



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 12 OF 2021**

**WAMBUI MWANGI.....APPELLANT/APPLICANT**

**VERSUS**

**JOHN KIOHI GATHOGOHI.....1<sup>ST</sup> RESPONDENT**

**SUSAN SHIRLEY GATHONI MURIITHI.....2<sup>ND</sup> RESPONDENT**

**UIGUANO WA KIRERE SAVINGS**

**COOPERATIVE SOCIETY LIMITED.....3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR, RUIRU.....4<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR,**

**MINISTRY OF LANDS AND PHYSICAL PLANNING....5<sup>TH</sup> RESPONDENT**

**DIRECTOR, SURVEY OF KENYA.....6<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**RULING**

By an application dated 9<sup>th</sup> February 2021, under Order 42 Rule 6 of the Civil Procedure Rules, Article 159 of the Constitution, and all other enabling provisions of the law, the Appellant/Applicant seeks for the following orders:-

*a) Pending hearing and determination of the instant appeal, this Honourable Court be pleased to grant an Order staying further proceedings in SPM ELC Case No. 63 of 2020 John Kiohi Gathogohi & Anor versus Wambui Mwangi and 5 others.*

*b) Costs of the application.*

The application is premised on the grounds stated on the face of the application and the Supporting Affidavit of **Wambui Mwangi** sworn on 9<sup>th</sup> February 2021. Among the grounds are that:-

*a) No summons to enter appearance were extracted and served upon the Applicant.*

*b) The matter was not due for hearing by 21<sup>st</sup> January 2021.*

*c) The Applicant was denied an opportunity to participate in the proceedings.*

*d) Any adjudication of the matter is offensive to the rules of procedure and detrimental to the Applicant.*

The Applicant has attached annexures WM “1” a Notice of Appointment, WM “2” a copy requesting for proceedings, WM “3” received

typed proceedings and WM “4” the Memorandum of Appeal.

While this application was pending, the Applicant moved the Court under Certificate of Urgency by another Notice of Motion dated **15<sup>th</sup> March 2021**, which led to Orders issued on **20<sup>th</sup> April 2021**, staying an Interlocutory Judgment for **27<sup>th</sup> April 2021**, at the lower Court. Following this new development, this Court gave directions for the disposal of the instant application by way of written submissions.

In her submissions dated **10<sup>th</sup> May 2021**, the Applicant alleges that there were no Summons to Enter Appearance filed with the Plaintiff at the time the suit was filed. However, the applicant has not supplied to this Court the entire proceedings in the file since commencement of the suit. There are no certified copies of the proceedings applied for and supplied to this Court confirming indeed the initial Plaintiff was not accompanied by summons and the same were not paid for and or issued by the Court. From the proceedings of **26<sup>th</sup> January 2021**, the advocate for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants confirm they had entered appearance and filed a defence on **29<sup>th</sup> July 2020**. It is inconceivable that Summons to Enter Appearance against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not taken out but those of the rest of the defendants were available.

In the absence of contrary evidence, the court is of the considered view that the Appellant/Applicant has failed to substantiate the said allegations. Needless to say, the 1<sup>st</sup> Respondent in his Replying Affidavit has clearly attached Summons to Enter Appearance dated **22<sup>nd</sup> October 2020**, duly sealed by the **Executive Officer, Ruiru Law Courts**, which were duly served upon the Appellant/Applicant, through her advocates known email as at **22<sup>nd</sup> October, 2020**. The applicant has not denied those averments by way of supplementary affidavit.

Similarly, if indeed the Summons were served to the Appellant/ Applicant, as at **22<sup>nd</sup> October 2020**, no explanation has been given as to why there was no defence filed as at **21<sup>st</sup> January 2021**. The applicant appears to have had more than enough time to respond to the amended Plaintiff and comply with pre trial directions, given on **10<sup>th</sup> November 2020**, and secondly on **17<sup>th</sup> November 2020**. Further, the 1<sup>st</sup> Respondent has averred that the Appellant/Applicant was served with a Hearing Notice and the Registrars report on **14<sup>th</sup> December 2020**, through her advocates email. All these averments have not been denied by the Applicant, and hence this Court cannot believe the allegations that at the time the matter proceeded for hearing, the suit was not ripe for hearing and hence the Appellant/ Applicant was denied a right to be heard.

Turning to the issue of stay of proceedings, as indicated above, the lower court file is now at Judgement delivery stage. The Applicant has approached this Court under **Order 42 Rule 6** of the **Civil Procedure Rules**. The Applicant has not attached any list of authorities in support of her submissions, while the 1<sup>st</sup> Respondent has attached three authorities in support of his written submissions dated **17<sup>th</sup> May 2021**. The Issues for consideration are:-

- a) Whether the Applicant has established that he or she has a prima facie arguable appeal or case.*
- b) Whether the application was filed expeditiously.*
- c) Whether the applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.*

It is not in doubt that this Court has powers to stay proceedings pending an appeal, and this powers are derived from **Order 42 Rule 6** of the **Civil Procedure Rules**, as well as the inherent jurisdiction reserved in **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.

This jurisdiction is meant to avoid wasteful of valuable judicial time, resources and their optimum use.

In invoking such power, the Court aims at ensuring the appeal if meritorious is not rendered nugatory. In weighing whether or not to grant the orders sought, the Court has to consider when the application was filed and the reasons why the Applicant deserves or ought to be given an opportunity to ventilate the Appeal.

In the instant case, the orders appealed against were made on **28<sup>th</sup> January 2021**. The Appeal was filed on **11<sup>th</sup> February 2021**, and on the same day, the application for stay of proceedings was filed. This is almost **14 days** after delivery of the orders complained about. Therefore, there was no reasonable delay in making this application.

On whether the Appeal raises arguable issue, while this Court must guard against determining the Appeal at this stage, a look at the grounds of Appeal shows that most or if not all the grounds are on issues raised in the Notice of Motion and the Supporting Affidavit, and to which the 1<sup>st</sup> Respondent herein has vehemently demonstrated to this Court to be factually incorrect.

So this Court is not convinced that the Appellant/Applicant has established sufficient cause to its satisfaction that it is in the interest of justice to grant the orders sought. The records indicate there are valid Summons to Enter Appearance in existence. The applicant has failed to seek leave to be given an opportunity to defend the suit. Even in the Memorandum of Appeal, such a prayer is not indicated. There are various avenues available to the applicant to which she is yet to exhaust.

Given the foregoing, this Court finds and holds that the instant Notice of Motion Application dated **9<sup>th</sup> February 2021**, lacks **merit** and the same is dismissed entirely with costs to the Respondents.

It is so ordered

**Dated, signed and Delivered at Thika this 29<sup>th</sup> day of July 2021.**

**L. GACHERU**

**JUDGE**

**29/7/2021**

**Court Assistant – Dominic**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Kinyanjui Stanely for the Appellant/Applicant**

**Mr. Muchiri holding brief for Mr.Dustan Omari for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

**No appearance for the 3<sup>rd</sup> Respondent**

**No appearance for the 4<sup>th</sup> Respondent**

**No appearance for the 5<sup>th</sup> Respondent**

**No appearance for the 6<sup>th</sup> Respondent**

**No appearance for the 7<sup>th</sup> Respondent**

**L. GACHERU**

**JUDGE**

**29/7/2021**