



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC SUIT NO. 1 OF 2019 (OS)**

**ZIPPORAH KARIGU ALIAS KARIGU**

**M'MUGAMBI NGITI.....1<sup>ST</sup> PLAINTIFF**

**JOHN MWATHI M'MUGAMBI.....2<sup>ND</sup> PLAINTIFF**

**JEREMIAH MURAUKO MUGAMBI.....3<sup>RD</sup> PLAINTIFF**

**BEATRICE GACUNKU.....4<sup>TH</sup> PLAINTIFF**

**DAVID MUTUGI KARIGU.....5<sup>TH</sup> PLAINTIFF**

**JOSPHAT NJERU KIAYA.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SABERA GAKUNDI MWITHI.....1<sup>ST</sup> DEFENDANT**

**BEATRICE KATHAMBI.....2<sup>ND</sup> DEFENDANT**

**CHARITY KAINDI.....3<sup>RD</sup> DEFENDANT**

**VIRGINIA MUTHONI.....4<sup>TH</sup> DEFENDANT**

**JOHN KIMATHI.....5<sup>TH</sup> DEFENDANT**

**ALICE KARIMI.....6<sup>TH</sup> DEFENDANT**

**JAMES MUTUGI MWITHI.....7<sup>TH</sup> DEFENDANT**

**GERALD MUGAMBI.....8<sup>TH</sup> DEFENDANT**

**JAMES MWENDA MWITHI alias JOHN KIMATHI.....9<sup>TH</sup> DEFENDANT**

**STANLEY MURITHI NYAMU.....10<sup>TH</sup> DEFENDANT**

**MARY WAMBUI MWOB.....11<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to a Notice of Motion dated **8<sup>th</sup> October, 2021** brought under Sections 3A, 75, 78 and 79G of the Civil Procedure Act, and Order 9 Rule 9, Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of law. The application seeks the following orders:

1. Spent

2. Spent

3. That this Honourable Court do allow the firm of KIJARU, NJERU & CO. Advocates to come on record in place of NJIRU KITHAKA & CO. Advocates to prosecute this application.

4. That a stay of execution in Chuka HC ELC No. 1 of 2019 (OS) be granted pending the hearing and determination of this application.

5. The court be pleased to grant a stay of execution on Chuka HC ELC No. 1 of 2019 (OS) pending hearing and determination of the appealed Nyerib(sic) against the Judgment delivered by the Hon. P. M. Njoroge on the **25<sup>th</sup> May, 2021**.

6. The costs of this application be provided for.

7. Any other orders that meets the ends of justice.

2. The application is supported by the affidavit of DAVID MUTUGI KARIGU sworn on **8<sup>th</sup> October, 2021** and is based on the following grounds:

i. That if a stay of execution is not granted substantial loss may result to the Applicants since the Respondents want and are in the process of evicting them from the suit land.

ii. That the Applicants have been on land parcel THARAKA/TUNYAI "A"/390 for over 30 years and if evicted they will be rendered landless and destitute.

iii. That the appeal herein has a reasonable chance of success and if execution is carried out it will render the appeal nugatory.

iv. That there has been no delay in bringing this application.

v. That the Defendants are likely to execute the decree herein at any time.

3. The above grounds are repeated in the supporting affidavit and were reiterated by Ms. Kijaru, learned counsel for the Applicants in her submissions. Ms. Kijaru urged the court to allow the application for stay to give the applicants the opportunity to exercise their right of appeal.

4. The application is opposed by the Respondents vide a replying affidavit sworn by James Mutugi Mwithi, the 7<sup>th</sup> Respondent on **10<sup>th</sup> November, 2021**. He depones that there are several parties named as Plaintiffs/Applicants but the affidavit in support of the application states that the deponent was the Appellant/Applicant, suggesting that he was the only applicant herein, and not the others. The Respondents further aver that the Applicant has not exhibited to the court the alleged appeal number or papers of the appeal filed against the Judgment of this court of **25<sup>th</sup> May, 2021**. The 7<sup>th</sup> Respondent has deponed that the subject matter Land Parcel Number SOUTH THARAKA/TUNYAI "A"/390 does not exist and that the same ceased to exist and title closed when the same was sub-divided resulting to parcels numbers SOUTH THARAKA/TUNYAI "A"/4586-4592. Copies of the certificates of searches have been annexed. The Respondents added that the inhibition which had been registered against the titles were removed following the order of this court dated **30<sup>th</sup> July, 2021**.

