



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**

**ELC CASE NO. 227 OF 2016 (O.S)**

**CHARITY NYAGUTHII KAMUTU.....1<sup>ST</sup> APPLICANT**

**FRANCIS MAINA KAGUCUI.....2<sup>ND</sup> APPLICANT**

**ESTHER WANGUI MURIITHI.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**ANTHONY MUNENE GITHUMBA (Sued as the administrator of the estate of the late GITHUMBA KANYUGI and on his own behalf).....1<sup>ST</sup> RESPONDENT**

**JOHN WACHIRA KITHUMBA.....2<sup>ND</sup> RESPONDENT**

**CLEMENT KARIMI GITHUMBA.....3<sup>RD</sup> RESPONDENT**

**BENSON WANJOHI GITHUMBA (Sued as trustee for themselves and of MARGARET KARUANA KITHUMBA).....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicants, vide a notice of motion dated 30/03/2021 are seeking the following orders;

1. Spent.

2. Spent.

3. THAT, this Hon. Court be pleased to grant the respondent an order for STAY of EXECUTION of the judgment/Decree dated 19/02/2021 pending the hearing & determination of the intended Appeal before the court of Appeal Nyeri.

4. THAT, the costs of this application be provided for.

2. The said application is brought under Order 42 Rule 6 of the Civil Procedure Rules. The application is premised on grounds shown on the face of the said application and the Applicant’s supporting as well as a further Affidavit sworn on 30/03/2021 and 07/06/2021 respectively. The said Application is opposed with a Replying Affidavit sworn by Charity Nyaguthii Kamutu and Francis Maina Kagucui on 19/14/2021.

3. When the Application came up for directions on 30/06/2021, the parties agreed to canvas the same by written submissions.

**4. APPLICANTS SUMMARY OF FACTS**

The Applicants through their supporting Affidavit and the further Affidavit made the following depositions;

A) That I am advised by our current Advocates on record which I verily believe to be true that on or about 13/06/2013, L.R Title NO. INOI/KARIKO/280 ceased to exist after its subdivision into L.R Title NO. INOI/KARIKO/3376, 3377, 3378, 3379, 3380, 3381 &

3382. The filing on 19/12/2016 of this suit and its continuous prosecution up to even judgment dated 19/02/2021 was academic because there are no existing valid orders for cancellation of the Titles of the subdivisions to revert to L.R Title NO. INOI/KARIKO/280.

B) THAT, to enable this Hon. Court appreciate the facts of this matter further, I annexed hereto copies of the Titles of the subdivisions as Exhibits marked “AMG-1”.

C) THAT after the judgment dated 19/02/2021, the Respondents filed a Notice of Appeal, sought for the typed proceedings herein and paid a deposit of Kshs 1,800/-.

FURTHER AFFIDAVIT.

D) I swear this Affidavit further to the one I swore on 30/03/2021 and also in response to the Replying Affidavit by CHARITY NYAGUTHII KAMUTU, FRANCIS MAINA KAGUCUI & ESTHER WANGUI MURIITHI.

E) THAT as demonstrated at paragraph 6 of the supporting affidavit to our application dated 30/03/2021, we had filed a Notice of Appeal and sought for proceedings in the matter after the impugned judgment herein dated 19/02/2021.

F) THAT I am advised by our Advocates on record which I verily believe to be true that the filing of the documents indicated in Paragraph 3 above in itself is evidence of having filed an appeal before the court of Appeal Nyeri.

G) THAT to set the record straight regarding L.R Title NO. INOI/KARIKO/280 and the subdivisions thereof being L.R Title NO. INOI/KARIKO/3376, 3377, 3378, 3379, 3380, 3381 & 3382. I hereby annex as an Exhibit marked “AMG-1” the following documents emanating from NAIROBI HIGH COURT SUCC. CAUSE NO. 68 OF 2011 which is a succession cause for L.R Title NO. INOI/KARIKO/280 only, that is to say;

(a) The petition for probate of written WILL dated 17<sup>th</sup> January, 2011 & filed in court on 18/01/2011.

(b) Affidavit in support of the petition also sworn on 17/01/2011 & filed on 18/01/2011.

(c) The Kenya gazette NO. 1548 dated 27/05/2011.

(d) Initial Letter of Administration issued on 14/07/2011.

