



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO E028 OF 2021**

**WILLIAM KAGOTHO GACHURI.....APPELLANT/APPLICANT**

**VERSUS**

**JULIUS KANYUKU WANJAU.....1<sup>ST</sup> RESPONDENT**

**BISHAR ALI MOHAMED.....2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal arising from the Judgment and Order of Hon. G. A. Mmasi delivered in Milimani Commercial Court Civil Suit No 3862 of 2016 on 15<sup>th</sup> March 2021)*

**BETWEEN**

**WILLIAM KAGOTHO GACHURI.....PLAINTIFF**

**VERSUS**

**JULIUS KANYUKU WANJAU.....1<sup>ST</sup> DEFENDANT**

**BISHAR ALI MOHAMED.....2<sup>ND</sup> DEFENDANT**

**NAIROBI CITY COUNTY.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 20<sup>th</sup> April 2021 brought under article 159(2)(d) of the Constitution of Kenya, sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act, Cap 21 Laws of Kenya, order 42 rule 6, order 22 rule 22 of the Civil Procedure rules and all the other enabling provisions of the law.

2. It seeks orders:-

**1. Spent**

**2. Spent.**

**3. That this honourable court be pleased to and hereby do grant a temporary injunction restraining the defendants by themselves, their agents, employees or anybody else whomsoever acting on their behalf from selling, transferring, auctioning, disposing off and/or otherwise howsoever interfering with Plot NO 163/1 Komarock Bridge Jua Kali pending the hearing and determination of this Appeal.**

**4. That cost of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs 1 to 11.

4. The Application is supported by the affidavit of Willam Kagotho Gachuri, the Appellant/Applicant sworn on the 20<sup>th</sup> April 2021 and a further affidavit sworn on the 16<sup>th</sup> August 2021.

5. The Application is opposed. There are grounds of opposition filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 2<sup>nd</sup> June 2021.

6. On the 21<sup>st</sup> July 2021 the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

7. I have considered the notice of motion and the affidavits in support. I have also considered the grounds of opposition and the rival submissions. The issue for determination is whether this application is merited.

8. **Order 42 rule 6** of the Civil Procedure Rules provides that:-

*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.*

*2) 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.*

*3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

9. I have considered the Application herein and I find that it was brought without unreasonable delay as the impugned judgment it was delivered on 15<sup>th</sup> March 2021.

10. It is the Appellant's case that he has invested heavily on the suit property and he would suffer irreparable loss if the same is disposed to a third party.

11. He has also stated that he is ready and willing to provide security for the due performance of the decree. In the case of **Focin Motorcycle Co. Ltd vs Ann Wambui Wangui & Another [2018] eKLR** it was held thus:-

*“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgement. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay.”*

12. I have considered the fact that the Appellant is willing to deposit security for costs pending the outcome of the Appeal.

13. In conclusion, I find merit in this application and grant the orders sought namely:-

*(a) That a temporary injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by themselves, their agents, employees or anybody else whomsoever acting on their behalf from selling, transferring, auctioning, disposing off and/or otherwise howsoever interfering with Plot NO 163/1 Komarock Bridge Jua Kali pending the hearing and determination of this appeal on condition that the Appellant do deposit Kshs.300,000 being security for costs in court within forty five (45) days from the date of this ruling in default the orders of stay shall lapse.*

*(b) The costs of this application do abide the outcome of the Appeal.*

It is so ordered.

**Dated, signed and delivered at Nairobi on this 2<sup>nd</sup> day of December 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Kuria for the Appellant

No appearance for the Respondents

Steve - Court Assistant