



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MURANG'A**  
**ELC MISC. APPLICATION NO. 35 OF 2017**

**PETER KINUTHIA WAGACHA.....3<sup>RD</sup> RESPONDENT/APPLICANT**

**VERSUS**

**THE LAND REGISTRAR, THIKA.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**HENRY WALLACE MAINA APPLICANT.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The ruling is in respect to the Notice of motion by the Applicant/3<sup>rd</sup> Respondent seeking orders as follows;

a. Spent

b. That pending the hearing and determination of this Application, this Honourable Court do restrain the 1<sup>st</sup> Respondent from interfering, dealing, alienating, and/or effecting registration of Title Deeds for the parcels of land known as LOC.16/KIGORO/2557, 2558 and 2559.

c. That pending the hearing and determination of the Appeal, this Honourable Court do restrain the 1<sup>st</sup> Respondent from interfering, alienating and/or effecting the registration of the Title Deeds for the parcels of land known as LOC.16/KIGORO/2557,2558 and 2559.

d. That pending the hearing and determination of this Application, this Honourable Court do restrain the Peter Kinuthia Wagacha, his agents, servants and/or employees from engaging in the construction of any structure permanent or otherwise on the land, pledging, encumbering, dealing and/or interfering with the land previously known as LOC.16/KIGORO/68 which has now been subdivided into LOC.16/KIGORO/2557, 2558 and 2559.

e. That pending the hearing and determination of the Appeal, this Honourable Court do restrain Peter Kinuthia Wagacha his agents, servants and/or employees from engaging in the construction of any structure permanent or otherwise on the land, pledging, encumbering, dealing and/or interfering with the land previously known as LOC.16/KIGORO/68 which has now been sub divided into LOC.16/KIGORO/2557, 2558 and 2559.

f. That further this Court do stay the execution of the Notice to Show Cause dated 5<sup>th</sup> February, 2021 and any other form of execution of the decree issued pursuant to the ruling of Justice Kemei on 2<sup>nd</sup> July 2018.

g. That the Officer Commanding Police Division - Gatanga Sub County do ensure compliance with the orders issued and superintendence of the orders issued herein.

h. That costs of this Application be borne by the Applicants

i. That such further relief as the Honourable Court may deem just and expedient to grant.

2. The application is supported by the affidavit of the Applicant and the grounds annexed thereto.

3. In summary, the Applicant states that he was aggrieved by the ruling of this Court issued on the 2/7/2018 and has filed an Appeal in the Court of Appeal which record of Appeal was filed on the 10/9/2018.
4. The Applicant further adds that on the 4/2/2021 Peter Kinuthia Wagacha, the 3<sup>rd</sup> Respondent and his agents entered the suit land and commenced construction thereon. That upon carrying out a search on the suit land he discovered that the same has been subdivided into 3 portions – namely parcel 2557,2558, and 2559. That failure to grant the orders sought will render his Appeal nugatory. That the 3<sup>rd</sup> Respondent has served him with a notice to show cause why he should not be committed to civil jail for 6 months.
5. That there is a likelihood of the 3<sup>rd</sup> Respondent disposing of the property hence defeating his Appeal which has a high chance of success. That the application has been brought without any delay.
6. Lastly he sought stay of execution of the Notice to show cause dated the 5/2/21 and further execution of the decree dated the 2/7/18 pending the hearing and determination of the Appeal.
7. The application is opposed by the 3<sup>rd</sup> Respondent vide the Replying Affidavit dated the 15/3/2021.
8. The 3<sup>rd</sup> Respondent terms the application frivolous malicious with intent to mislead the Court. That the application is brought with delay given the ruling was issued 3 years ago. He faulted the Applicant for filing the application after their participation and involvement in the taxation of the costs in this suit. That he was prompted to file this application by the issuance of the notice to show cause on the 15/2/2021. Further that the application has been overtaken by events on account that the decree has been executed to the extent that the original parcel LOC16/KIGORO/68 is no longer in existence. That the land has since been subdivided and new titles issued to the beneficiaries.
9. The 3<sup>rd</sup> Respondent stated that the documents being relied by the Applicant in his quest for title were invalidated by various Courts which he has enumerated in his affidavit and which decisions of the various Courts have yet to be challenged set aside vacated or appealed. That the title had been cancelled even before the decision of this Court in 2018 and issuing restraining orders will be an academic exercise.
10. With respect to the stay of execution of the Notice to show cause the 3<sup>rd</sup> Respondent argued that the warrants of arrest have been issued and so the prayer is overtaken by events.
11. That the application is a sham and he and other beneficiaries stand to be prejudiced because of the developments made on the suit land.
12. The Applicant in his further affidavit filed on the 29/6/2021 reiterated the contents of his earlier affidavit and added that the 3<sup>rd</sup> Respondent was duly served with the Record of Appeal and so has been aware of its existence and notwithstanding has acted in a fraudulent and mischievous manner with intent to defeat the Appeal. That the bill of taxation was done in violation of the provisions of the Civil Procedure Act. He also faulted the 3<sup>rd</sup> Respondent for dealing with the land in view of the decision of the National Land Commission that the suit land belonged to the Giachuki Secondary school. That the titles issued to Peter and John Wagacha are in doubt given that there is no evidence that the Land control board consent was obtained.
13. Parties elected to file written submissions which I have read and considered.
14. Having read and considered the application, the rival affidavits and the written submissions of the parties the issues for determination are;
  - a. whether the Applicant is entitled to orders of injunction pending the hearing and determination of the Appeal.
  - b. Whether the Court should issue stay of the execution of the Notice to show cause and the ruling issued on the 2/7/2018.
  - c. Who meets the costs of the application?
15. On the issue of injunctive orders pending Appeal, the Applicant citing various decided cases submitted that the Court is within its powers to grant the orders to preserve the substance of the suit land. That the suit land is in danger of being wasted by the 3<sup>rd</sup> Respondent and failure to grant the orders would render the Appeal nugatory. That the Applicant has approached the Court with clean hands and is therefore deserving of the equitable remedy of injunction. That the application was made without delay and that the Applicant has complied with the orders of the Court issued on the 17/3/2021 which required him to deposit the entire amount of costs awarded by the Court.
16. Whilst opposing the application the 3<sup>rd</sup> Respondent in his submissions argued that the Applicant has not met the threshold for the issuance of injunctive orders and that he is not deserving of the same.
17. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are:

