



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 482 OF 2017

ALICE WAMBUI NGANGA PLAINTIFF/RESPONDENT

VERSUS

JOHN NGURE KAHORO 1ST DEFENDANT/RESPONDENT

JOSEPH KIBATHI KAMAU2nd DEFENDANT/APPLICANT

RULING

Through a Notice of Motion Application dated **2nd July 2020**, brought under **Article 159(2)** of the **Constitution**, **Sections 3A, 79G** and **95** of the **Civil Procedure Act**, **Order 9 Rule 9 (a)** and **10**, **Order 22 Rule 22**, **Order 42 Rule 6**, **Order 50 Rule 6** and **Order 51 Rule 1** and **3** of the **Civil Procedure Rules**, the Applicant/Appellant sought the following orders;

- 1. That the Honorable Court be pleased to grant leave to the Law Firm of Norman Otieno & Co. Advocates to come on record for Joseph Kibathi Kamau, the 2nd Defendant/Applicant herein in place of the Firm of Thuku & Associates Advocates and the Notice of Change of Advocates dated and filed on the 1st July 2020 be deemed as duly and properly filed.***
- 2. That the Honorable Court be pleased to grant stay of Execution of Judgement of Lady Justice L.N Gacheru delivered on the 18th June 2020, pending the hearing and determination of this application inter parties.***
- 3. That the Honorable Court be pleased to grant leave for the 2nd Defendant/Applicant and the intended Appellant to Appeal out of time against the Judgement of Lady Justice L. N Gacheru, delivered on the 18th June 2020, as per the attached Memorandum of Appeal.***
- 4. That the Costs of this Application abide the outcome of the appeal.***

The Application is supported by the Affidavit of **Joseph Kibathi Kamau**. He averred that the Judgement was delivered on the **18th June 2020**, allowing the Plaintiff's suit and prayers. That he was dissatisfied with the outcome to which, he instructed his current advocates who filed a Notice of Change of Advocates and applied for certified copies of proceedings and lodging a Notice of Appeal with a view of preferring an Appeal at the Court of Appeal.

He further averred that at the delivery of the said Judgement, his then advocates on record failed to apply for **Stay of Execution**, of the said Judgement and Decree. He contended that he is apprehensive that unless an order of Stay of Execution is granted, the Plaintiff/Respondent will proceed with execution and he stands to suffer irreparable damage and loss. That he believes that he has a good and arguable Appeal on merits with high chances of success.

The Application is opposed by **Damaris Nyambura Munyua**, who filed her Replying Affidavit on **10th November 2020**, and averred that the 2nd Defendant/Applicant only wants to block the path of justice for the Plaintiff/Respondent, and that the Appeal has no probability of success.

That the Plaintiff/Respondent, will be highly prejudiced if she is not allowed to execute her **Decree**, as she lives in the United States and has to follow up with the suit again having prosecuted it fully earlier on. She further contended that the Application is brought with unreasonable delay and that he has not issued any Notice of Appeal nor has he filed a draft Memorandum of Appeal to show preparedness from his end.

The Court directed that the Application be canvassed by way of written submissions and the 2nd Defendant/Applicant filed his submissions dated **7th January 2021**, through the **Law Firm of Norman Otieno & Co. Advocates**, while the Plaintiff/Respondent filed her submissions

dated 7th December 2020 through the Law Firm of Nyambura Munyua & Associates Advocates.

The Court has considered the Application, the Replying Affidavit and the Submissions thereto and finds that the issues for determination are;

1. *Whether the firm of Norman Otieno & Co. Advocates should come on record in place of the Firm of Thuku & Associates Advocates.*

2. *Whether the Applicant is entitled to the orders sought*

Whether the Law Firm of Norman Otieno & Co. Advocates should come on record in place of the Firm of Thuku & Associates Advocates

The 2nd Defendant/Applicant Advocate has sought for leave to come on record. It is not in doubt that the said Advocates came on record after the delivery of Judgment and needed to seek leave of Court as per the provisions of **Order 9 Rule 9 of the Civil Procedure Rules, 2010**, which provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

The Court is called upon to determine the question of leave first. The Law Firm of Norman Otieno & Co. Advocates, have sought for leave. The provisions of **Order 9**, allows the Court to grant leave when a consent is filed and **Rule 10**, allows the said prayer seeking leave to be brought together with other prayers. **The prayer for leave for the said Law Firm has not been disputed nor contested thus the Law Firm of Norman Otieno & Co. Advocates**, is properly on record.

