



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 56 OF 2018

ESTHER NJERI GIKONYO.....PLAINTIFF

VERSUS

MARGARET WAMBUI MISHURI.....1<sup>ST</sup> DEFENDANT

MISHURI MAINA.....2<sup>ND</sup> DEFENDANT

THE CHIEF LAND REGISTRAR, UASIN GISHU COUNTY.....3<sup>RD</sup> DEFENDANT

ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT

RULING

**[NOTICE OF MOTION DATED 14<sup>TH</sup> DECEMBER, 2020]**

1. The Plaintiffs moved the Court through the Notice of Motion dated 14<sup>th</sup> December 2020, seeking for stay of execution of the judgment delivered on the 2<sup>nd</sup> December 2020, pending the hearing and determination of the Intended appeal, and injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from interfering with land parcel *Uasin Gishu/Illula/312*. The application is based on the eleven (11) grounds on its face and supported by the affidavit sworn by **Esther Njeri Gikonyo** on the 14<sup>th</sup> December, 2020. The Plaintiff's case is that she has lived on the suit land from 1988, and has no alternative land. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have since the delivery of the judgment started trespassing onto the land, erected structures and a fence. That as she has filed the Notice of Appeal, the execution of the judgment should be stayed, and the said Defendants enjoined pending the hearing and determination of the appeal. That this application has been filed without undue delay and the Defendants will not be prejudiced or subjected to substantial and irreparable loss. That on the other hand, she has demonstrated the substantial loss that she stands to suffer unless stay is granted. That she will abide by any conditions the Court may impose.

2. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through the replying affidavit sworn by **Margaret Wamboi Michori** sworn on the 10<sup>th</sup> March, 2021. It is their case that the Court has no jurisdiction to grant injunction order pending an intended appeal to the Court of Appeal. That **Order 42 Rule 6 (6) of the Civil Procedure Rules** allows the Court to grant injunction when exercising its appellate jurisdiction. That stay of execution can only be against the decree holder, who in this case is the sovereign. That the Plaintiff should comply with the decree by submitting the annulled title as the same can be reinstated if in the unlikely event she succeeds on appeal.

3. That though on the 15<sup>th</sup> March, 2021 the 3<sup>rd</sup> and 4<sup>th</sup> Defendants indicated that they had filed their grounds of opposition in February, 2021 and were directed to ensure a copy was placed on the record, none has been seen.

4. The learned Counsel for the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their written submissions dated the 5<sup>th</sup> March, 2021 and 10<sup>th</sup> March, 2021 respectively.

5. The following are the issues for the Court's determinations;

**(a) Whether the Plaintiff has made a reasonable case for stay of execution and injunction orders to issue.**

**(b) Who pays the costs?**

6. I have considered the grounds on the Notice of Motion, parties' affidavit evidence, written submissions by both learned Counsel, the superior Courts' decisions cited, the record and come to the following determinations;

(a) That the record confirms that the Court delivered its judgment on the 2<sup>nd</sup> December, 2020 in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counterclaim and against the Plaintiff, who is the Applicant herein. That in the judgment, the title held by the Plaintiff in respect of land parcel Uasin Gishu/Ilulla/312 was cancelled, and title reverted to the Settlement Fund Trustees. That the Plaintiff was directed to surrender the original title deed in respect of the said land to the Land Registrar, Uasin Gishu for cancellation.

(b) That the record further confirms that the Plaintiff filed the Notice of Appeal dated 10<sup>th</sup> December, 2020 that was lodged with the Deputy Registrar on the 15<sup>th</sup> December, 2020 which was within the 14 days period prescribed by the law. That on the day the judgment was delivered, that is 2<sup>nd</sup> December 2020, the learned Counsel for the Plaintiff orally sought and was granted the prayer to be provided with copies of the proceedings and judgment. That by their letter dated the 21<sup>st</sup> December, 2020, the Counsel requested for typed proceedings and judgment.

(c) That further to the filing of the Notice of Appeal and orally applying for typed proceedings and judgment, the Plaintiff filed the instant application dated the 14<sup>th</sup> December, 2020 on the 15<sup>th</sup> December, 2020, which was in 13 days after the delivery of the judgment on the 2<sup>nd</sup> December, 2020. That I therefore agree with the Plaintiff that she moved the court without undue delay.

(d) That prayer 4 on the Notice of Motion dated the 14<sup>th</sup> December, 2020 reads as follows;

**“4. THAT there be an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents from in any way interfering with the parcel of land namely UASIN GISHU/ILLULA/312.”**

There is therefore no doubt that this prayer does not touch the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, who are the decree holders in respect of the judgment delivered on the 2<sup>nd</sup> December, 2020. That in that judgment, the Court did not issue any positive order in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That the application herein has been brought under **Order 42 Rule 6 of the Civil Procedure Rules**. The learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has referred to **Order 42 Rule 6 (6) of the Civil Procedure Rules**, and the decision in the case of ***Bartholomew Mwanyungu & 3 Others Vs Florence Dean Karimi [2019] eKLR***, and submitted that the Court's jurisdiction to issue injunction orders is limited to only when exercising its appellate jurisdictions from decisions of the subordinate courts and tribunals. That in respect of this matter, the Plaintiff should seek for the injunction order from the Court of Appeal to which she has already filed a Notice of Appeal under **Rule 5 (2) of the Court of Appeal Rules**. That I agree with the learned Counsel's submissions that is indeed, the position, but hasten to add that **Section 63 of the Civil Procedure Act Chapter 21 of Laws of Kenya** cloths the Court with the power to issue interlocutory orders, as may appear to be just and convenient to prevent the ends of justice from being defeated. That the application has not cited that Section but **Sections 1A, 1B, 3 and 3A of the said Act** have been relied upon. That the Plaintiff alleges that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have since the delivery of the judgment trespassed onto the suit land, erected structure and a fence and hence the need to issue stay of execution and injunction orders. That there is however no evidence presented by the Plaintiff to confirm entry onto the suit land by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and I find no basis of issuing restraining order against them.

(e) That though the Plaintiff moved the Court without undue delay, the nature and extent of the substantial loss the Plaintiff alleges she will suffer if the stay order is not granted has not been substantiated or particularized. That in any case, the decree holder in the judgment delivered on the 2<sup>nd</sup> December, 2020 to whom the suit land was vested through Settlement Fund Trustees has not complained of any encroachment. That there is also no evidence that the Settlement Fund Trustees has commenced the process of divesting itself of the suit land and under the circumstances, I find the Plaintiff has failed to prove that she stands to suffer substantial loss unless the order of stay pending determination of the appeal is not granted.

(f) That contrary to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions contention that security has not been provided, the Plaintiff has under paragraph 13 of the supporting affidavit deponed that she is ready and willing to abide by the condition to granting the stay order that the Court may impose. That I take it that had the Plaintiff succeeded in showing that she is likely to suffer substantial loss, and the Court required of her to provide such security for the due performance of the decree as the Court would have determined, she would have complied, as failure not to have done so would result to the stay order lapsing. That as the Plaintiff has failed to prove that she is likely to suffer substantial loss, her offer of security is therefore of no relevance.

(g) That the Plaintiff having failed in her application should pay the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' costs of the application.

7. That flowing from the foregoing, the Plaintiff's application dated the 14<sup>th</sup> December, 2020 is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Orders accordingly.

**DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 19<sup>TH</sup> DAY OF MAY, 2021**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Omboto for the Plaintiff.

Mr. Mogambi for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr. Odongo for 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.