“that firstly, an Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”
18. The Court of Appeal in **Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 ECLR )** defined a prima facie case in the following terms;

“A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

19. In the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 others EKLR** the Court of Appeal stated as follows;

“.....All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation....The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the Applicant’s case is more likely than not to ultimately succeed.”

20. In addressing the issue of a prima facie case, the Court has noted that the Applicant has indeed filed an Appeal in the appellate Court. A perusal of the record and the green card shows that the ruling of the Court issued on the 2/7/2018 has been fully implemented to the extent that other third parties not enjoined in the suit are now title holders of the subdivisions of the main suit land. It is my view that Applicant is guilty of delay in bringing this application given that he filed the Appeal in 2018. This is an application that ought to have been brought earlier in my considered view. Injunctive orders being equitable remedies and in this case are affected by delay. Laches dissipates an equitable remedy.

21. In view of the holding of the Court in para 20 I find no necessity to inquire on the other limbs of granting an injunction save to state that the prayer is untenable. It is declined.

22. As to stay of execution of the notice to show cause, I note that the same has been overtaken by events to the extent that the Applicant has claimed that he has deposited the money as per the orders of the Court issued on the 17/3/2021. The position has not been challenged by the 3<sup>rd</sup> Respondent and notwithstanding that no evidence was tabled in support, the Court finds no reason to disbelieve the Applicant.

23. With respect to the stay of execution of the ruling of 2/7/18 the court is guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules as follows;

(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.

24. It is to be noted that the Applicant did not submit on this prayer at all. It is deemed that he abandoned the prayer. That said 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.”

25. Having said that I find no difficulty in holding that the Applicant has not persuaded the Court in demonstrating any substantial loss that he stands to suffer if this application is not granted.

26. The ruling of the Court, the subject of this ruling was rendered on the 2/7/2018 and this application has been filed on the 18/2/2021, a period of 3 years and 7 months. The Applicant has not explained the delay in bringing the application to warrant consideration by the Court in exercise of its discretionary power. The application is therefore inordinate.

27. It is worth noting that the Applicant has not demonstrated his willingness and readiness to provide security for the due performance of the decree of the Court.

28. In the upshot the application dated the 18/2/2021 is without merit. It is dismissed with costs to the 3<sup>rd</sup> Respondent/Applicant.

29. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2021

J. G. KEMEI

**JUDGE**

**Delivered online in the presence of:**

Applicant: Absent

1<sup>st</sup> & 2<sup>nd</sup> Respondents: Absent

Nduhiu for the 3<sup>rd</sup> Respondent

Court Assistant: Kuyiki/Alex