



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO 650 OF 2017**

**FRANCIS KIARIE KAMAU.....1ST PLAINTIFF**

**MICHAEL KAMAU WANDEGWA.....2ND PLAINTIFF**

**=VERSUS=**

**SAMMY KIMEMIA NJUGUNA.....1ST DEFENDANT**

**THERESA WAIRIMU NJUGUNA.....2ND DEFENDANT**

**RULING**

1. Judgment in this suit was rendered by Gacheru J on 8/10/2021. She made a final finding in favour of the plaintiffs and issued the following disposal orders.

*a) An order be and is hereby made directed to the Land Registrar, Thika Land Registry, to remove the caution registered against the property known as Land Reference Number Kiambu/Gatuanyanga/ 4891, registered by the 2nd defendant herein on the 4th August 2014.*

*b) That an order of specific performance be and is hereby made compelling the defendants herein jointly and severally to complete their obligations both under the contract for sale and the subsequent addendum in respect to the transfer of the one decimal six hectares property being Land Reference Number Kiambu/Gatuanyanga/ 4891.*

*c) That the plaintiffs shall have costs of this suit together with interest thereon.*

2. More than one month subsequent to the delivery of the judgment, the 2nd defendant brought a notice of motion dated 12/11/2021, seeking: (i) a post-judgment injunctive order; (ii) an order of stay of execution of the resultant decree pending the hearing of an intended appeal against the said judgment; and (iii) an order directing the Court Registry to fast-track issuance of typed and certified proceedings to her to enable her file the record of appeal. The said application is the subject of this ruling.

3. The application was supported by the 2nd defendant's affidavit sworn on 11/10/2021. She deponed that she had preferred an appeal against the said judgment. She exhibited a copy of the notice of appeal dated 21/10/2021. She further deponed that the intended appeal stood to be rendered nugatory and she stood to suffer substantial loss if the orders sought were not granted. She deponed in her supplementary affidavit that she had established that the suit property had been transferred to **Thika East Park Limited** on 22/10/2021.

4. The application was canvassed through written submissions dated 1/12/2021 filed through the firm of *Ndungu, Njoroge and Kwach Advocates, LLP*. Counsel identified the following as the issues falling for determination in the application: (i) Whether the court should grant a temporary injunction to restrain the plaintiffs and the 1st defendant from transferring, alienating or dealing in any way in the property known as Land Reference Number Kiambu/Gatuanyanga/4891 pending the hearing and determination of this application; (ii) Whether the court should stay the execution of the decree arising from the Judgment and orders of this honourable court made on 8/10/2021 as against the applicant pending the hearing and determination of the intended appeal by the applicant in the Court of Appeal; (iii) Whether the court can issue orders it may deem fit to serve the ends of justice in the circumstances of this case, including an order that the issuance of the certified typed proceedings be fast-tracked to enable the applicant to file the record of appeal; and (iv) Who should bear costs of the application.

5. On the first identified issue, counsel submitted that the court had inherent powers under **Sections 3A and 63(e)** of the **Civil Procedure Act** to issue a post-judgment injunction in favour of a judgment debtor. Counsel contended that the applicant had satisfied the threshold in **Giella v Cassman Brown & Co Ltd [1973] EA 358**, hence she should be granted the post judgment injunction.

6. On the second issue, counsel submitted that the applicant had met the requirements of **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. Counsel urged the court to be guided by the general rule that the court ought to exercise its best discretion in a way to prevent the appeal, if successful, from being rendered nugatory. Counsel relied on the decision in **Butt v Rent Restriction Tribunal [1979]eKLR**, among others.

7. On the third identified issue, counsel proposed that in the interest of justice, given the circumstances, the court should exercise discretion and its inherent power under **Sections 3A and 91** of the **Civil Procedure Act** and **Section 80** of the **Land Registration Act** to vary and/or reverse the decree to reinstate the caution registered against the suit property by the applicant and order the Land Registrar to cancel the title issued to **Thika East Park Limited** pending the hearing and determination of the intended appeal. Lastly, counsel urged the court to award the applicant costs of the application, to be borne by the respondents.

8. The plaintiffs opposed the application through a replying affidavit sworn on 1/12/2021 by Francis Kiarie Kamau. He deponed, *inter alia*, that the orders sought were not available because the judgment of the court and the resultant decree had already been executed. He added that the 2nd defendant's claim was quantifiable and capable of being compensated by way of damages in the event of success of the appeal. He further deponed that the intended appeal had not been "preferred" despite a notice of appeal having been filed. He faulted the applicant for not exhibiting a draft memorandum of appeal.

9. In their written submissions dated 3/12/2021, filed through the firm of *Olando Okello and Luseneka Advocates*, the plaintiffs reiterated that the orders sought in the application were not available because the judgment and the resultant decree had been executed. They added that the court cannot issue the orders sought in the absence of the current registered proprietor of the suit property. They urged the court to dismiss the application.

10. I have considered the application; the response to the application; and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The plea for post-judgment injunctive orders was sought pending the interpartes hearing and determination of the application. The application was heard and falls for determination through this ruling. That plea is therefore spent.

11. The plea for an order directing the Court Registry to supply the 2nd defendant with typed and certified copies of the proceedings should probably not be necessary because any party who desires to access typed and certified proceedings should be supplied with the proceedings expeditiously. I will nonetheless issue an appropriate directive to the effect that the proceedings be typed and issued to the 2nd defendant immediately.

12. The only substantive issue that remains to be determined is whether the

applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant orders of stay pending appeal. That jurisdiction is regulated by the framework in **Order 42 rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

***"6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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."***

13. In the present application, the applicant's advocate swore a supplementary affidavit dated 1/12/2021 in which she deponed that she had established that the suit property was on 22/10/2021 transferred to **Thika East Park Limited**. She exhibited a copy of the parcel register confirming that position. Indeed, the parcel register exhibited shows that the caution which had been placed against the parcel register was vacated on 22/10/2021 pursuant to a decree of this court. It further shows that the suit property was on the same day transferred to **Thika East Park Limited**.

14. The import of the foregoing is that the judgment and decree of the court was executed on 22/10/2021 and the suit property now belongs to a third party who is not a party to this suit. In the circumstances, there is nothing to stay. The application for stay came too late in the day. Further, it would be against the rules of natural justice if this court were to issue orders against the said third party in their absence.

15. In light of the foregoing, the 2nd defendant's application dated 12/11/2021 is disposed in the following terms:

***a) The plea for post-judgment injunctive orders is spent because the post-judgment injunctive orders were sought pending the hearing and determination of the application and the application is now disposed.***

***b) The plea for stay of execution pending an intended appeal is declined on the ground that the decree has been executed and the land is now held by a third party who is not a party to this suit.***

***c) The Court Registry is hereby directed to forthwith type and avail to the 2nd defendant certified copies of the typed proceedings in this file.***

***d) There shall be no order as to costs of the application.***

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF DECEMBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Mr Okello for the Plaintiffs

Ms Gatuhi for the 2nd Defendant

Court Assistant: Lucy Muthoni