



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELCA NO. E004 OF 2020**

**FRANCIS MUTHOGA MUHIKA .....APPELLANT**

**-VERSUS-**

**MARGARET WANGARI KARONJO.....RESPONDENT**

**RULING**

**A. INTRODUCTION AND BACKGROUND**

1. The material on record indicates that the Appellant was the 1<sup>st</sup> Defendant whereas the Respondent was the Plaintiff in *Nyahururu MCE&L No. 340 of 2018*. The record shows that vide a plaint dated 17<sup>th</sup> September, 2018 and amended on 28<sup>th</sup> May, 2020 the Respondent sought an eviction order, an injunction, and a declaration against the Appellant with respect to Title No. Nyandarua/Olaragwai/994 (*the suit property*). The basis of the Respondent's claim was that the entire suit property was owned by her husband, Samuel Karonjo Muriuki and that the Appellant among other persons had wrongfully encroached thereon without lawful justification or excuse.

2. It would further appear that vide a notice of motion dated 28<sup>th</sup> May, 2020 the Respondent sought an interim injunction restraining the Appellant and other parties from trespassing, occupying, threatening to occupy, putting up houses or interfering with the suit property pending the hearing and determination of the suit. It would also appear that on or about 5<sup>th</sup> June, 2020 the Respondent obtained interim orders pending *inter partes* hearing in terms of her application. It is also evident from the material on record that vide a notice of motion dated 23<sup>rd</sup> June, 2020 the Appellant sought the setting aside or variation of the interim orders and for stay of further proceedings pending the hearing and determination of his claim for adverse possession of a portion of the suit property in *Nyahururu ELC No. 14 of 2020 (OS) – Francis MuthogaMuhika v Samuel KaronjoMuriuki*.

3. The record further shows that the said two applications were canvassed together and vide a ruling dated 14<sup>th</sup> October, 2020 the trial court (Hon. S. N. Mwangi) dismissed the Appellant's application and granted an interim injunction as sought by the Respondent pending the hearing and determination of the suit. Being aggrieved by the said ruling and order the Appellant filed a memorandum of appeal dated 21<sup>st</sup> October, 2020 against it and the instant application for stay pending appeal.

**B. THE APPELLANT'S APPLICATION**

4. By a notice of motion dated 28<sup>th</sup> October, 2020 expressed to be based upon **Sections 1A, 1B, 3A of the Civil Procedure Act (Cap. 21), Order 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules, 2010 (the Rules) and any other applicable provisions of the law**, the Appellant sought a stay of proceedings and stay of execution of the ruling and order dated 14<sup>th</sup> October, 2020 in *Nyahururu MCE&L No. 340 of 2018* pending the hearing and determination of the appeal.

5. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 28<sup>th</sup> October, 2020. The Appellant contended that vide a sale agreement dated 3<sup>rd</sup> July, 1994 he purchased 2 acres of land from the then registered owner Joseph MunaKitui which was to be excised from Title No. Nyandarua/Olaragwai/305 (old number) which was assigned a new number being 994. It was contended that he thereupon took possession and constructed a house, planted trees and generally developed the suit property without interruptions for over 12 years.

6. The Appellant contended that at the time the Respondent filed her amended plaint and application for an interim injunction, it was common ground that he was in possession hence the interim injunction granted on 14<sup>th</sup> October, 2020 amounted to an eviction from the suit property. It was contended that the pending appeal had high chances of success and that the trial court had erred in law in effect granting a mandatory injunction at the interlocutory state.

### **C. THE RESPONDENT'S RESPONSE**

7. The Respondent filed a replying affidavit sworn on 1<sup>st</sup> March, 2021 in opposition to the application for stay on several grounds. First, that her husband was the registered proprietor of the suit property. Second, that the Appellant had purported to buy the suit property from a stranger who was unknown to her. Third, that an out of court settlement had failed to bear fruit due to the Appellant's rudeness. Fourth, that the orders of 14<sup>th</sup> October, 2020 did not amount to an eviction order since the Appellant was still in possession. Finally, that the appeal had no chances of success. The court was consequently urged to dismiss the application.

### **D. DIRECTIONS ON SUBMISSIONS**

8. When the said application was listed for hearing on 3<sup>rd</sup> March, 2021 it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their submissions. The record shows that the Appellant filed his submissions on 24<sup>th</sup> May, 2021 whereas the Respondent's submissions were not on record by the time of preparation of the ruling.

### **E. THE ISSUES FOR DETERMINATION**

9. The court has perused the Appellant's notice of motion dated 28<sup>th</sup> October, 2020, the 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 satisfied the requirements for grant of stay of execution pending appeal.*

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

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

### **F. ANALYSIS AND DETERMINATION**

#### **(a) Whether the Appellant has satisfied the requirements for stay of execution pending appeal**

10. The court has considered the submissions and material on record on this issue. The Appellant submitted that he had satisfied the legal requirements for the grant of stay as set out in **Order 42 rule 6(2)** of *the Rules*. In particular, it was contended that the Appellant shall suffer substantial loss unless the stay was granted since he stood to be evicted from the suit property or cited for contempt of court. The Appellant relied upon **Beatrice Ndunguri Mwaiani and Another v Sicily Wawira Titus and Another [2020] eKLR; Mugah v Kunga [1988] KLR 748; Mukuma v Abuoga [1988] KLR 645; and Focin Motor Cycle Limited v Ann Wambui Wangui and Another [2018] eKLR** in support of his application.

