



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KITALE
ELC CASE NO. 169 OF 2013

FLORA CHERONO.....PLAINTIFF

VERSUS

MARY NJIHIA.....1ST DEFENDANT

GRACE ABENI.....2ND DEFENDANT

HAMISI SUMBA.....3RD DEFENDANT

WAWERU NYAGA.....4TH DEFENDANT

JOSEPH BARASA NYONGESA.....5TH DEFENDANT

THE LAND REGISTRAR TRANS NZOIA.....6TH DEFENDANT

ABUBAKAR TEMBULA CHANGE.....7TH DEFENDANT

KESOGON MOSQUE COMMITTEE.....8TH DEFENDANT

AND

DANIEL NYAGA MUNYAMBO.....1ST APPLICANT

PETER MAINA MUNGAI.....2ND APPLICANT

ANNE WAMBUI JOSEPH.....3RD APPLICANT

LUCIA WAITHERA MUCHACHE.....4TH APPLICANT

MOSES MWANGI.....5TH APPLICANT

CHRISTOPHER KIPKOECH MELLY.....6TH APPLICANT

ELIZABETH NDUTA KIIGE.....7TH APPLICANT

DICKSON KIIGE MURUGU.....8TH APPLICANT

RULING

The Application

1. Vide an application dated 16/3/2021 brought under **Order 42 Rule 6** of the **Civil Procedure Rules**. The 1st - 8th Applicants jointly sought

for orders that:-

1 ...spent

2. That while pending the *inter partes* hearing and determination of this application, this honourable Court be pleased to stay the enforcement of the judgment and decree of this court, issued on the 31/07/2019.

3. That upon *inter partes* hearing and determination of the application herein, this honourable court be pleased to stay the enforcement of the judgment and decree of this court, issued on the 31/7/2019 while pending the hearing and determination of an intended appeal to the Court of Appeal, against this court ruling of 26/2/2021.

4. That the costs of this application do abide in the results of the intended appeal.

2. The application is supported by the affidavit of the 1st applicant, **Daniel Nyaga Munyambu** sworn on 16/3/2021 on his own behalf and on behalf of the other 7 co-applicants. It is further supported by the annexures in the application.

3. The grounds on which the applicants rely are as follows: that the applicants being aggrieved by this court's ruling of 26/2/2021 lodged a notice of appeal against the said ruling on the 8/3/2021 which has already been served upon the affected respondents; that the applicants have in writing applied for the proceedings and judgment and the ruling of 26/2/2021 and served copies of the letter to the respondents; that the applicants who were not parties to the suit are in occupation of their own parcels and which are titled; that the applicants have developed their parcels and there are commercial buildings standing thereon; that an eviction order was issued on the 3/3/2021 and the seven (7) days' notice given by the auctioneers shall lapse on 17/3/2021; that the eviction of the applicants from their titled parcels shall subject them to very substantial loss and also render the intended appeal nugatory; that the application has been made timeously; that the applicants have a statutory right of appeal to the Court of Appeal and which should be safeguarded and that the applicants are ready to give such reasonable security as the court would order for due performance of the decree.

The Response

4. The Plaintiff filed her replying affidavit sworn on 12/4/2021. Her response is that her woes arising from the suit properties date as far back as at 1991 when she filed a suit over the parcel of land before the land Disputes Tribunal which is a total of thirty (30) years to date; that this case was filed before this Honourable Court in 2013 when she was acting in person; that she had preferred the suit against 23 Defendants but later withdrew the suit against some of the defendants; that service was effected upon all the defendants before she withdrew the suit against some defendants; that after she withdrew the suit against the defendants, they did not take the initiative of being re-enjoined in the proceedings as interested parties and were all aware of the case; that the applicants could not have slept on their rights only to wake up 7 years after they were served only to allege that they have legitimate claim over her parcels of land; that those who sold land to the applicants were parties in this suit to its conclusion; that **Mary Njihia** the 1st Defendant in this suit having been appointed an administrator of the estate of **Josphat Njihia** (deceased) who sold the portions of the illegal sub-divisions emanating from **Sinyerere/Kipsaina Block 2/Kesogon 87** and having been served and participated in the suit ought to have enjoined the purchasers of the parcel of land thereof or notified them of the suit as it was already within her knowledge that the suit was pending in court and was present during the surveyors' visit to the property; that the applicants have come to court with unclean hands; that she is aware that one **Daniel Nyaga Munyambu** has entered into a fresh sale agreement with her for sale of the land that he occupied; that the applicants have not demonstrated that they have an arguable appeal; that the applicants have not met the conditions set out in **Order 42 Rule 6** of the **CPR**; that no substantial loss shall be suffered by the applicants as purported; that the application has been overtaken by events since she has taken over possession of her property thus the hearing of this application would be an exercise in futility; that execution has already been effected; that the application is an afterthought calculated to vex her with endless litigation; that the application is frivolous; misconceived, devoid of merit and an abuse of the court process and that the application was not filed in good faith, is tainted with falsehoods and is undeserving of any favourable orders of this court. She prays that the application be dismissed with costs.

