



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 292 OF 2015

JOSEPH KINYANJUI WANJIRU..... PLAINTIFF

=VERSUS=

SILAS MURIITHI NGUCHU.....1ST DEFENDANT

LAND REGISTRAR THIKA..... 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL..... 3RD DEFENDANT

RULING

1. On 9/7/2020, this court rendered a Judgment in this suit in which it made a finding that the plaintiff, Joseph Kinyanjui Wanjiru, was the legitimate registered proprietor of *Land Parcel Number Ruiru East Block 1 (Githunguri) 1436*. Further, the court issued the following disposal orders:

a) It is hereby declared that the plaintiff is the legitimate registered proprietor of Land Parcel Number Ruiru East Block 1(Githunguri)/1436.

b) It is hereby declared that the purported transfer of the said parcel of land to the 1st defendant under an instrument of transfer bearing title number Ruiru/Ruiru East Block 1/1436, and the creation of a parallel register under that number in the deed file relating to Land Parcel Number Ruiru East Block 1 (Githunguri)/1436 is null and void, and the said parallel parcel register (green card) is expunged from the said parcel deed file.

c) A permanent injunction is hereby issued restraining the 1st defendant, his agents and servants, against interfering with the plaintiff's possession and quiet enjoyment of the said parcel of land.

d) The counter-claim by the 1st defendant is hereby dismissed.

e) The 1st defendant shall bear costs of the plaintiff's suit and the counter-claim.

2. Arising from the above Judgment, the 1st defendant brought a notice of motion dated 30/7/2020 seeking an order of stay of execution of the said Judgment. The said application is the subject of this ruling.

3. The application was supported by an affidavit sworn on 30/7/2020 by the 1st defendant. He deposed that he had filed a notice of appeal together with a memorandum of appeal, challenging the said Judgment. He contended that he stood to suffer substantial and irreparable damage should the plaintiff execute the Judgment.

4. The 1st defendant opposed the application through his replying affidavit sworn on 1/10/2020. He deposed that the applicant had not lodged an appeal in the Court of Appeal and therefore there was no basis for the orders sought in the application. He added that the applicant had not shown what substantial loss he stood to suffer should the Judgment be executed. The plaintiff added that should the court be inclined to grant a stay order, the 1st defendant should be ordered to provide security in the sum of Kshs 80,000,000.

5. The application was canvassed through written submissions dated 22/2/2021. The plaintiff responded through written submissions dated 22/2/2021.

6. I have considered the application, the reply thereto, and the parties respective submissions. I have also considered the relevant legal framework and the prevailing jurisprudence on the key question in this application. The key question falling for determination in this application is whether the applicant has satisfied the criteria upon which our trial courts exercise jurisdiction to grant an order of stay pending

appeal. Jurisdiction to grant an order of stay of execution is a discretionary one and is guided by the legal framework in **Order 42 rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

(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.

7. The general applicable principle is that, if there is no overwhelming hindrance or compelling circumstances, a stay ought to be granted so that an appeal, if successful, is not rendered nugatory. [See **Butt v Rent Restriction Tribunal [1979] eKLR**

8. It is now over ten (10) months since Judgment in this matter was rendered. On 15/2/2021, I made an order directing the Court Registry to expedite typing of proceedings to enable the 1st defendant process his appeal in the Court of Appeal. Counsel for the 1st defendant has confirmed that they were duly supplied with typed proceedings. Secondly, the import of the disposal orders contained in the Judgment of this court is that the parallel register (card) bearing the name of the 1st defendant as a purported proprietor of the suit property was to be expunged from the parcel deed file. Fourthly, it is not contested that the plaintiff has been and is still in possession of the suit property. In the circumstances, it is my view that it would serve the interest of justice to keep on hold the destruction of the fraudulent parallel register (card) bearing the 1st defendant's name for a period of twelve months from today to enable the 1st defendant prosecute his appeal in the Court of Appeal. The 1st defendant will, however, provide a modest security in tandem with the requirements of the law.

9. The plaintiff urged the court to order the defendant to provide security in the sum of Kshs 80,000,000. The plaintiff is in possession of the suit property. No proper basis was laid to justify the demand for this colossal sum of Kshs 80,000,000 as security. I will not, in the circumstances, grant that request. I will instead order the plaintiff to provide a modest security in the sum of Kshs 2,000,000.

Disposal Orders

10. In the end, the 1st defendant's application dated 30/7/2020 is disposed in the following terms:

a) Destruction of the parallel register (card) bearing the 1st defendant as a purported proprietor of the suit property herein shall be stayed for a period of twelve (12) months from today, to enable the 1st defendant prosecute his appeal in the Court of Appeal.

b) The 1st defendant shall deposit in court, as security, Kshs 2,000,000 or present to the court an irrevocable bank guarantee for a similar amount within thirty (30) days from the date of this ruling. In default, the above stay order shall stand vacated.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF MAY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Ayieko for the Plaintiff

Court Assistant: June Nafula