11. The Appellant's application for stay of execution was essentially based upon **Order 42 rule 6(2)** of *the Rules* which stipulates as follows:

**"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."**

12. The court has noted from the material on record that the Appellant has been in possession of the suit property and that there is a house and other developments thereon. In fact, the Respondent expressly admitted in paragraph 9 of her replying affidavit that the Appellant was still in occupation of the suit property. The court is of the opinion that an injunction which requires a person in occupation to refrain from occupying or trespassing on the suit property effectively requires him to vacate the suit property in order to comply with the order.

13. The court is further of the opinion that the Appellant shall suffer substantial loss if he is evicted on the basis of the interim injunction made on 14<sup>th</sup> October, 2021 and before the main suit before the trial court is determined and the pending appeal is heard and determined. An eviction of the Appellant and removal or demolition of developments already on the suit property would definitely amount to substantial loss within the meaning of **Order 42 rule 6(2)** of *the Rules*. The court is further satisfied that the instant application was filed without undue delay as required by law.

14. Since the Appellant does not have title documents for the suit property, the court is of the opinion that no security for due performance of any order or decree is required at this stage. The Appellant can still be evicted should he ultimately lose the appeal before this court or any higher court.

15. As was held in the case of **Butt v Rent Restriction Tribunal [1979] eKLR** the power of the court to grant a stay is discretionary. However, such power should be exercised in such manner as not to prevent an appeal or to render a successful appeal nugatory. Accordingly, the court is inclined to grant the application for stay of execution in the circumstances of this case.

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

16. The court has considered the submissions and material on record on this issue. What appears from the material on record is that whereas the Respondent filed NyahururuMCE&L No. 340 of 2018 seeking recovery of the suit property, the Appellant also filed Nyahururu ELC No. 14 of 2020 (OS) seeking adverse possession of the suit property. Both suits are currently pending before the respective courts where they were filed. The court is of the opinion that it would be prejudicial to the Appellant to have the suit for eviction and injunction heard and determined before the claim for adverse possession is canvassed. The two claims are so closely intertwined such that the claim for adverse possession ought to be heard first.

17. In the case of **Re Global tours and Travel Ltd Milimani Winding up Cause No. 43 of 2000** Ringera J (as he then was) considered the factors to be taken into account in an application for stay of proceedings as follows:

**“As I understand the law, whether or not to grant a stay of proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ...**

**the sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”**

18. Similarly, in the case of **Ezekiel Mule Musembi v H Young and Company (EA) Ltd [2019] eKLR** Odunga J considered the rationale of the court’s power to order stay of proceedings as follows:

**“The jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and the defendant were to succeed it would have rendered the appeal nugatory. In such applications the court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the plaintiff succeeds. Obviously, the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account ...”**

19. The court is satisfied on the basis of the material on record that the Appellant has an arguable appeal; that the application for stay was filed expeditiously; that the Respondent’s suit for recovery of the suit property ought not to proceed before the Appellant’s claim for adverse possession is determined; and that it would be just in the circumstances of this case to stay the proceedings before the trial court. In the premises, the court is satisfied that the Appellant has made out a case for the grant of stay of proceedings pending appeal.

***(c) Who shall bear costs of the application***

20. 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**. Although the Appellant is entitled to costs on the interlocutory application for stay of execution and stay of proceedings, the court is of the opinion that since the main appeal is still pending the costs of the application should abide the result of the appeal. Accordingly, the order which commends itself to the court is that costs of the application shall be costs in the appeal.

**G. CONCLUSION AND DISPOSAL**

21. The upshot of the foregoing is that the court finds merit in the Appellant’s notice of motion dated 28<sup>th</sup> October, 2020. Accordingly, the same is hereby allowed in the following terms:

*(a) There shall be an unconditional stay of the ruling and order*

*of the trial court dated 14<sup>th</sup> October, 2020 pending the hearing and determination of the appeal.*

*(b) There shall be a stay of further proceedings in NyahururuMCE&L No. 340 of 2018 pending the hearing and determination of the appeal.*

*(c) The Court Administrator shall transmit the original record of the trial court to the Environment and Land Court as per the Deputy Registrar's letter dated 27<sup>th</sup> October, 2020 within 21 days from the date hereof to facilitate admission of the appeal.*

*(d) The appeal shall be mentioned on 23<sup>rd</sup> September, 2021 to ascertain availability of the original record and for further orders.*

*(e) Costs of the application shall be costs in the appeal.*

It is so ordered.

**RULING DATED AND SIGNED AT NAIVASHA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 22ND DAY OF JULY 2021.**

In the presence of:

No appearance for the Appellant

Mr. Ngamate for the Respondent

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**Y. M. ANGIMA**

**ELC JUDGE**