



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC MISC. APPL. NO. 11 OF 2019

CHARLES GITHINJI MUIGUA.....APPLICANT

-VERSUS-

JACKSON MAINA NDERITU.....RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 31st July 2019 brought under *Section 3, 3A 78, 79G of the Civil Procedure Act Order 42 and 51 Rule 1, of the Civil Procedure Rules*, where the Applicant seeks:

i. Spent

ii. Spent

iii. That this honorable Court be pleased to grant stay of execution of the decree dated the 15th March 2019 pending the hearing and determination of the Appeal.

iv. That the Honorable Court be pleased to grant the Applicant leave to file the Appeal out of time.

v. That this Honorable Court be pleased to grant a temporary injunction directed that the Respondent, his agent and/or servants on any person acting under his authority from selling by public auction land parcel No. Mweiga/BLK 5/Muthuini/1133 and Plots No. 22 and 42 Kiandu pending the hearing and determination of this Application and Appeal herein.

vi. The cost of this Application and Appeal be borne by the Respondent.

2. The said Application is premised on the grounds on the face of it as well as the sworn affidavit of Charles Githinji Muigua sworn on the 31st July 2019.

3. On the 31st October, 2019, after the Court had heard the submission by Counsel on how they sought to dispose of the Application, it held that although the matter had been slated for viva voce hearing that morning, Counsel for the Respondent had taken the liberty to file his written submissions without leave of Court thereby ambushing the Applicant's Counsel. That to be fair to the Applicant and in view of the fact that their property was at the verge of being sold, the written submissions were admitted as properly on record whereby the Applicant was granted 14 days to file and serve their written submissions with a corresponding leave to the Respondent to file and serve their response if need be within 7 days.

4. The Court also exercised its discretion and granted a temporary stay of execution until the delivery of the ruling to the Application.

5. I have considered the Application and the supporting affidavit herein. The Applicant's bone of contention is that on the 27th October 2007 he had entered into a sale and agreement with the Respondent for the sale of 3 (three) plots at the consideration of ksh.180,000/= per plot. That upon execution of the agreement, the Respondent had paid him Ksh 360,000/- for consideration of two plots and was to pay a balance of Ksh 180,000/- by the 31st January 2008.

6. Tat the Respondent did not pay the balance as agreed thus breaching the contract which led to its repudiation. The Applicant then sold the plot to a 3rd party and sought to return to the Respondent the consideration he had paid but the Respondent declined to receive the money on several occasions wherein he had subsequently filed suit in the Chief Magistrates' Court being CMCC No. 447 of 2009 wherein he sought for a sum of Ksh 316,000/=

7. That the Applicant fell ill in the months of June, October and December 2009 hence was unable to take part at the hearing of the matter. Subsequently his advocate also withdrew from acting for him where the matter proceeded ex-parte where an interlocutory judgment was entered and a Decree issued on 31st August 2010.

8. The Applicant filed an application dated 28th August 2014 seeking to set aside the interlocutory judgment and all consequential orders. However his new appointed Counsel failed to appear in Court and the application was dismissed for non-attendance.

9. Through an application dated the 12th November 2015, the Applicant sought to stay the sale of these properties by public auction wherein the application was heard and ruled in his favour and he was allowed to amend his defence. The interlocutory judgment was set aside and the defence allowed to state their case.

10. The Applicant had been called to testify wherein his witnesses were never called and the matter was concluded where judgment was entered on the 27th November 2018 against the Applicant who only got to know of the results vide a letter and Decree dated 15th March 2019.

11. Upon getting to learn of the decision of the Court he had filed his Application dated the 24th June 2019 seeking stay of execution of the Decree, which application was dismissed with costs vide a ruling delivered on 23rd July 2019.

12. That he now faced the risk of losing his matrimonial home if the Respondent was allowed to execute the Decree dated 15th March 2019 and the Order dated the 23rd September 2015.

13. That he had not filed his Appeal on time as he had got to learn that judgment had been entered against him and a Decree issued, upon receipt of a letter dated 23rd May 2019 from his Advocate, which was almost six months after the judgment had been delivered.

14. That the delay in filing the Appeal was not deliberate and his Appeal had a high chance of success and further that the Respondents did not stand to suffer any damage if the orders he sought were granted.

15. In response to the Applicant's Application, the Respondent filed his Grounds of Opposition as well as his written submission to the effect that the said judgment was given on 27th November 2018 wherein the present application was made seven months after the delivery of the judgment which was after an unreasonable delay contrary to the provisions of Order 42 Rule 6(2) (a) of the Civil Procedure Rules.

16. That the Applicant had not offered any security for the due performance of the Decree and further that an injunction could not be issued against a judgment creditor who was executing a Decree issued by the Court.

17. The Respondent's further grounds of opposition was that unlike what the Applicant had submitted, the Application that had been dismissed by the lower Court on the 2nd July 2019 had not been an Application for stay of execution of a decree but rather, an application for a temporary injunction. That this was a dispute between parties that had begun in the year 2007 which was 12 years ago and the purpose of the Applicant's application was to further prolong litigation which was against the cardinal principle of law that there must be an end to litigation.

