



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NUMBER 117 OF 2015

MARTHA WANGUI THURURA

KOJAK NDEGWA THURURA (Both suing as leg. Rep. of

CHRISTINE WANGECHI THURURA)PLAINTIFF

VERSUS

HENRY GITAH THURURA1ST DEFENDANT

STABEX INTERNATIONAL LIMITED.....2ND DEFENDANT

COUNTY LAND REGISTRAR BUSIA3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The 2nd defendant/applicant brought an application dated 5th May 2021 under Article 159 of the Constitution, Section 3 and 13(7)(a) of the Environment and Land Court Act, 2011, Order 42 Rule 6(1) and (4) and Order 51 Rule 1 of the Civil Procedure Rules and Rule 1, 20, 21 and 22 of the Practice Directions on Proceedings in the Environment and Land Courts and all enabling provisions of the law seeking for the following orders;

a) Spent.

b) Pending the inter partes hearing of the application, this court be pleased to grant stay of execution of the judgment of the Hon. Lady Justice A. Omollo delivered on the 18th day of March 2021.

c) Pending the hearing and determination of the appeal in Kisumu Court of Appeal Civil Appeal No. E064 OF 2021, this court be pleased to grant stay of execution of the judgment of the Hon. Lady Justice A. Omollo delivered on the 18th day of March 2021.

d) Costs of this application be provided for.

2. The application was supported by the grounds on the face of it and the affidavit of ABRAHAM KIPKOECH KORIR inter alia;

i) By a judgment of this Honourable Court delivered on 18/3/2021, the court directed the cancellation of the successive transfer of land parcel number North Teso/Kamuriai/1002 from the deceased proprietor to the 1st defendant and from the 1st defendant to the 2nd defendant.

ii) The 2nd defendant/applicant is dissatisfied with the judgment and has since filed an appeal against the judgment being Kisumu Court of Appeal Civil Appeal No. E064 of 2021.

iii) The appeal is arguable and shall be rendered nugatory in the event that the application for stay is not granted.

iv) Unless stay of execution pending appeal is granted by this Honourable Court the 3rd defendant/respondent will proceed to cancel the successive titles and register the suit property in the name of the deceased proprietor and thus leave the suit property at

the disposal of the plaintiffs/respondents.

v) *The 2nd defendant/applicant is apprehensive that the plaintiffs will proceed to execute the decree by seeking to evict the 2nd defendant from the suit property and the 2nd defendant shall suffer irreparable loss and damage as it has spent money in developing/upgrading the petrol station for the purposes of carrying its business therein.*

vi) *The 2nd defendant will suffer substantial loss if the suit property is left at the disposal of the plaintiffs as they are likely to dispose of the same by way of sale to third parties or transfer to the beneficiaries of the deceased proprietor's estate.*

3. The Plaintiffs/respondents filed their Grounds of Opposition dated 26th May 2021 and stated that the application lacks merit and the plaintiffs stand to continue suffering irreparable loss that started way back in the year 2015 when the title for the deceased kin was stolen by the applicant. They further stated that the legal property in the title deed never passed to the applicant hence there is no arguable appeal and there is no pending suit in law vide which the imputed conversion can be imputed against the plaintiffs/respondents.

4. The plaintiffs/respondents further filed a Replying Affidavit dated 22nd June 2021 which was sworn by Martha Wangui Thurura who deposed that during the period when the suit was pending, the estate continued to lose rental income of Kshs.672,000/= per annum which was then and is now going into the accounts of the applicant. She deposed that owing to the lack of movement of property in the suit title to the applicant, the filed appeal that revolves on the plea of an innocent purchaser for value without notice remains frivolous in view of the provisions of Section 26(1)(b) of the Land Registration Act. She stated that the estate has suffered irreparable losses and has been exposed to suffering and denial of rental income for the last five years when the deceased's legal title deed had been taken away and there was no basis to extend the loss and suffering any further especially when the legal title deed in the suit property has now been restored to its rightful deceased owner. She deposed that they do not intend to sell or transfer the suit property to third parties but they sought to be put back in control as they awaited the applicant to pursue his appeal.

5. She further deposed that the applicant has already recouped the purchase money from the rental income and profits which it had drawn for the last five years when the suit was pending in court and they should therefore leave the suit property as they pursue the appeal and restitution of its purchase money by the 1st defendant. She added that the applicant would not suffer any loss if the application is refused because they still have the option of suing and recovering all the losses from the 1st defendant who was their contracting partner. She stated that the applicant has failed to offer any security for the grant of any stay orders and such stay orders, if granted, shall be applied generally to block their efforts to recover the taxed costs. She stated that granting the application will sustain the illegal criminal conduct that is prohibited by Section 45 of the Law of Succession Act to the detriment of the deceased's estate and that there shall be no prejudice to the applicant if the deceased's suit property is succeeded and held by the succession court's appointed legal representative until the determination of the filed appeal. Annexed to the affidavit was a copy of the values report marked MWT-1, a copy of certificate of costs marked as MWT-2.

