



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E002 OF 2020

NYALI BEACH CYCADS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

FRANCIS KAMAU GUCHU.....1ST DEFENDANT

MWAURA KINYANJUI.....2ND DEFENDANT/APPLICANT

KAMAU WAWERU.....3RD DEFENDANT

LUKAS MUTUA.....4TH DEFENDANT

RULING

1. Before this Court is the Notice of Motion Application dated 13th April, 2021 filed by the 2nd Defendant/Applicant and the Notice of Preliminary Objection to the said Application filed on 3rd May, 2021 by the Plaintiff/Respondent.

2. Vide the afore stated Notice of Motion Application, the 2nd Defendant/Applicant sought for the following orders:-

a. That an order of stay be and is hereby issued staying the execution of this Court's Ruling delivered, dated and signed on 19th March, 2021 and the consequent orders issued on 22nd March, 2021 pending the hearing and determination of the Application herein inter-parties.

b. That an order of stay be and hereby issued staying the execution of this Court's Ruling delivered, dated and signed on 19th March, 2021 and the consequent orders issued on 22nd March, 2021 pending the hearing and determination of the Appellants Appeal (Nairobi Civil Appeal No. E 180 of 2021; Mwaura Kinyanjui vs. Nyali Beach Cycads Ltd) in the Court of Appeal.

c. That the Honourable Court be pleased to grant any other preservatory orders of status quo obtaining at the time of filing of the Respondent's Suit instituted by way of Plaint dated 16th September, 2020 as it may deem fit to further the ends of justice.

d. That the costs of this Application be provided for.

3. The Application is supported by the Affidavit of the 2nd Defendant/Applicant deponed and sworn on 13th April, 2021. The 2nd Defendant deponed that on 19th March, 2021, this Honourable Court delivered a Ruling ordering the Defendants to bring down all their houses from the suit land known as L.R. No. 3565 situated in Kikomba area within Machakos County (*hereinafter referred to as "the suit property"*).

4. The 2nd Defendant deponed that this Court ordered that the Defendants should be evicted from the only land that they had occupied and known as their home since they were born, which was several decades ago; that the afore stated order of eviction was to be enforced and overseen by the Officer Commanding Kikomba Police Post, 30 days after the date of the Ruling and that the Plaintiff/Respondent extracted the said orders on 22nd March, 2021 and served it upon his Advocates on 23rd March, 2021.

5. The 2nd Defendant/Applicant deponed that all his six (6) siblings and himself, all of whom have children, were very shocked at the Ruling given that their case had not been heard; that the evidence on record demonstrates that they were entitled to the suit land having been born and brought up on the suit property; that this Court made an error in arriving at the said decision and that he instructed his Advocates on

record to institute a Notice of Appeal which was filed on 6th April, 2021.

6. The 2nd Defendant/Applicant deponed that his appeal has high chance of success; that there was need for this Honourable Court to grant him stay of execution of the orders pending the hearing and final determination of the lodged Appeal before the Court of Appeal and that unless this Honourable Court intervenes, they will be evicted from the suit property and their houses demolished by 16th April, 2021. If that happens, it was deponed, their Appeal will be overtaken by events and rendered nugatory.

7. The 2nd Defendant/Applicant deponed that this Application had been made without any unreasonable delay, the Ruling having been read about two weeks earlier. The 2nd Defendant/Applicant filed a Supplementary Affidavit dated 28th May, 2021 in reply to the Plaintiff's Replying Affidavit dated 27th April, 2021 filed in Court on 28th May, 2021.

8. In the Supplementary Affidavit, the 2nd Defendant/Respondent deponed that he ought to have lodged a Notice of Appeal within fourteen (14) days of the delivery of the Ruling; that the computation of the fourteen (14) days was to take effect the next day being 20th March, 2021 and that the lapse of the fourteen (14) days was on 2nd April, 2021 which happened to have been a public holiday (*Good Friday*).

9. It was deponed that the next two days – 3rd and 4th April, 2021 were weekends while 5th April, 2021 was Easter Monday which was another public holiday. The 2nd Defendant/Applicant deponed that the only other working day was on 6th April, 2021 and that was when the Notice of Appeal was filed in Court which was within the required statutory timelines.

10. The 2nd Defendant/Applicant deponed that the Preliminary Objection by the Plaintiff/Respondent dated 27th April, 2021 was totally misconceived and should be dismissed with costs and that he had a meritorious appeal with high chances of success.

11. To controvert the argument advanced by the 2nd Defendant/Applicant, the Plaintiff/Respondent filed both a Replying Affidavit dated 27th April, 2021 and a Notice of Preliminary Objection dated 27th April, 2021 and filed on 3rd May, 2021.

12. The Plaintiff's Director deponed that the 2nd Defendant/Applicant's Application dated 13th April, 2021 was misconceived and solely meant to delay the execution of the orders of this Honourable Court and is intended to keep the Plaintiff/Respondent away from its land for as long as it was possible.

13. According to the Plaintiff's Director, a valid Notice of Appeal to the Court of Appeal ought to have been lodged 14 days of the Ruling or decision sought to be appealed against and that the Notice of Appeal annexed to the Application and lodged on 6th April, 2021 was invalid having been lodged eighteen (18) days after the Ruling was delivered, which was outside the prescribed time.

14. The Plaintiff/Respondent's Director asserted that they have already filed an Application before the Court of Appeal seeking to strike out the Notice of Appeal and the entire Appeal under Rule 84 of the Court of Appeal Rules.

15. The Plaintiff/Respondent deponed that the Application by the 2nd Defendant/Applicant was fatally defective as there was no valid Appeal or Notice of Appeal filed against the orders sought to be stayed; that this Honourable Court has no jurisdiction to entertain an Application for stay of execution pending the hearing and final determination of the Appeal and that this Court should down its tools and proceed to dismiss and/or strike out the Application forthwith.

16. Further, the Plaintiff/Respondent's Director deponed that the 2nd Defendant/Applicant has not satisfied the mandatory conditions set out under the provisions of Order 42 Rule 6 of the Civil Procedure Rules to warrant the orders sought and that the 2nd Defendant/Applicant stood to suffer no loss whatsoever nor substantial loss if execution was levied since execution was a lawful process of the Court.

17. The Plaintiff/Respondent's Director deponed that this Court could not determine the arguability or otherwise of the intended Appeal as that would amount to sitting on Appeal of its own decision.

18. In the Notice of Preliminary Objection dated 27th April, 2021 filed in this Court on 3rd May, 2021, the Plaintiff/Respondent raised two (2) main issues of law for determination as follows:

a. The Application is fatally defective and incompetent as there is no competent Appeal or Notice of Appeal filed within the mandatory timeline stipulated under Rule 75 of the Court of Appeal Rules; and

b. In the absence of a proper and valid Appeal or Notice of Appeal, this Court has no jurisdiction to entertain application for stay of execution pending appeal.

Submissions:

19. The 2nd Defendant/Applicant's Advocate submitted that the Notice of Motion dated 13th April, 2021 was seeking for orders of stay of execution against the Ruling and orders of this Honourable Court dated 19th March, 2021 and 22nd March, 2021.

20. Counsel submitted that they had filed a Notice of Appeal before the Court of Appeal being ***Nairobi Civil Appeal No. E180 of 2021-Mwaura Kinyanjui vs. Nyali Beach Cycads Limited*** which sought to challenge this Court's Ruling that dismissed the Applicant's Application for status quo orders and allowed the Plaintiff's Application for mandatory injunction and eviction orders.

21. With regard to the Notice of Preliminary Objection filed by the Plaintiff/Respondent, the 2nd Defendant/Applicant's Advocates submitted that a Notice of Preliminary Objection was a Preliminary issue premised on pure point of law that goes to the root of the Court's jurisdiction.

22. While relying on the provisions of Section 57 of the Interpretation and General Provision Act, Order 50 Rules 3 & 7 of the Civil Procedure Rules and the decision of "*Mburu Drycleaners (2007) eKLR*" the Advocate for the 2nd Defendant/Applicant submitted that the Plaintiff/Respondent failed to take into consideration the consequences of what ought to happen if the last day prescribed for filing of a pleading fell on a non-working day as was in this case.

23. While relying on the case of "*Kyule Makau vs. Dominic Musei Ikombe (2015) eKLR*", counsel submitted that the 2nd, 3rd, 4th and 5th April, 2021 were excluded days within the provisions of Section 57 of the Interpretation and General Provisions Act and Order 50 Rules 3 and 7 of the Civil Procedure Rules, 2010 and hence the Notice of Appeal filed on 6th April, 2021 was lodged within the prescribed timelines and therefore legally valid and competent.

24. The Advocate for the 2nd Defendant/Applicant further submitted that the 2nd Defendant/Applicant had met the legal threshold to warrant being granted stay of execution under the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

25. The 2nd Defendant/Applicant's Advocates argued that the Applicant and his family were born on the suit land and had constructed their homes on the suit land; that they have been cultivating the land for their subsistence and commercial needs and that the loss of homes and means of living that would result from eviction would lead to substantial loss to the Applicant and his whole family. To buttress his argument, counsel relied on the case of *David Oyiare Ntungani vs. Matuiya Ole Naisuaku Orket (2017) eKLR*.

26. On whether the Application was made without unreasonable delay; the Defendant's/Applicant's Advocates submitted that the Court's Ruling was delivered on 19th March, 2021 while the Notice of Appeal was lodged on 6th April, 2021 and that the present Application was filed on 13th April, 2021 in less than a month.

27. The 2nd Defendant/Applicant's advocate submitted that security must be seen from the spectrum of the purpose thereof, which purpose was to guarantee the due performance of the decree or order as may ultimately be binding on the Applicant. Counsel submitted that in land ownership cases, the land itself was security as it was immovable property and no security was needed.

28. The Advocate for the Plaintiff/Respondent submitted that the Preliminary Objection was premised on the fact that there was no valid Notice of Appeal and hence there could be no valid appeal; that the Notice of Appeal was filed outside the statutory timelines and that he had filed an Application being *Nairobi Civil Appeal No. E180 of 2021- Mwaura Kinyanjui vs. Nyali Beach Cycads Limited* in the Court of Appeal for striking out the Notice of Appeal for being filed out of time.

29. It was submitted that the validity of the Notice of Appeal and any ensuing appeal was sub-judice and this court should defer it to the Court of Appeal and that the 2nd Defendant/Applicant had failed to satisfy the Court on the requirement stipulated out under Order 42 Rule 6 of the Civil Procedure Rules which is couched in mandatory terms.

30. The Plaintiff's Advocate opined that the 2nd Defendant/Applicant stood to suffer no loss whatsoever, let alone substantial loss, if the stay was not granted and that the 2nd Defendant/Applicant and his predecessor had previously agreed to move out of the portions of the suit property they occupied after a survey was commissioned by the Court

31. It was the Plaintiff's/Respondent's Advocate's submission that there could be no conceivable loss resulting from a lawful eviction of a party who had previously consented in Court to moving out and/or being evicted from the suit property he occupied wrongfully.

32. The Advocate for the Plaintiff submitted that in the unlikely event that the intended Appeal by the 2nd Defendant/Applicant succeeds, he would be restored to the portion of the suit property he occupies; that the 2nd Defendant had previously been evicted and returned to the suit property albeit unlawfully and that the notion by the 2nd Defendant/Applicant that he would suffer substantial loss if execution of this Court's lawful order was not stayed was completely without merit. Counsel relied on the case *James Wangalwa & Another vs. Agnes Naliaka Cheseto (2012) eKLR*.

33. The Plaintiff's counsel also cited the case of *Machira t/a Machira & Co. Advocates vs. East Africa Standard (2002) eKLR 63* to argue that an Applicant seeking for a stay of execution ought to specify the particulars of the said loss in order to succeed; that the 2nd Defendant/Applicant failed to do so and that the Plaintiff/Respondent should be allowed to enjoy the fruits of its Judgment in the interest of justice and fairness.