5. Mr. Kaai advocate for the Respondents in his submissions took issue with the said supporting affidavit, arguing that whereas there are six applicants' in this case, the deponent of the supporting affidavit has not stated whether he was the only one who appealed, or the others have also appealed. That the deponent has not stated whether he was making the application on his own behalf and on behalf of the others. Mr. Kaai submitted that if there was an appeal filed, it would have been prudent for the Applicants to disclose it to the Respondents and to the court, instead of using submissions from the Applicant's counsel. The Respondents counsel reiterated that the suit property South Tharaka/Tunyai "A"/390 sought to be preserved ceased to exist on **25.9.2019** and the title for the same closed when the said parcel of land was subdivided following the execution of the decree of court. The Respondents' counsel therefore urged the court to dismiss the application with costs.

6. The court has considered the application, the Replying Affidavit and the submissions thereto and finds that the issues for determination are:

i. Whether the firm of Kijaru, Njeru & Co. Advocates should come on record in place of the firm of Njiru Kithaka & Co. Advocates.

ii. Whether the Applicant is entitled to the orders sought.

7. With regard to the first issue, the Plaintiffs/Applicants advocates M/s. Kijaru, Njeru & Co. Advocates have sought for leave to come on record in place of M/S. Njiru Kithaka & Co. Advocates who were previously on record for the Plaintiffs. It is not in dispute that the said Advocates came on record after the delivery of Judgment and needed to seek leave of court as per the provisions of Order 9 Rule 9 of the Civil Procedure Rules which provides that:

***"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –***

*(a) Upon an application with notice to all the parties; or*

*(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”*

8. The provisions of Order 9 allows the court to grant leave upon an application with notice to all the parties, or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person. Rule 10 allows the said prayer seeking leave to be brought together with other prayers. I have perused the application herein and confirm that the same has been served on all the parties including the outgoing advocate. The prayer for leave for the firm of Kijaru, Njeru & Co. Advocates has not been contested, thus the said firm is granted leave to come on record in terms of prayer 3 of the application herein.

9. The next issue to consider is whether the order of stay of execution of the Judgment and decree in Chuka ELC No. 1 of 2019 [OS] should be granted pending appeal. Order 42 Rule 6 of the Civil Procedure Rules lays out the law on stay of execution pending appeal by giving the court the discretion to order stay for sufficient cause. Sub rule 2 outlines mandatory conditions that have to be met for court to grant stay pending appeal.

10. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy that substantial loss may result to the applicant unless stay of execution is granted; and thirdly, 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.

11. From the record, the Judgment appealed against was made on **25<sup>th</sup> May, 2021** and the application herein was filed on **14<sup>th</sup> October, 2021**. This was after a period of over five months. The application was therefore not made timeously and the Applicants have not even given an explanation for the delay.

12. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicants, I wish to refer to the case of Kenya Shell Limited –v- Benjamin Karanja Kigibu & Another (1982 – 1988) KAR 108 where the Court of Appeal stated:

***“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”***

13. In the present case, the Applicants have stated that they will suffer substantial loss and the appeal rendered nugatory unless stay of execution is granted because the Respondents may evict them, or sell the suit property. However, in this case, the Respondents have shown evidence that the subject property land parcel THARAKA/TUNYAI “A”/390 no longer exists and the title closed because the same has since been sub-divided into parcels numbers SOUTH THARAKA/TUNYAI “A”/4586-4592. The Applicants have not disputed this fact. In my view, to allow the application would serve no purpose as the subject property sought to be preserved is no longer in existence, the same having been sub-divided and the original title closed. The Applicants, as already stated have brought their application for stay very late in the day. Moreover, if the Applicants were to succeed in the intended appeal, I do not think that the appeal would be rendered nugatory if the stay is not granted because the resultant titles may be revoked and the Applicants ordered back to the land. In my considered view, the application herein has been overtaken by events due to the indolence on the part of the Applicants in failing to make an application for stay timeously.

14. In the result, this court finds no merit in the Notice of Motion dated **8<sup>th</sup> October, 2021**. The same has failed to meet the threshold laid down in Order 42 Rule 6 of the Civil Procedure Rules and is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**In the presence of:**

CA: Ndegwa

Ms. Kajuri for Plaintiffs/Applicants

N/A for Defendants/Respondents

**C. K. YANO,**

**JUDGE.**