6. The parties herein agreed to dispense with the hearing of the application by way of written submissions. The 2nd defendant/applicant filed their submissions on 19th July 2021 and submitted that they made their application for stay without unreasonable delay and that if the application is not stayed they will suffer substantial loss as the plaintiffs/respondents may proceed to sell the same or distribute to the beneficiaries of the deceased's estate to their detriment. They relied on the decisions in **Rhoda Mukuma v John Abuoga (1988) eKLR**, **Kiplagat Kotut v Rose Jebor Kipngok (2015) eLKR**, **Desterio Nyongesa Wanyama v Gilbert Wesonga Mugeni & another (2019) eKLR**.

7. The plaintiffs/respondents filed their submissions on 26th July 2021 and submitted that though the applicant has a statutory right to file an appeal, the right to appeal once taken up by the applicant should not be perceived to be granting to it automatic stay orders of execution especially when the court had ordered that the suit title be restored into the name of its deceased owner and that the applicant has failed to show that it has an arguable appeal. They submitted that the applicant has failed to show and prove that the appeal will be rendered nugatory if stay orders are not granted and the applicant will not suffer irreparable loss if the application is refused as they are the ones who have suffered irreparable loss owing to their title that had been taken away. They further submitted that the applicant is required to deposit security in court and a deposit of Kshs.1,344,000/= in court as security to cater for the aspect of loss of rental income would suffice as a condition for stay irrespective of the legal status of the plot and as they awaited the determination of the appeal.

8. I have carefully considered the grounds upon which the application is based, the replying affidavit and submissions and it is my view that the issue the court is called upon to decide at this point is whether the Applicant has met the conditions for the grant of stay of execution orders.

9. The principles guiding the grant of stay of execution orders pending appeal are now well settled in law as is provided under Order 42 Rule 6 of the Civil Procedure Rules. The applicant should satisfy the court that;

- *Substantial loss may result to him unless the order is made;*
- *That the Application has been made without unreasonable delay; and*
- *The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.*

10. There is also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See **Civil Appeal No.107 of 2015, Masisi Mwita -vs- Damaris Wanjiku Njeri (2016) eKLR**, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another -vs- Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that: -

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows: -

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”.

11. The applicant has stated that if stay is not granted and the appeal succeeds, they will suffer substantial loss as the plaintiffs/respondents are likely to dispose the suit property by way of sale to third parties or transfer to the beneficiaries of the deceased proprietor’s estate. They also stated that they have spent money in developing/upgrading the petrol station for the purposes of carrying out their business and they are apprehensive the plaintiffs/respondents will execute the decree and evict them. The applicant pleaded that the plaintiffs/respondents might not be in a position to compensate them should the execution process proceed. The plaintiffs/respondents, on the other hand, have stated that they do not intend to sell or transfer the same to third parties but they seek to be put back in control as they await the applicant to pursue his appeal. The plaintiffs/respondents did not make any averments with regard to their means to compensate the applicant should the appeal be successful.

12. In the decision in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR**, the Court of Appeal expressed itself as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

The 2nd defendant/applicant has shown that he is still in possession of the suit property. I find that the 2nd defendant/applicant has satisfied the court that he would suffer substantial loss if it is evicted which eviction will result in loss of business and property.

13. The 2nd defendant/applicant filed their application on 7th May 2021. The Notice of Appeal and Record of Appeal were filed on 1st April 2021 and 23rd April 2021 respectively. The judgment herein was delivered on 18th March 2021. I find that there was no unreasonable delay in bringing this application for stay pending appeal.

14. The 2nd defendant/applicant has not expressed his willingness to offer security pending the hearing and determination of the appeal. The plaintiffs/respondents have stated that the deceased’s estate has been losing Kshs.672,000/= per annum for the five years the suit was pending and pleaded that a deposit of Kshs.1,344,000/= as security to cater for the aspect of loss of rental income would suffice as a condition for stay. The plaintiffs/respondents have also attached a Certificate of Costs which was taxed at Kshs.404,725/= on 19th May 2021. Though the plaintiff/applicant has not demonstrated that the 2nd defendant/applicant might be unable to compensate them the taxed costs should the appeal fail, it is the duty of the court, as far as possible, to balance the interests of the parties. In that regard, I do order that the 2nd defendant/applicant do deposit the whole of the taxed costs in a joint interest earning account as security.

15. In the circumstances, I am satisfied that the interests of justice in this case demand that there be a stay of execution pending appeal. I proceed to grant the following orders;

a) An order of stay of execution be and is hereby granted pending hearing and determination of the appeal before the Court of Appeal.

b) That the applicant shall, within 30 days from the date of this ruling deposit security in the sum of Kshs.404,725/= in a joint interest earning account to be held in the names of advocates for the plaintiff and the 2nd Defendant/Applicant herein in a banking institution with repute.

c) In the event of failure to comply with condition (b) the stay of execution orders to the respondents will be at liberty to execution for the taxed costs.

d) These orders do apply mutatis mutandis Busia ELC 119 of 2015 which is between the same parties herein

e) Costs to be in the intended appeal.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF DECEMBER 2021.

A. OMOLLO

JUDGE