(e) The certificate of Confirmation of Grant dated 28/02/2012 and issued on 23/07/2013.

(f) Letter of the consent by Central Division Land Control Board dated 25/10/2013.

(g) Mutation forms for subdivision to support the Titles issued as in paragraph 5 & 6 of my other supporting affidavit. Notice the approval by the county Government of Kirinyaga & the District Physical Planning Officer Kirinyaga.

h) THAT evidence has been laid bare before this Hon. Court that L.R Title NO. INOI/KARIKO/280 ceased to exist even before the filing of this suit herein which are facts no court can wish away.

##### **5. RESPONDENTS SUMMARY OF FACTS**

The Respondents in their Replying Affidavit deposed as follows;

1) THAT there is no evidence of any appeal filed in the Nyeri Court of Appeal and no grounds of appeal have been annexed to the application.

2) THAT the Applicants are seeking indefinite orders as the appeal case is not mentioned and I will be greatly prejudiced if an indefinite stay of execution of the judgment is issued.

3) THAT I wish to enjoy the fruits of my Judgment.

4) THAT it is clear from the proceedings that we stay on the land with a lot of hostility from the Applicants and it is only fair that our portion of land be transferred to us so that we can occupy our portion peacefully and develop the same as the Applicants pursue other forums.

5) THAT our houses are run down by rain as we had not been able to build permanent residences as the land was in the defendants' names.

6) THAT I stand to suffer great prejudice if a stay of execution of the judgment is issued as I am aged and have lived like a squatter.

7) THAT the court awarded us only one acre whereas the Applicants will remain with the rest of the land and they have not annexed

a mutation form to show which title deed is for the 1 acre that we occupy and how the other defendants are affected by the said subdivision because their Title deeds are not genuine.

8) THAT the Applicants have not demonstrated that they have an arguable appeal.

9) THAT the Applicants only issue is that they are of the view that the old number had been subdivided and consolidation was necessary.

10) THAT their said ground has no merit as I have purchased a green card and recent search and the land parcel the court dealt with still exists and even has a caution and it is trite law that a certificate of search is proof of ownership and a guarantee as to the content of the same to be correct (annexed and marked CNK (a) & (b) is a copy of the green card and search).

11) THAT the issue of the land INOI/KARIKO/280 having been subdivided to land parcel NO. INOI/KARIKO/3376-3382 was not brought up at the hearing and new grounds cannot be introduced at this stage or at the appeal stage.

12) THAT the Title Deeds for Land Parcel Nos. INOI/KARIKO/3377-3382 annexed to the application have no relationship to the suit land.

13) THAT the Applicants have not shown how this court erred in making a determination of this case other than allege the land parcel INOI/KARIKO/280 does not exist and the intended appeal is meant to delay us from getting our entitlement and the application should be rejected entirely.

14) THAT the Applicants have not denied that we are not entitled to the land by way of adverse possession.

15) THAT the Applicants have not shown what prejudice they will suffer if the application is not allowed as we occupy the ground the court awarded us and they occupy the rest of the land and no one is going to be displaced.

## **6. ANALYSIS AND DECISION**

I have considered the application dated 30/03/2021, the affidavits both in support and in opposition and the annexures. I have also considered the submission by the counsels and the applicable law. It is trite law that a party seeking stay of execution Under Order 42 Rule 6 must establish the three conditions set out thereunder. First, the Applicant must make such application without unreasonable delay. Secondly, the applicant must show that unless the orders of stay are granted, he will suffer substantial loss and finally, the Applicant should provide such security for the due performance of the decree as may ultimately be binding on him.

7. On the first condition, the impugned Judgment of this court was delivered on 19/02/2021 while the application under review was made on 30/03/2021. The application was made within a period of one month and one week. The application in my view was brought without unreasonable delay. As regards the second condition, the Applicants have not stated what substantial loss they will suffer if the application is not granted. Substantial loss has been defined as substratum or the essence of the appeal which the court must safeguard so that the appeal is not rendered nugatory. The Applicants have not said that unless the application is granted, the intended appeal will be rendered superfluous.

8. The Applicants have not also given security as one of the conditions for the grant of the orders sought. In my view, the application dated 30/03/2021 lack merit and the same is hereby dismissed with costs to the respondent.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10<sup>TH</sup> DECEMBER, 2021**

**HON. E. C. CHERONO**

**ELC JUDGE**