



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 102 OF 2017

SAMUEL KARICHU KAMAUPLAINTIFF/RESPONDENT

VS

ROBERT MACHARIA MWANGIDEFENDANT /APPLICANT

RULING

1. By way of brief background, the Plaintiff's claim for adverse possession in respect of land parcel known as LOC 11/MARAGI/1365 was allowed vide a Judgement delivered herein on 29/11/2018. Dissatisfied with said Judgment, the Defendant/Applicant filed a notice of Appeal dated 5/12/2018.
2. Contemporaneous to filing the Notice of Appeal, on 7/12/2018 the Defendant applied for certified copies of Judgment and Court proceedings.
3. Later on 15/04/2019, the Defendant filed an application seeking leave for the firm of Githiga Kimani Advocates to come on record for him in place of his former firm, T.M Njoroge & Co. Advocates. That Application was unopposed thus allowed as prayed on 08/05/2019.
4. The firm **P.M Kahiga Advocates** is now on record for the Defendant vide a consent dated 16/03/2021 signed to that effect with the firm of Githiga Kimani Advocates.
5. The Defendant has now filed the instant Application dated 16/03/2021 seeking orders that; -
 1. Spent.
 2. That the Honorable Court be pleased to grant an order for stay of execution of the Judgement delivered on 29/11/2018 in Murang'a E.L.C No. 102 of 2017 pending the hearing and determination of the Applicant's Appeal to the Court of Appeal at Nyeri.
 3. In the alternative an order of status quo currently as prevailing on LOC 11/MARAGI/1365 be maintained pending the hearing and determination of the Applicant's Appeal in the Court of Appeal at Nyeri.
 4. That costs of this application be provided for.
6. The Application is based on grounds on the face of it and a Supporting Affidavit sworn on 16/03/2021. That the Applicant is aggrieved by the Judgment delivered on 29/11/2018 and filed his Appeal at Court of Appeal Nyeri alongside an application for extension of time vide Civil Application No. 103 of 2019 which is pending determination. That he timeously filed his Notice of Appeal in this Honorable Court but realized that his former Advocates failed to obtain stay of execution orders of the impugned Judgement. That as a result, mistakes of Counsel should not be visited upon him as his Appeal has overwhelming chances of success and would be rendered nugatory if stay of execution is denied.
7. Further, the Applicant deponed that he was informed by the Murang'a Land Registrar that the Court had already authorized the execution of transfer forms without his knowledge. That he was unable to make proper follow ups on his case during the Covid-19 pandemic during which period he was indisposed. That he is apprehensive that the Respondent may execute the said Judgment and evict him from his home. That his Appeal is meritorious with high chances of success and he is willing to furnish reasonable security and abide by any conditions the Court may set.
8. The Application is unopposed.
9. On behalf of the Respondent, the firm of Gori Ombongi Advocates was served with the Application and mention notice vide Return of Service sworn on 22/03/2021 and 17/05/2021.

10. On **18/05/2021**, the application was orally argued in Court. Learned Counsel for the Applicant argued that the Applicant is aggrieved by the impugned Judgment hence the prayer for stay of execution. That the delaying in filing the instant application was due to Covid-19 pandemic. That the Applicant has also filed two applications in the Court of Appeal for leave to file an Appeal out of time and stay of execution pending Appeal that are yet to be heard. The Applicant relies on Article 159(2) of the Constitution and urges the Court to exercise its discretion in his favour and allow the application.

11. The main issue for determination is whether a prayer for stay of execution of the Judgment delivered on 29/11/2018 can be made. The Applicant premised the application on **Order 42 Rule 6**, Sections 1A, 1B, 3A and 63E of the Civil Procedure Act and Article 159(2) of the Constitution. **Order 42 Rule 6** of the Civil Procedure Rules states; -

6. Stay in case of Appeal [Order 42, rule 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.

12. **Subsection (2)** above is couched in mandatory terms. The first limb an Applicant must prove is that substantial loss will occur if stay of execution is denied. The Applicant deposed that he has learnt that this Honorable Court has authorized execution of transfer forms by the Deputy Registrar. He blamed the covid-19 pandemic for failure to follow up with his former Counsel on account of illness. No evidence is attached to this effect.

13. The issue of what constitutes substantial loss was aptly discussed in the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto Bungoma Misc. App. No. 42 of 2011 [2012] eKLR**, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the Appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

14. It is therefore trite that process of execution i.e. execution of transfer forms by the Deputy Registrar was underway at the timing of filing the instant Application. The Respondent has a right to enjoy the fruits of his judgment and guided by the decision in **Mohammed Salim T/A Choice Butchery –Vs- Nasserpuria Memon Jamat (2013) eKLR**, where the Court upheld the decision of **M/S Portreitz Maternity –Vs- James Karanga Kabia Civil Appeal No.3 of 1997** and stated that the right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment.

15. Secondly, the Court has to be satisfied that the application has been made without unreasonable delay. The Application was filed on 17/03/2021, over two years and four months after the impugned Judgment was delivered. The Court record shows that the judgment was delivered in the absence of the Respondent but in the presence of the Applicant's Counsel and no attempt was made to even apply for interim stay of execution as is the practice. No plausible explanation has been given in my view to persuade this Court to exercise its discretionary power in the Applicant's favour.

16. It is trite that an order for stay of execution is discretionary relief. The 2nd Respondent rightly cited the case of **Butt vs. Rent Restriction Tribunal (1982) KLR 417**.

17. A party who seeks discretionary favors from the Court must endear itself to the Court by coming with clean hands. The conduct of the Applicant points to tainted hands that do not endear this Court's discretion.

18. Having found that the 2nd Respondent has not satisfied the first requirement for stay of execution, the other two limbs for stay of execution are now moot.

19. In the end, I find the application unmeritorious.

20. It is dismissed with no orders as to costs.

21. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE AT MURANG'A THIS 17TH DAY OF JUNE 2021

J.G. KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff: Absent

Ms Mukami for the Respondent

Court Assistant: Alex