Having granted the leave and given that the Rules allow the said

prayer to be brought together with other prayers, the Court finds and holds that the said Advocates are properly on record.

Whether the 2nd Defendant/Applicant is entitled to the orders sought

The 2nd Defendant/Applicant has sought for Orders of Stay of execution, pending the hearing and determination of the Application, Orders to Appeal out of time against the Judgement of **Lady Justice L.N Gacheru**, delivered on the **18th June 2020**, and Costs.

Order 42 Rule 6(2) of the Civil Procedure Act sets out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are;-

“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.”

Section 79(G) of the **Civil Procedure Act**, is very clear Leave of Court should be sought when a party wishes to file Appeal out of time. It provides; -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having [Rev. 2012] Civil Procedure CAP. 21 C17 - 35 [Issue 1] been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

The yardstick is for the Court to balance or weigh the scales of justice by ensuring that an Appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion.

It is clear that for the Court to grant stay of execution of the Judgment, the Applicant/Appellant needs to satisfy the Court that he will suffer substantial loss. In the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** the Court stated;-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence.

The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

With the above in mind, the Court must then determine whether the Applicant has established that he will suffer substantial loss and or has presented special circumstances that will warrant the Court to exercise its discretion and grant stay of Execution.

It is the Applicant averment that he will suffer substantial loss if stay of execution is not granted as the Court in its Judgment ordered the 1st and 2nd Defendants to transfer back to the Plaintiff all that parcel of land known as **Ruiru/Mugutha Block 1/T.850**, or in the alternative pay the Plaintiff a sum equivalent to the current value of such a parcel of land within 60 days.

The Applicant contends that he had paid a substantial amount for the subject property and if orders of stay are not granted, he stands to suffer substantial loss. **However, there is no evidence placed in this court to show how the Applicant will suffer substantial loss and neither has he tabled any evidence to show that he is in active occupation of the suit property.** Failure to produce evidence means that the 2nd Defendant/ Applicant will not suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigant the fruits of his/her Judgment.

Secondly the Applicant must satisfy the Court that the Appeal was made **without inordinate delay**. Judgement was delivered on **18th June 2020**, and the instant Application is dated **2nd July 2020**. The Court notes that the Applicant did not seek stay upon the Court delivering its judgement. The Court notes that there was no inordinate delay in bringing this Application.

On **Security of Costs**, the Applicant has not explained on provision of Security of Costs. It is incumbent upon him to show commitment by providing security of Cost which he has failed to do so.

In considering whether the Appeal will be rendered nugatory, the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

Whether or not an Appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. The 2nd Defendant/Applicant did not demonstrate that if the Appeal is not allowed, it will be an academic exercise. It was not stated, for instance, that the Plaintiff/Respondent will not be able to establish ownership of the suit property, should the Applicant succeed in his intended Appeal.

The two limbs of argueability and the nugatory aspect must be satisfied before this Court can exercise its discretion in favour of the Applicant, short of which, the Court cannot grant orders sought.

It is virtually impossible for this instant application to succeed, as the 2nd Defendant/Applicant has failed to demonstrate that he will suffer substantial loss, if stay is not granted. Further, the Applicant has not attached a **Draft Memorandum of Appeal** to demonstrate that he indeed intends to appeal and such Appeal will be rendered nugatory.

Having claimed to have instructed his previous Advocates to lodge a **Notice of Appeal**, the same has not been produced in this Court. Therefore, the Court finds and holds that the Applicant has not satisfactorily explained to Court why it should exercise its discretion and grant the said Stay of Execution.

Having now carefully considered the instant **Notice of Motion Application** dated **2nd July 2020**, the Court finds it merited only in terms of prayer **no. 1 only**. However, the other prayers are not merited and are **dismissed** entirely with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 26th day of July 2021.

L. GACHERU

JUDGE

26/7/2021

Court Assistant – Lucy

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 **15th 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

No appearance for the Plaintiff/Respondent

No appearance for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Applicant

L. GACHERU

JUDGE

26/7/2021