



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 179 OF 2017

VIRGINIA N NDUNGU..... 1ST PLAINTIFF/APPLICANT

PETER MBURU NGUNGU.....2ND PLAINTIFF/APPLICANT

VS

SAMSON WAWERU.....1ST DEFENDANT/RESPONDENT

SAMSON WAWERU GITAU.....2ND DEFENDANT/RESPONDENT

AND

ESTHER NJERI WAWERU..... INTENDED THIRD PARTY

RULING

1. Pursuant to a Judgment delivered herein on 11/03/2021 the Plaintiffs' claim for acquisition of title by way of adverse possession was dismissed with costs for want of proof. Dissatisfied with the said Judgment, the Plaintiff/Applicant filed a Notice of Motion dated 23/03/2021 expressed under Section 3A, Order 45 Rule 1, Order 22 Rule 22, Order 21 Rule 9 and Section 4(4) of Limitation of Actions Act, seeking orders; -

1. Spent.
2. That there be a stay of execution on the orders granted on 11/3/2021 until this application is heard and determined.
3. There be an injunction against the Defendant and or third party agents or servants from interfering with the suit land till this application is heard and determined.
4. Status quo be maintained until the intended Appeal is heard or determined
5. Any other relief this honorable Court may deem fit to grant.
6. Costs of this application be in the cause.

2. The Application is supported by the Supporting Affidavit sworn by the Peter Mburu Ndungu, the 2nd Plaintiff/Applicant. He averred that he is aggrieved by the judgment delivered on 11/3/2021 and therefore instructed his advocate to file a notice of Appeal thereto. A draft undated notice of Appeal is annexed as PMN1. He swore that unless the said judgment is stayed, his family shall be evicted from the suit property which they have lived on since 1968. That the Defendants might further alienate and damage the suit property and cause him irreparable loss which cannot be compensated by way of damages. That the Defendants shall suffer no prejudice as they have never lived on the suit land.

3. The intended third party/Respondent has opposed the Application vide the Replying affidavit sworn on 30/04/2021. She deponed that she has a decree in her favour and ought to be allowed to enjoy the fruits of her judgment. The Respondent contend that the intended Appeal has no chance of success and urged the Court to dismiss the application with costs.

4. The 1st and 2nd Defendants did not oppose the Application.

5. On 3/6/2021 directions were taken and parties agreed to canvass the Application by way of written submissions. The Applicant and the

Respondent filed their submissions dated 29/6/2021 and 20/6/2021 respectively.

6. According to the Applicant, the orders for stay of execution of Judgment should be granted to avoid eviction of the Applicants who have been in peaceful occupation of the suit property. Similarly, that the substantive order sought is an injunction against the Defendants or their agents from interfering with the suit land until the intended Appeal is heard and determined.

7. The Applicants submitted that he already filed his notice of Appeal within the stipulated time hence the Appeal process has commenced. That unless the application is allowed, it would be prejudicial and cause irreparable harm to them in the event they are evicted. She also sought an order for maintaining the status quo because they have been in quiet and peaceful occupation of the suit land. That there is a real danger of destruction and alienation of the property that only this Court can prevent.

8. The Respondent submitted that she already won the case and the Applicant has not tendered good reasons for an order of stay of execution to be granted. That in any event the land is not in her name and the Applicants are parties to pending succession cause involving the subject matter. The Respondent pointed out that the Applicant has not even filed a memorandum of Appeal for this Court to determine chances of success of the intended Appeal.

9. The main issues for determination is whether a prayer for stay of execution of the Judgment delivered on 11/03/2021 and an order for injunction can be granted.

10. Applications for stay of execution pending Appeal are filed pursuant to Order 42 Rule 6 of the Civil Procedure Rules states; -

(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.

11. 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. In the instant case the Applicant has argued that eviction and destruction of the suit property is imminent. No evidence was adduced to support this allegation for the Court to consider in his favour.

12. In countering the Applicants, the Respondent has submitted that the suit land is not in her name and in any event succession proceedings are pending to which the Applicants are parties. In that case, it is her view that whatever the outcome of the intended Appeal is, the suit land will be subjected to it accordingly.

13. The issue of what substantial loss constitutes 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. In light of the forgoing, it is my view that commencement of execution of a judgment in itself does not amount to substantial loss. The Applicant has not established pertinent reasons to persuade this Court to grant the order sought.

15. Secondly, the Court has to consider if the application was filed timeously. The application is dated 23/3/2021 and filed on 25/3/2021, 14 days after delivery of the impugned Judgment. It is my opinion that the application was filed without inordinate delay.

16. Closely related with the filing of this application, is the issue of filing of notice of Appeal. I have perused the file and noted that the alleged notice of Appeal is a *draft notice* annexed to the Applicant's supporting affidavit. Moreover, the said notice of Appeal is not dated nor filed or signed as alleged in the instant application.

17. The last test for the Court to apply in determining this application is security for due performance of the decree. The Applicant did not offer any security or indicate their willingness to offer sufficient security for the due performance of the decree.

18. Having found that the Applicants have not demonstrated any substantial loss, the prayer for stay of execution is unmerited and hereby fails.

19. In the end, the application dated 23/3/2021 is dismissed with costs to the Intended third party/Respondent.

20. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANGA THIS 15TH DAY OF JULY 2021.

J G KEMEI

JUDGE

Delivered in the presence of:

Mugo HB for Kimwere for the 1st & 2nd Plaintiff

1st & 2nd Defendant; Absent

Kimayu HB for Karuga Wandai for the Interested Party

Kuiyaki: Court Assistant