Reply to the Replying Affidavit

5. The 2nd applicant, **Peter Maina Mungai** filed a further affidavit sworn on 8/5/2021 on his own behalf and on behalf of the other 7 co-applicants. His response is that the prayers in the amended plaint that was the subject of the judgment read on 30/7/2019 had not sought the reliefs that the court ultimately granted, and the parties against whom the suit got withdrawn would not reasonably have sought to be enjoined in the suit; that other than the 4th applicant and the estate of the late **Kiige Murugu** represented by the 7th and 8th applicants, the other applicants had not been parties to the original suit; that the court in its ruling of 26/2/2021 pronounced itself on the issues raised in paragraphs 9, 10, 11 and 14 of the replying affidavit and it is now the Court of Appeal that should address the said issues; that no eviction has been effected; that however the plaintiff has just planted an iron sheet fence in front of the applicant's shops and that the applicants have established risk of substantial loss in that the ordered eviction will demolish their permanent developments and which they effected on their titled properties and thereby expose them to very huge losses and psychological trauma.

Submissions

6. This court directed that the application be canvassed by way of written submissions. The applicants filed their submissions on 7/6/2021. There are none filed for the respondent.

Analysis, Issues and Determination

7. I have perused the application, the supporting affidavit, the replying affidavit, the further affidavit and the cited authorities, all the annexures thereto and the submissions on record the main issue for determination is whether an order of stay of execution should issue.

8. This court is guided by **Order 42 Rule 6** of the **CPR** which sets out the principles that it should consider while deciding whether to grant stay of execution pending appeal. The conditions to be met before stay are granted are provided for in **Order 42 Rule 6 (2)** as follows:

“No order of 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 applicant 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. Further in the case of **RWW Vs EKW [2019] eKLR**, the Court addressed its mind to the purpose of a stay of execution order pending appeal as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

10. This court must then determine whether the applicants have established that they will suffer substantial loss. In the instant application, it is the contention of the applicants that they will suffer substantial loss if the execution process is not stayed and that the intended appeal shall be rendered nugatory. The nature of the loss is that they are under threat of eviction from their titled properties which they have conducted extensive permanent developments on over the years.

11. The respondent on the other hand depones that she has already taken possession of the property. The 2nd applicant in his further affidavit depones that the 1st applicant entered into a fresh agreement for sale of the parcel he (the 1st applicant) was in possession prior to the judgment of the court. The respondent also acknowledges having sold that parcel to the 1st Applicant. The agreement for sale marked as annexure **FC 2** shows that the vendor thereon is the respondent herein and the purchaser is the 1st applicant. The 2nd applicant deponed that the 1st applicant did not concede by buying the property from the respondent and is ready to pursue the appeal to its conclusion. Given the probable consequences of the decree held like the sword of Damocles over the applicants’ heads, this court hardly thinks that the aforementioned sale by the 1st applicant is a voluntary one.

12. The applicants submit that they will lose their titles and together with their permanent structures erected thereon and suffer psychologically in the event that execution of the decree is not stayed and that this appeal shall be rendered nugatory if they succeed in their intended appeal and, having perused the this court agrees with them.

13. Was the application filed without unreasonable delay? The application was filed on **16/3/2021** whereas the ruling was delivered on **26/2/2021** that translates to **18 days** from the date of the ruling thus a clear demonstration that the applicants have considerable interest to pursue the intended appeal. Indeed they have annexed a draft memorandum of appeal which they indicate that they have already served upon the respondent. The application therefore has been brought timeously.

14. The upshot of the foregoing is that the application dated **16/3/2021** has merit and the same is hereby granted as prayed in **Prayers Nos. (3) and (4)** thereof.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 14th day of July, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.