



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO E064 OF 2021

B. GACHANJA KAMANDA.....APPLICANT/APELLANT

CHRISTOPHER MBAI MUNGA.....1ST INTERESTED PARTY

PETER WERU MUNGA 2ND INTERESTED PARTY

VS

GEORGE GICHUKI MWANGI.....RESPONDENT

RULING

1. The Applicant filed the instant Notice of Motion dated 18/8/2021 and expressed under Order 9 Rule 9, Order 10 rule 11, Order 22 (1), (2), (3) of the Civil Procedure Rules and Section 3A of Civil Procedure Act seeking orders that;

a. Spent.

b. Spent.

c. Pending the hearing and determination of the intended appeal this Honorable Court be pleased to issue an Order for Stay of execution of the decree and judgment dated 10/8/2021 together with all other consequential orders therein.

d. Costs of this Application be provided for.

2. The application is based on the grounds on the face of it and the Supporting Affidavit of **B. Gachanja Kamanda**, the Applicant. He avowed that he alongside the two interested parties are aggrieved by the Judgment in Thika MCL&E 31 of 2019 delivered by Hon. Chief Magistrate J.M Nang'ea. That they are the actual owners of the parcel of land L.R Ruiru/Ruiru East Block 3/1584 (*hereinafter referred to as the suit land*). That they stand to suffer irreparable loss as the Respondent is in the process of executing the said Judgement hence the instant application.

3. The interested parties similarly swore a further undated Supporting Affidavit expressing similar averments as the Applicant. They stated that their appeal has overwhelming chances of success and implored the Court to allow the application.

4. The Respondent, **George Gichuki Mwangi** swore his Replying Affidavit on 9/9/2021 and filed 14/9/2021. He deponed that he is the registered owner of the suit land vide Title Deed marked as annexure **GGM1** and confirmed by Certificate of search (**GGM2**) dated 5/10/2018. He dismissed the appeal as lacking chances of success and maintained that he has a right to enjoy the fruits of his judgment. That the Applicant has not met the threshold for grant of stay of execution as laid out in Order 42 of the Civil Procedure Rules. He contended that the Applicant does not stand to suffer any irreparable harm because he (the Respondent) has been in possession of the suit land since the time of purchase. He urged the Court to dismiss the application with costs.

5. On **21/10/2021**, parties took directions and agreed to canvass the application by way of written submissions.

6. The Applicant through the firm of **Ndung'u Mwaura & Co. Advocates** filed submissions dated 1st November 2021 and filed on 3/11/2021. He submitted that he is the registered owner of the suit land having purchased the same in 2014 from Brilliant Ventures Limited. That the interested parties have also jointly owned the suit land from 1984 for a consideration of Kshs. 28,000/= from Thomson Tsuma through the Mwalimu Investment Co. Ltd. He highlighted the provisions of Order 42 rule 6 on stay of execution and cited the case of **Wilfred Nyawira Maina v Peterson Onyienko Gichana (2015) eKLR**.

7. On the issue of substantial loss, the Applicant pointed out that his family has been extensively developing the property by constructing

rental houses. That he thus stands to suffer economic loss in the event the tenants vacate the houses. That the Respondent's averment of occupying the suit land is false.

8. Secondly the Applicant submitted that the instant application was filed without delay being 18/8/2021.

9. On the issue of security he urged that his sole intention in filing the application is for protection until the intended appeal is determined and ensure that the same is not rendered nugatory.

10. On the other hand, the firm of **Kabaka Ombui & Co. Advocates** filed submissions dated 5/11/2021 and filed on the same day on behalf of the Respondent. He beseeched the Court not to take away his right to enjoy fruits of his judgment because he has been in possession of the suit land. He denied any developments on the suit land by the appellant that will occasion him economic loss as submitted. Reliance was placed on the cases of **Machira t/a Machira & Co. Advocates vs. east African Standard (2002) KLR 63** and **Charles Wahome Gethi vs. Angela Wairimu Gethi CoA Civil App. No. NAI 302 of 2007 UR** for the proposition that substantial loss must be specifically demonstrated to the satisfaction of the Court.

