



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA 20 OF 2017

GRACE RUGURU MWANGI.....APPLICANT

VS

MARY WANGARI MAINA.....1ST RESPONDENT

FRANCIS MWANGI KANYURU.....2ND RESPONDENT

PETER MWANGI NJUGUNA.....3RD RESPONDENT

RULING

1. The Appellant/Applicant filed a Notice of Motion dated 4/2/2021 premised under Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A,1B & 3A of the Civil Procedure Act seeking orders; -

a. Spent.

b. Spent.

c. That upon hearing this application interpartes, this Honorable Court be pleased to grant a stay of execution against its ruling delivered on 14/1/2021 pending the hearing and determination of the Appeal preferred therefrom.

d. That costs of this application be provided for.

2. The Application is supported by the grounds contained in the Supporting Affidavit sworn by the Applicant, Grace Ruguru Mwangi. That she is aggrieved with the ruling of the Court aforesaid and has proffered an Appeal. That the application is fundamental to safeguard the status quo pending the Appeal lest the outcome is rendered nugatory. That she has an arguable Appeal. That the application has been brought without any delay. That she stands to suffer loss and damage as she has lived on the land for over 50 years. Lastly that she is willing and ready to abide by any of the terms as to security as the Court may order.

3. The 1st Respondent opposed the application through her grounds of opposition filed on the 18/2/2021 as follows; the application is incompetent and bad in law as there is nothing to be stayed; the application does not lie in law as the order of stay cannot issue and the it is defective as the orders that have been sought cannot be countenanced by this Court.

4. The 2nd Respondent did not file any response to the application.

5. The application is opposed by the 3rd Respondent where he contends that the ruling issued on the 14/1/2021 is incapable of being stayed as the Court issued a negative order. That the said orders are incapable of being stayed. That no substantial loss will be occasioned by a dismissal order of a negative nature.

6. Parties elected to canvass the application by way of written submissions however it is only the 3rd Respondent who complied.

7. The 3rd Respondent submitted that the Orders contained in the Ruling were negative in nature and cannot be stayed. That there is no order therein capable of enforcement or execution to warrant the Application before this Court. Reliance was placed on the cases of **Kellen Karimi Ndambiri & Anor. V Attorney General & 2 Others [2017] eKLR**, **Kanwal Sarjit Singh Dhiman vs Keshavji Jiuraj Shah (2008) eKLR** and **Kaushik Panchmatia & 3 Others v Prime Bank Limited [2020] eKLR**.

8. The gravamen of the instant Application is a prayer for stay of execution of Court Ruling delivered on 14/01/2021. It is expressed to be

brought under **Order 42 Rule 6** of the Civil Procedure Rules which states; -

6. Stay in case of Appeal [Order 42, Rule 6 of the Civil Procedure Rules.]

(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 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.

9. Subsection (2) above is coached in mandatory terms. The first limb an Applicant must demonstrate that substantial loss will occur if stay of execution is denied. The Applicant has not shown the kind of loss she will suffer since no party was ordered to do anything to the disadvantage of the other.

10. The impugned Ruling arose from an Appeal challenging the trial Court's decision delivered on 29/09/2017 allowing the withdrawal of a suit by the Plaintiff in Kigumo SPMCC No. 73 of 2015. The Applicant herein was an interested party in the trial Court and subsequently the Appellant before this Court.

11. Section 2 of the Civil Procedure Act defines a decree holder as any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order. The definition alludes to an order capable of being executed. In this case, neither party can execute the orders of 14/01/2021 save for costs whose taxation is already pending before the Deputy Registrar.

12. The Applicant's Appeal was dismissed with costs hence the instant Application. Essentially the appellate Court affirmed and upheld the trial Court's finding. At paragraph 47 of the said Ruling the Court appreciated the Appellant's recourse in her claim being in **Murang'a ELC 167 of 2017**. Therefore, and as rightly submitted by the 3rd Respondent, the nature of the Ruling is in form of a negative Order that cannot be stayed.

13. Recently the Court of Appeal in **Julius Mugo Muchiri v Njiru K Njagi & another [2021] eKLR** dismissed a similar application for stay of execution of negative orders issued in Kerugoya High Court Misc. Application No. 65 of 2013. The Learned Judges quoted and cited with approval the case of **Kaushik Panchmatia supra** and the case of **Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, where it was held inter alia that: -

“But what is there to be executed under the judgment, the subject of the intended Appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this Court in an application for stay to enforce or restrain by injunction.”

14. Having found that the Applicant has not satisfied the first requirement for stay of execution, the other two limbs are now moot and it is my considered view that the Application is devoid of merit.

15. It is dismissed with costs in favour of the 1st and 3rd Respondents.

16. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 10TH DAY OF JUNE, 2021.

J.G. KEMEI

JUDGE

Delivered online in the presence of:

Njuki for the Applicant

1st – 3rd Respondents – Absent

Court Assistant: Alex