34. On the contrary, the Plaintiff's/Respondent's Advocates submitted, it was the Plaintiff/Respondent who continues to suffer substantial loss for being deprived of the portion of his property which is unlawfully occupied by the 2nd Defendant/Applicant and that the consent between the parties in previous suits had never been challenged or set aside.

Analysis and determination:

35. On 16th September, 2020, this suit was instituted by the Plaintiff/Respondent via a Plaint. In the Plaint, the Plaintiff averred that it was the registered owner of all that parcel of land known as land reference Numbers 3565 situated in Kikomba area within the County of Machakos and locally known as Magutu /Eden Farm (*the suit property*).

36. The Plaintiff/Respondent pleaded that it had bought the suit land in the year 2009 from Magutu Company Limited free from any

encumbrances and/or adverse claims from third parties. According to the Plaintiff, a title deed was issued to it after the said purchase. However, on diverse dates between August and December, 2009, the 1st, 2nd and 3rd Defendants, together with one Kinyanjui Gakubu, who is deceased and the father to the 2nd Defendant/Applicant, trespassed and occupied part of the suit land, erected temporary structures, cultivated and harvested crops on the land.

37. The Plaintiff pleaded that it was compelled to institute several civil cases, amongst them being Thika PMCC No. 1102 of 2009 and Yatta SRMCC No. 1 of 2011 all seeking eviction orders against the four Defendants herein. The record shows that in Yatta SRMCC No. 1 of 2011, all parties agreed and consented to have a land surveyor demarcate the boundaries between the Plaintiff's land and the area the Defendants were occupying, and in the event it is found that they had encroached on the Plaintiff's land they forthwith vacate.

38. On 15th April, 2011, the survey was undertaken and boundaries were determined on the area in dispute. The survey report showed the Defendants were in occupation of a portion of the Plaintiff's land. The Defendants, including the 2nd Defendant's father, were evicted from the suit land pursuant to the consent order. However, they subsequently returned to the suit land. It is with the above background in mind that this court allowed the Plaintiff's Application in this matter for the eviction of the Defendants from the suit property.

39. The issues for determination in the current Application are as follows:

- a. Whether the Notice of Preliminary Objections raised by the Plaintiff /Respondent dated 27th April, 2021 against the Notice of Motion application filed by the 2nd Defendant/Applicant dated 13th April, 2021 is meritorious.
- b. Whether the 2nd Defendant/Applicant is entitled to an order for stay of execution against the ruling and orders of this Court of 19th March, 2021 and 22nd March, 2021.

40. In the Notice of Preliminary Objection dated 3rd May, 2021, the Plaintiff has invited this court to make a determination on two issues: Whether the Application by the 2nd Defendant is incompetent as there is no competent Appeal or Notice of Appeal filed within the mandatory timeline stipulated under Rule 75 of the Court of Appeal Rules and; whether in the absence of a proper and valid Notice of Appeal, this Court has jurisdiction to entertain an Application for stay of execution pending appeal.

41. The Application by the 2nd Defendant/Applicant emanates from a Ruling and orders of this Court of 19th March, 2021. The Application is filed under Order 42 Rule 6 of the Civil Procedure Rules seeking for the stay of execution pending the hearing and final determination of an appeal. Order 42 Rules 6(1) provides as follows:-

“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 an 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.”

42. An Application for stay of execution is predicated on the fact that the Applicant has filed an Appeal. The Plaintiff/Respondent has raised a Preliminary Objection challenging the validity of the Notice of Appeal filed by the 2nd Defendant/Applicant on 6th April, 2021. The Plaintiff has argued that the Notice of Appeal was filed eighteen (18) days after the Ruling appealed from which is outside the prescribed timeframe of fourteen (14) days as provided under Rule 75 of the Court of Appeal Rules which states as follows:

1. Any person who desires to appeal to the Court of Appeal shall give notice in writing, which shall be lodged in duplicate with the register of the superior Court.
2. Every such notice shall subject to the Rules 84 and 97 be so lodged within fourteen (14) days of the days of the decision against which it is desired to appeal.

