



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 577 OF 2012**

**RICHARD NYAMWANGE.....1<sup>ST</sup> PLAINTIFF**

**MONICA NYAMWANGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL KIMANI GATHEMBA.....1<sup>ST</sup> DEFENDANT**

**DANIEL GATHEMBA KIIRU.....2<sup>ND</sup> DEFENDANT**

**KIMANI KAHIRO T/A KIMANI KAHIRO & CO. ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**CHEGE WAINAINA T/A CHEGE WAINAINA & CO. ADVOCATES....4<sup>TH</sup> DEFENDANT**

**PETER MUNGAL.....5<sup>TH</sup> DEFENDANT**

**VEMA AGENCIES LIMITED.....6<sup>TH</sup> DEFENDANT**

**LIVINGSTONE GITONGA MUCHUNGI.....7<sup>TH</sup> DEFENDANT**

**JAMES MUSAU KIMEU.....8<sup>TH</sup> DEFENDANT**

**CHARLES KAMARI.....9<sup>TH</sup> DEFENDANT**

**JORETH LIMITED.....10<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF TITLES AND COMMISSIONER OF LANDS...11<sup>TH</sup> DEFENDANT**

**RULING**

In a judgment that was delivered herein on 5<sup>th</sup> May, 2020, the court made the following orders;

1. The plaintiffs suit is dismissed.
2. Judgment is entered for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants in terms of prayers (i) and (ii) of the counter-claim dated 4<sup>th</sup> December, 2012.
3. The plaintiffs shall vacate and hand over possession of L.R No. 13330/142(the suit property) to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants within 60 days from the date hereof in default of which the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants shall be at liberty to apply for their forceful eviction.
4. Each party shall bear its own costs of the suit.

The plaintiffs were aggrieved by the said decision and filled a notice on 13<sup>th</sup> May, 2020 of their intention to challenge the same in the Court of Appeal. The plaintiffs also requested for the typed and certified copies of proceedings and ruling for the purposes of the intended appeal. What is now before me is the plaintiffs' application dated 4<sup>th</sup> June, 2020 seeking a stay of execution of the said judgment made on 5<sup>th</sup> May, 2020 pending the hearing and determination of the intended appeal against the same to the Court of Appeal. The application has been brought on the grounds that unless an order of stay is granted, the plaintiffs stand to suffer substantial loss as they risk being evicted from the suit property. The plaintiffs have contended that the intended appeal has high chances of success and that they are ready and willing to offer security as the court may direct.

The plaintiffs' application is opposed by the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants and, the 10<sup>th</sup> defendant. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants have opposed the application through a replying affidavit sworn by the 8<sup>th</sup> defendant, James Musau Kimeu on 25<sup>th</sup> June, 2020. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants have contended that the plaintiffs' intended appeal has no chances of success and that contrary to the plaintiffs' assertion that they will suffer substantial loss, it is the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants who will suffer substantial loss if the stay sought is granted as they have been kept out their property for over 8 years. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants have contended in the alternative that if the court is inclined to grant the stay sought then the plaintiffs should be ordered to deposit a minimum sum of Kshs. 10,000,000/- as security since the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants have been deprived of the use of the suit property on which they wanted to build houses for renting.

On its part, the 10<sup>th</sup> defendant opposed the application through an affidavit sworn by Peter Mungai on 30<sup>th</sup> June, 2020. The 10<sup>th</sup> defendant has averred that the court having found that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants are the registered proprietors of the suit property, they should be allowed to enjoy quiet possession of the same. The 10<sup>th</sup> defendant has averred that the plaintiffs were all along staying in the U.S.A and as such they have never been in occupation of the suit property for over 25 years as claimed by them. The 10<sup>th</sup> defendant has contended that the plaintiffs have no arguable appeal and that they will not suffer substantial loss if the stay sought is not granted. The application was argued by way of written submissions. The plaintiffs filed their submissions on 4<sup>th</sup> November, 2020 while the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants filed their submissions in reply on 8<sup>th</sup> December, 2020. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavits in reply and the submissions of counsels from both sides. The plaintiffs' application was brought under Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

**“(2) No order for stay of execution shall be made under sub-rule 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 ultimately be binding on him has been given by the applicant.”**

In Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018 the court stated that:

**“It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”**

I am satisfied that the plaintiffs are likely to suffer substantial loss if the stay sought is not granted. In the judgment of the court execution of which is sought to be stayed, the court found that the plaintiffs were in possession of the suit property and ordered that they handover possession to the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants within 60 days of the date of judgment. What this means is that unless the stay sought is granted, the plaintiffs are likely to be evicted from the suit property. It is also not disputed that the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants are the registered owners of the suit property. If the stay sought is not granted, they will be at liberty to deal with the suit property as they deem fit including selling or charging the same. If the property is sold, it will be put beyond the reach of the plaintiffs should they succeed in the intended appeal.

I am in agreement with the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants that they have been kept out of the suit property for several years. However, the plaintiffs have a right of appeal against this court's judgment delivered on 5<sup>th</sup> May, 2020 and that right must be protected so that it does not become illusory. I am also satisfied that the application was brought without unreasonable delay. On the issue of security, the plaintiffs have agreed to abide by any order on security that the court may give.

In conclusion, it is my finding that the plaintiffs' application dated 4<sup>th</sup> June, 2020 has merit. The application is allowed on the following terms:

1. Pending the hearing and determination of the intended appeal by the plaintiffs to the Court of Appeal, execution of the judgment delivered herein on 5<sup>th</sup> May, 2020 and the subsequent decree is stayed.
2. The plaintiffs shall deposit in an interest earning bank account in the joint names of the advocates for the plaintiffs and the advocates for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants a sum of Kshs. 2,000,000/= as security within sixty (60) days from the date hereof in default of which the stay granted herein shall lapse automatically without any further reference to the court.
3. Each party shall bear its own costs of the application.

**DELIVERED AND DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Kalu h/b for Mr. Mutua for the Plaintiffs

Ms. Lipwop for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants

Ms. Olembo h/b for Ms. Koech for the 10<sup>th</sup> defendant

Ms. C.Nyokabi-Court Assistant