



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 25 OF 2020

TRISERVE LIMITED.....APPELLANT

-VERSUS-

MURAGE MWANGI MANJA.....1ST RESPONDENT

PETER KIMONDO MBUTHIA.....2ND RESPONDENT

RULING

A. APPELLANT'S APPLICATION

1. By a notice of motion dated 15th December, 2020 brought under **Order 42 Rule 6 of the Civil Procedure Rules, 2010 (the Rules), Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law** the Appellant sought a stay of execution of the judgment and decree of the trial court (*Hon. Nelly Kariuki, SRM*) dated 16th July, 2020 in *Nyeri MCL & E No. 80 of 2018 – Murage Mwangi Manja v Peter Kimondo Mbuthia and Triserve Limited*. By the said judgment, the trial court held that the transfer of the suit property to the Appellant was null and void and consequently ordered cancellation of the Appellant's title and rectification of the register and restoration of the 1st Respondent as proprietor.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Wanjiku Gathii Gitonga, a director of the Appellant, on 15th December, 2020. The Appellant contended that being aggrieved by the judgment and decree of the trial court it lodged an appeal against the same vide a memorandum of appeal dated 7th August, 2020. It was contended that the appeal had good chances of success and that unless a stay was granted to preserve the suit property the pending appeal might be rendered nugatory. The Appellant indicated that it was willing to abide by any orders in order to facilitate preservation of the suit property.

B. THE RESPONDENTS' RESPONSE

3. The 1st Respondent filed a replying affidavit sworn on 8th February, 2021 in opposition to the application. It was contended that the application was frivolous, vexatious and otherwise an abuse of the court process. It was contended that the memorandum of appeal does not raise any serious grounds since it was demonstrated at the trial that the Appellant had obtained registration of the suit property without the consent of the Land Control Board. It was further contended that the Appellant had not demonstrated that it shall suffer any irreparable loss unless the order of stay was granted.

4. The 2nd Respondent did not file any response to the application. His advocate informed the court that he did not wish to oppose the application.

C. DIRECTIONS ON SUBMISSIONS

5. When the application was listed for *inter partes* hearing on 9th February, 2021 it was directed that the same shall be canvassed through written submissions. The parties were given 14 days within which to file and exchange their submissions. The record shows that the Appellant filed its submissions on 23rd February, 2021 whereas the 1st Respondent filed his on 15th March, 2021.

D. THE ISSUES FOR DETERMINATION

6. The court has considered Appellant's notice of motion dated 15th December, 2020, the 1st Respondent's replying affidavit in opposition

thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Appellant has made out of a case for an order of stay pending appeal.*

(b) *Who shall bear costs of the application.*

E. ANALYSIS AND DETERMINATION

(a) Whether the Appellant has made out a case for an order of stay pending appeal

7. The court has considered the material and submissions on record on this issue. Whereas the Appellant contended that it has satisfied the requirements for the grant of stay pending appeal, the 1st Respondent contended otherwise. The Respondent relied upon the case of **Ndege Kabibi Kimanga and Another v Karinga Gaciani and 12 Others [2017] eKLR** in opposition to the application whereas the Appellant did not cite any authority.

8. The Appellant's application is essentially grounded upon **Order 42 Rule 6(2)** which stipulates as follows:

“(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.

9. In the case of **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365**, the court of Appeal held that the jurisdiction of the High court to grant a stay under **Order 42 Rule 6** of the **Rules** was fettered by at least 4 conditions, namely:

(a) The applicant must establish sufficient cause.

(b) The applicant must demonstrate the risk of substantial loss unless stay is granted.

(c) The applicant must furnish security for due performance of the decree should the appeal eventually fail.

(d) The application must be made without unreasonable delay.

10. In the case of **Butt v Rent Restriction Tribunal [1979] eKLR** it was held that although the power of a court to grant a stay pending appeal is discretionary, it should be exercised in such manner as to prevent a successful appeal from being rendered nugatory. The court is required to take into account the particular circumstances of each case in either granting or refusing stay of execution.

11. An application for stay of execution of a decree usually raises two competing interests in the administration of justice. There is the right of the successful litigant to enjoy the fruits of his judgment on the one hand. On the other hand, there is the right of the unsuccessful litigant to pursue his right of appeal without the risk of the outcome being rendered merely academic and nugatory. The court has a duty to balance these competing but legitimate interests hence the need to adhere to the set down principles for granting a stay pending appeal.

12. The key requirement to be demonstrated by the Appellant is substantial loss. The Appellant has stated that it is the registered proprietor of the suit property and that should the decree be executed then its registration would be cancelled and the 1st Respondent registered as proprietor thereof. The Appellant was apprehensive that once the suit property is in the hands of the 1st Respondent he may alienate or dispose of the same before conclusion of the appeal with the risk that it may not be available to the successful party upon conclusion of the pending appeal. In the event, should the Appellant be the successful party in the appeal then its victory would be merely of academic importance.

13. On the other hand, the court is of the opinion that unless effective measures are taken to preserve the suit property pending the outcome of the appeal, the Appellant itself may deal with the suit property in such manner that it shall not be available to the 1st Respondent should he be the successful party in the appeal. Accordingly, even though the court is satisfied that the Appellant shall suffer substantial loss should the suit property be unavailable upon conclusion of the appeal, the court must also guard against the risk of the Respondents suffering such loss.

14. The court is satisfied from the material on record that the Appellant has shown sufficient cause to justify the grant of an order of stay pending appeal. The court is further satisfied that the instant application was filed without unreasonable delay. The material on record shows that although the decree in issue was passed on 16th July, 2020, the Appellant's application for stay before the trial court was determined on or about 3rd December, 2020. The instant application was filed on 21st January, 2021 about one and half months after the ruling of the trial court on stay was delivered. In the circumstances, the court is inclined to grant the Appellant an order for stay of execution.

(b) Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since this is an interlocutory application in a pending appeal, the court is of the opinion that costs should abide the outcome of the appeal.

G. CONCLUSION AND DISPOSAL

16. The upshot of the foregoing is that the court finds merit in the application for stay of execution pending appeal. Accordingly, the Appellant's notice of motion dated 15th December, 2020 is hereby allowed in the following terms:

(a) There shall be a stay of execution of the decree of the trial court dated 16th July, 2020 in Nyeri MCL&E No. 80 of 2018 for a period of 2 years from the date hereof or until the conclusion of the appeal, whichever comes first.

(b) The Appellant shall file its record of appeal within 90 days from the date hereof.

(c) The Appellant shall deposit the original title deed for the suit property, that is, Title No. Ruguru/Gachika/1525 in court within 7 days from the date hereof.

(d) An order of inhibition is hereby issued to stop any dealings with Title No. Ruguru/Gachika/1525 for a period of two years from the date hereof or until conclusion of the appeal, whichever comes first.

(e) In the event of the Appellant defaulting on orders (b) and (c) above, the stay granted herein shall lapse automatically.

17. It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 5TH DAY OF MAY, 2021.

In the presence of:

Mr. Ndubi for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Court assistant - Wario

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Y. M. ANGIMA

JUDGE

05.05.2021