43. On the other hand, the 2nd Defendant's position is the 2nd, 3rd, 4th & 5th April, 2021 were excluded days within the provisions of Section 57 of the Interpretation and General Provisions Act and Order 50 Rules 3 and 7 of the Civil Procedure Rules, 2010 and hence the Notice of Appeal filed on 6th April, 2021 was lodged within the prescribed timelines and therefore legally valid and competent.

44. The Plaintiff's advocate informed the court that he has filed *Nairobi Civil Appeal No. E180 of 2021 - Mwaura Kinyanjui vs. Nyali Beach Cycads Limited* in the Court of Appeal for striking out the Notice of Appeal for being filed out of time. Counsel submitted that the validity of the Notice of Appeal and any ensuing appeal was sub-judice and this court should defer it to the Court of Appeal.

45. I agree with the Plaintiff's submissions. It is only the Court of Appeal that can determine if the impugned Notice of Appeal was filed out of time or not, more so considering that there is a pending Application before the Court of Appeal on the said issue. Have made that argument, the Plaintiff cannot in the same breath argue that this court should find the impugned Notice of Appeal invalid.

46. Therefore, this court will refrain itself from making a finding on the validity of the Notice of Appeal. That being the case, until the Court of Appeal determines otherwise, this court will presume, for the purpose of the present Application for orders of stay of execution alone, that the Notice of Appeal that was filed in this court is a valid pleading.

47. On 19th March, 2021, this Honourable Court granted Mandatory Injunction against the 2nd Defendant/Applicant in the following terms:

a. Pending the hearing and determination of this suit an order be and is hereby issued compelling the Defendants, their servants, agents and/or whomsoever to remove all structures erected on L.R No. 3565 and all those parties claiming title under them do vacate the property on the basis of the survey report dated 18th April, 2011 within 30 days of the date of the Ruling.

b. The Office Commanding Kikomba Police Post to enforce the Court orders issued herein.

c. The Defendants to pay the costs of the Application.

48. The 2nd Defendant is aggrieved with these orders and has filed a Notice of Appeal. In the meantime, the 2nd Defendant wants the orders of the court stayed pending the hearing and determination of the Appeal. The grant of orders of stay of execution pending appeal is provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, the relevant part of which states as follows:

“(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.

49. An applicant for stay of execution of a decree or order pending Appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

50. In *Butt vs. Rent Restriction Tribunal [1979]*, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.

51. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, to grant a stay so that an Appeal may not be rendered nugatory should the Appeal court reverse the Judge’s discretion.

52. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

53. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto [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 CPR. 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.”

54. In the instant case, it is the 2nd Defendant’s case that himself and his siblings were born on the suit land and had constructed their homes on the land; that they have been cultivating the land for their subsistence and commercial needs and that the loss of homes and means of living that would result from the eviction would lead to substantial loss to him and his whole family.

55. As was held in *RWW vs. EKW [2019] eKLR*, the purpose of a stay of execution order pending 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.

56. Considering that the 2nd Defendant is in occupation of a portion of the suit property, and is likely to suffer substantial loss in the event the houses on the land are demolished, I shall allow the 2nd Defendant’s Application dated 13th April, 2021 on condition that he succeeds in convincing the Court of Appeal that the Notice of Appeal that he filed is valid.

57. For those reasons, I allow the Application dated 13th April, 2021 as follows:

a. An order of stay be and hereby issued staying the execution of this Court’s Ruling delivered, dated and signed on 19th March, 2021 and the consequent orders issued on 22nd March, 2021 pending the hearing and determination of the Appellants Appeal in Nairobi Civil Appeal No. E 180 of 2021; Mwaura Kinyanjui vs. Nyali Beach Cycads Ltd) in the Court of Appeal.

b. The order of stay of execution is granted on condition that the Court of Appeal validates the Notice of Appeal filed by the

2nd Defendant.

c. Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021

O. A. ANGOTE

JUDGE