stay orders.

8. I am also not persuaded that in the circumstances of this case, the appellant stands to suffer any substantial loss, for if she succeeds on appeal, the appellate court can as well reverse back the registration of the land to her.

10. For the above reasons, I decline to give a stay pending appeal and this application is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 9th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Gichuki holding brief for Mr. P.K Njuguna for the respondent.

No appearance on the part of M/s Omwoyo Masese & Co. for the applicants.

Court Assistants- Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU