



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 10 OF 2016**

**LILIAN WAIRIMU KIMOTHO.....PLAINTIFF**

**VERSUS**

**SAMUEL NJOGU KIMOTHO.....1<sup>ST</sup> DEFENDANT**

**SMART MOVERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Judgment was delivered herein on 30<sup>th</sup> November 2020 as follows:

***1. I enter judgment in favour of the plaintiff as follows:***

***(a) A declaration is issued that the first defendant held the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) in trust for himself, the plaintiff and their children.***

***(b) A declaration is issued that the subdivision of the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru) and sale of the parcel of land known as Bahati/Wendo Block 2/259 (Ruguru) to the second defendant is null and void for want of consent from the plaintiff.***

***(c) The titles in respect of the parcels of land known as Bahati/Wendo Block 2/258 (Ruguru) and Bahati/Wendo Block 2/259 (Ruguru) are hereby cancelled.***

***(d) The land registrar is hereby ordered to restore in the register the title in respect of the parcel of land known as Bahati/Wendo Block 2/55 (Ruguru).***

***2. I also enter judgment against the first defendant and in favour of the second defendant as follows:***

***(a) KShs 2,500,000 (two million five hundred thousand) being refund of the purchase price.***

***(b) Interest on (a) above at court rates from the date of this judgment.***

***3. Each party shall bear own costs.***

2. Being dissatisfied with the judgment, the 2<sup>nd</sup> defendant lodged Notice of Appeal and also filed Notice of Motion dated 21<sup>st</sup> December 2020. The following orders are sought in the application:

1. [Spent]

2. [Spent]

3. THAT pending the hearing and determination of the Intended Appeal, this Honourable Court be pleased to stay execution of the Judgement delivered on 30<sup>th</sup> November, 2020, and the resultant order directing the cancellation of the Applicant's title deed to property known as BAHATI/WENDO BLOCK 2/259 (RUGURU) and/or any other orders issued therein and/or incidentals therefrom.

4. *THAT the costs of this Application be awarded to the Applicant.*

3. The application is supported by an affidavit sworn by Catherine Mueni Njeru. She deposed that she is the director of the 2<sup>nd</sup> defendant and that the applicant has invested heavily on the suit property. That the applicant has not been able to recover the sum of KShs 2,500,000 which the court awarded to it since the court also held that the suit property is matrimonial property and considering that the 1<sup>st</sup> defendant professed not owning any other property worth being executed against. She added that if the suit property reverts back to the 1<sup>st</sup> defendant and the appeal is successful, there will be no way the applicant can execute against the 1<sup>st</sup> defendant. She added that the applicant is willing to abide by any reasonable conditions set by the court.

4. The 1<sup>st</sup> defendant did not file any response. However, his advocate orally indicated to the court that he supports the application.

5. The plaintiff opposed the application through a replying affidavit in which she deposed that the applicant has never developed the suit property save for an attempt to put a barbed wire fence which did not materialize. She added that the applicant has not annexed any evidence to show any investments it has made on the property warranting orders of stay being granted. That the application lacks merit as it has not shown what loss will be suffered should stay of execution not be granted. That further, the applicant has failed to offer any security for due performance of the decree.

6. The application was canvassed through written submissions. Only the applicant filed submissions. It argued that it filed its application on time and that it has shown sufficient cause for grant of stay considering it bought the suit property and erected a stone wall around it. That it stands to suffer substantial loss if the suit property is taken away from it. It relied on the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** as cited in the case of **Felix Mochiemo Oindi v Gutonya Newton Mbogo [2018] eKLR**. Lastly, on the issue of who should bear the costs of this application. It submitted that costs follow event and urged the court to allow the application with costs in its favour.

7. I have considered the application, the affidavits and the submissions. The applicant seeks stay of execution pending appeal. This court's jurisdiction to grant stay of execution pending appeal is guided by **Order 42 rule 6 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides as follows:

***6.(1) 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 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.***

8. The applicant is thus required to demonstrate that substantial loss will result to it if stay is not granted and that the application has been made without unreasonable delay. The applicant is further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**.

9. In the judgment delivered herein, the court among others ordered cancellation of the applicant's title. If that aspect of the decree was to be effected prior to the determination of the appeal, the applicant would suffer substantial loss.

10. The present application was filed less than a month after delivery of the judgment being appealed against. Thus, there has been no unreasonable delay. In the circumstances, I am satisfied that there is merit in the application.

11. Regarding the issue of security, the applicant has declared readiness to abide by any reasonable conditions set by the court. I deem it adequate that the applicant deposits party and party costs of this suit as security. Further, to ensure that there is no undue delay in the prosecution of the appeal, I will limit the duration of the stay orders.

12. In the result, I make the following orders:

**(a) Pending the hearing and determination of the Intended Appeal, there be stay of execution of the judgement delivered on 30<sup>th</sup> November 2020 and the resultant order directing the cancellation of the applicant's title to property known as BAHATI/WENDO BLOCK 2/259 (RUGURU) and any other orders issued therein and/or incidentals therefrom.**

**(b) The stay is conditional on the applicant depositing in this court such sum as will be determined as the party and party costs of this suit. The deposit shall be made within 21 (twenty-one) days of the costs being determined. In default, the stay orders shall automatically lapse.**

**(c) The stay orders shall, if the applicants timeously comply with the condition in (b) above, remain in force for a period of**

only 1 (one) year from the date of delivery of this ruling, unless otherwise extended by the Court of Appeal.

(d) Costs usually follow the event. The order in the judgment was that each party bear own costs. Consequently, each party shall bear own costs as regards the present application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF MAY 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Nancy Njoroge for the plaintiff

Mr Ouma holding brief for Mrs MUKira for the first defendant

Mr Mwangi for the second defendant

Court Assistants: B. Jelimo & J. Lotkomoi