18. The Respondent further questioned the jurisdiction of the Court to the effect that matter before the Magistrate's Court had concerned a claim for money and not a claim for land and thus filing this application in the present Court offended the provisions of Article 162(2) (b) of the Constitution.

19. In addition, the Respondent submitted that as per the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules the same was clear to the effect that a stay of execution would only be entertained and granted where there was an Appeal filed. That in the present case, the Applicant had not filed any Appeal and therefore this application for stay of execution has incompetent.

Determination.

22. On the onset, the jurisdiction of the Court has been questioned. It is therefore important to address this issue before delving into the merit of the Application for as was held in the case of **Lillian 'S' [1989] KLR 1** Nyarangi, JA stated, inter alia:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. Article 162 of the Constitution establishes the Environment and Land Court whose jurisdiction is succinctly spelt out in Article 162 (2)(b) in that it shall hear cases relating to the use and occupation of, and title to, land.

21. I have perused the attachments herein filed and more so the Plaintiff in Nyeri CMCC No 447 and note that the Plaintiff was seeking for a refund of Ksh. 360,000/= for breach of a land sale agreement. Clearly this was a matter within the jurisdiction of this Court, and therefore the Court has jurisdiction to determine the same. Having found as such I now move to determine the merits of the Applicant's Application.

22. The law concerning stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows:

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 sub rule (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.

23. I shall rely on the conditions set down for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules as issues for determination to which :

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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.

24. On the first condition/issue for determination, the Applicant has stated that he now faced the risk of losing his matrimonial home if the Respondent is allowed to execute the Decree dated 15th March 2019 and the order dated the 23rd September 2015.

25. In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

26. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of her Judgment. **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410;**

27. It was stated by Kuloba, J in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.

28. In an application of this nature, the Applicant should show the damages he would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of her judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see **Kenya Shell Ltd (Supra)**

29. On the second issue for determination, I find that there is no dispute that Judgment was delivered on the 27th November 2018 wherein this Application as made 7 months later. The Applicants explanation was that he was unaware that the matter had been concluded until he received a letter dated the 15th March 2019 forwarding a decree that had been issued. He had subsequently filed an application for injunction dated the 24th June 2019 which was dismissed. I find that the delay of seven (6) months after the delivery of the judgment and five (5) months after notification of the same was inordinate in my humble opinion.

30. On the last issued for determination, The Court also finds that the Applicant has offered no security for the performance of the decree, and taking into account the unreasonable and inexcusable delay in filing the application, he should have figured out what security to provide in the event a stay was granted. Applicant on the question of security also fails.

31. Having found that the conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Plaintiff/Applicant, I find that this Court is not inclined to grant the order of stay of execution so sought.

32. On the issue wherein the Applicant sought for leave to file his Appeal out of time, the provisions of Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the Appeal is merited. The section provides as follows:

Every Appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order Appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an Appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time.

33. The Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR* laid down some basic principles that a Court needs to have in mind while granting or refusing to grant an extension of time to Appeal which **list is not exhaustive. It is upon the Applicant to place sufficient material before the Court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court then has to balance the competing interests of the Applicant with those of the Respondent as was stated in the case *M/S Portreitz Maternity vs James Karanga Kabia, Civil Appeal NO. 63 OF 1997.***

34. I have considered the peculiar circumstances of this case. The impugned judgment was delivered in the absence of the Applicant and his Counsel; although I find that there was inordinate delay in bringing the application for extension of time to file his Appeal, yet on the other hand, other than arguing on the application for stay of execution, the Respondent has not demonstrated what prejudice, if any he would suffer if the application to extend time to file the Appeal is allowed.

35. Looking at the Draft Memorandum of Appeal filed on 9th August 2019, I am unable to say that the intended Appeal is not arguable because at this point, the Applicant is *not* required to persuade the Appellate Court that the intended Appeal has a high probability of success. All he is required to demonstrate is that the Appeal is arguable.

36. I am unable to see any substantial adverse effects upon the Respondents should I grant this order which will be to permit the Applicant to exercise a preciously cherished right of Appeal which will only be for academic purpose

37. I am, therefore, inclined to exercise the discretion vested in this Court in favour of the Applicant as no substantial prejudice will be occasioned on the Respondent.

38. On the last application for seeking an injunction against the execution of the decree, the Court finds that the Applicant having not satisfied the conditions necessary for grant of orders for stay of execution, this in effect shows that he has also not established a prima facie case as set down in the *Giella vs. Cassman Brown & Company Ltd [1973] E.A 358.*

39. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

40. Having found as herein above, I now make the following orders in conclusion.

i. The Application for stay of execution of the Judgment and Decree issued on the 27th November 2018 pending the hearing and determination of the Appeal is herein denied

ii. The Application for temporary injunction directing the Respondent, his agent and/or servants on any person acting under his authority from selling by Public Auction land parcel No. Mweiga/BLK 5/Muthuini/1133 and Plots No. 22 and 42 Kiandu pending the hearing and determination of this Application and Appeal is herein denied

iii. The Applicant is herein granted thirty (30) days leave, from the date of delivery of this ruling, within which to have filed his Appeal.

iv. If the Applicant does not file the Appeal within the time stipulated in (iii) above, the window granted to file the Appeal shall automatically lapse.

v. Applicant shall pay the costs of this Application.

Dated and delivered at Nyeri this 30th day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE