



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC MISC. NO. 31 OF 2020

CHARLES GATHEE MUHORO.....1ST APPLICANT

PAUL MUHORO MURIITHI.....2ND APPLICANT

VERSUS

WANJIKU NDWARU.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

RULING

In a judgment delivered on 9th September, 2019 by Hon. M.W.Murage(Ms.) SRM in Nairobi Commercial Court Chief Magistrate's Court Civil Case No. 2323 of 2011, Wanjiku Ndwaru v Peter Kiboi Githu & 3 others (the lower court case), the court made the following orders in favour of the 1st respondent against the applicants;

1. A declaration that the plaintiff is the rightful owner of Plot No. 455 JAMUHURI PHASE II NAIROBI registered as NAIROBI/BLOCK63/455(the suit property).
2. A permanent injunction requiring the 2nd and 3rd defendants to forthwith vacate and remove the construction they are erecting or have erected on the suit property.
3. Damages for trespass in the sum of Kshs. 100,000/- plus costs of the suit and interest at court rates.

The 1st respondent's costs were assessed at Kshs. 97,815/- and a decree issued by the court on 27th January, 2020. What is now before me is the applicants' application dated 11th March, 2020 seeking; a stay of execution of the said judgment delivered on 9th September, 2019 pending the hearing and determination of the intended appeal against the same to this court, extension of time within which to file the intended appeal and an order that the draft memorandum of appeal attached to the affidavit in support of the application be deemed as duly filed with leave. The application has been brought on the grounds set out on the face thereof and on the affidavit of the 1st applicant sworn on 10th March, 2020. The applicants have averred that they are registered as the joint leasehold proprietors of the suit property. The applicants have averred that they have constructed on the suit property apartments from which they derive rental income.

The applicants have averred that the 1st respondent filed the lower court suit claiming that she was the lawful owner of the suit property. The applicants have averred that the suit was defended. The applicants averred that after the lower court suit was heard on 6th February, 2019, the court delivered judgment on 9th September, 2019 in favour of the 1st respondent. The applicants have averred that neither their advocates nor them were notified of the judgment date and as such they were not aware that judgment had been delivered on 9th September, 2019. The applicants have averred that they came to know of the judgment in February, 2020 when the 1st respondent's agent served them with a court decree issued on 27th January, 2020 that required them to vacate the suit property. The applicants have averred that they are desirous of appealing against the said judgment of the lower court. The applicants have averred that they could not lodge an appeal within time because they had no notice of the judgment of the lower court and that when they came to know of the judgment, the time within which to appeal had lapsed. The applicants have averred that they stand to suffer irreparable loss if the orders sought are not granted. The applicants have averred that they brought the present application without unreasonable delay as soon as they learnt of the judgment.

The application is opposed by the 1st respondent through grounds of opposition dated 15th July, 2020. The 1st respondent has averred that the applicants are guilty of laches and indolence in that they had a duty to inquire from the court as to when the judgment was to be delivered. The 1st respondent has averred that the application has been brought after undue delay which has not been explained. The 1st respondent has averred further that the applicants have not invoked any provision of the Civil Procedure Rules that entitles them to an order for stay of execution. The 1st respondent has averred further that the applicants have not offered any security for the due performance of the decree of

the lower court. The 1st respondent has averred that she has suffered and will continue to suffer if she is not allowed to enjoy the fruits of judgment that has been made in her favour by the lower court.

The applicants filed their submissions on 8th February, 2021 while the 1st respondent filed her submissions on 2nd March, 2021. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the 1st respondent in opposition to the application. Finally, I have considered the submissions of counsels from both sides and the authorities cited in support thereof. The applicants' application has two limbs. The first limb seeks a stay of execution pending the hearing and determination of the intended appeal to this court while the second limb seeks extension of time to file the intended appeal. I will deal with the two limbs one after the other. The application for stay 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 (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 applicants are likely to suffer substantial loss if the stay sought is not granted. It is not disputed that the applicants are the registered owners of the suit property and that they have developed the property with residential apartments. In the judgment of the lower court execution of which is sought to be stayed, the court has declared the 1st respondent to be the lawful owner of the suit property and has ordered the applicants to vacate the suit property and handover possession to the 1st respondent. What this means is that unless the stay sought is granted, the applicants are likely to be evicted from the suit property. The 1st respondent having been declared as the owner of the suit property, the applicants also stand the risk of having their title to the suit property cancelled and the property registered in the name of the 1st respondent if the stay sought is not granted.

I am in agreement with the 1st respondent that she has a right to enjoy the fruits of her judgment. That right must however be weighed against the applicants' right of appeal. The applicants have a right of appeal against the lower court's judgment 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 once the applicants learnt of the judgment. The applicants learnt of the judgment in February, 2020 and brought the application in March, 2020. On the issue of security, the court will order an appropriate security to be furnished by the applicants as a condition for the stay.

On the second limb of the application, I am once again persuaded that a proper basis has been laid for the extension of time sought. The 1st respondent did not file a replying affidavit. That means that all the averments of fact in the applicants' affidavit in support of the application are not controverted. The fact that the lower court was to deliver judgment on notice is not controverted. The fact that the judgment was delivered without notice to the applicants' advocates is not controverted. The averment that the judgment was not brought to the attention of the applicants until February, 2020 was also not controverted. The fact that as at the time the applicants learnt of the judgment, the time within which to file an appeal against the lower court judgment had lapsed is also not controverted. I am satisfied that the applicants have given valid reasons for their delay in the filing of the intended appeal. I am also not persuaded that the 1st respondent would suffer prejudice if the extension of time sought is granted.

In conclusion, it is my finding that the applicants' application dated 11th March, 2020 has merit. The application is allowed on the following terms;

1. Pending the hearing and determination of the intended appeal by the applicants to this court, execution of the judgment delivered on 9th September, 2019 by Hon. M.W.Murage(Ms.) SRM in Milimani Commercial Court Chief Magistrate's Court Civil Case No. 2323 of 2011, Wanjiku Ndwaru v Peter Kiboi Githu & 3 others (the lower court case) and the subsequent decree is stayed.
2. Pending the hearing and determination of the intended appeal by the applicants to this court, there shall be an inhibition inhibiting the registration of any other or further dealings with all that parcel of land known NAIROBI/BLOCK63/455.
3. The applicants shall deposit in an interest earning bank account in the joint names of the advocates for the applicants and the advocates for the 1st respondent a sum of Kshs. 500,000/= as security within ninety (90) days from the date hereof in default of which the stay and the order of inhibition granted herein shall lapse automatically without any further reference to the court.
4. The time for filing appeal is extended up to and including 15th November, 2021.
5. The appeal shall be filed in a separate file.
6. Each party shall bear its own costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 21ST DAY OF OCTOBER 2021

S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

MS. KAMWAMI FOR THE APPLICANTS

MR. OKOYO H/B FOR MR. WASUNA FOR THE 1ST RESPONDENT

MR. AWINO FOR THE 2ND RESPONDENT

MS. C.NYOKABI-COURT ASSISTANT