11. Further the Respondent submitted that the Applicant has not offered any security for the due performance of the decree as provided under Order 42 of the Civil Procedure Rules. He implored the Court to dismiss the application with costs.

12. The singular issue for determination is whether the Applicant has satisfied the conditions for grant of stay of execution of Judgment.

13. The Applicant in his application cited Order 9 rule 9 of the Civil Procedure Rules that deals with Change to be effected by order of Court or consent of parties, Order 10 rule 11 - Setting aside judgment [Order 10, rule 11. Order 22 that deals with execution of decree and orders. Section 3A - 3A. Saving of inherent powers of Court. Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

14. I have highlighted all the provisions relied on by the Applicant to demonstrate that whereas an application may not fail for citing wrong provisions of the law, the Court is obligated to determine disputes in accordance with the relevant law and principles. See Order 51 rule 10(2) of the Civil Procedure Rules.

15. The principles governing the granting of orders for stay of execution pending appeal are provided for under Order 42 rule 6 of the Civil Procedure Rules as follows: -

“6. Stay in case of appeal [Order 42, rule 6.]

(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.

“No order for stay of execution shall be made under subrule (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.”

16. A reading of sub rule 1 above contemplates that such an application be made at the trial Court in the first instance. Whether the application will be allowed or not, the appellate Court shall be at liberty to hear an application for stay of execution and order the same **as it may deem just**. This provision is augmented by the holding in the celebrated case of **Butt v Rent Restriction Tribunal [1979] eKLR**. That the power to grant or deny stay of execution is discretionary power, to be exercised in favour of a deserving party. Stay of execution is therefore not an absolute right and a party pursuing this relief must demonstrate to the Court that they merit it.

17. In a recent persuasive decision in **Bonito Hotels v Denise Kibisu [2021] eKLR** the Learned Judge held that substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. That the Applicant having failed to proof such, the application for stay of execution was dismissed.

18. In the case of **Macharia T/A Macharia & Co. Advocates vs East Africa Standard [2002] eKLR** cited by the Respondent Kuloba J. (as he then was) held that an Applicant's ground for substantial loss must be specific and detailed as it is not enough merely to state that substantial loss will result or that the appeal will be rendered nugatory. The Applicant has only explained in his submissions that they stand to suffer economic loss in the event the tenants vacate the alleged rental houses.

19. In his submissions, the Applicant expresses the economic loss he stands to suffer should execution of the judgment proceed. He avers that he and his family have occupied the land and made developments including rental houses. The fact of the occupation is confirmed by the prayers in the plaint and the judgement of the Court. The Court has noted the averment that the Respondent is keen in disposing the land which averment has not been controverted.

20. It is to be appreciated that in an application for stay of execution, the Court must also balance the two competing rights as noted by Gacheru J. in **John Gacunja Njoroge vs Joseph Njoroge** (supra). Also see **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR** Ombwayo J **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** Mabeya, J and **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** where the Court set out thus

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal.”

21. As regards security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered.

22. The upshot is that the application has merit and the Court grants conditional stay on the following terms;

a. The stay of execution is granted provided that the record of appeal is filed within 60 days from the date of this ruling.

b. The Applicant to provide security for the due performance of the decree in the sum of Kshs. 150,000/- (One Hundred and Fifty Thousand only) within 30 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both advocates of the parties or a bank guarantee of a similar amount.

c. If the Applicant fails to comply with a)-b) the stay lapses and the Application stands dismissed.

23. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 18TH DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms. Kiarie holding brief for Ndungu Mwaura for the Applicant/Appellant

Ms. Kiarie holding brief for Ndungu Mwaura for the 1st and 2nd Interested Parties

Kabaka for the Respondent

Ms. Phyllis Mwangi – Court Assistant