



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC.APPL. NO. 273 OF 2015

JULIUS KIMANI T/A GEOMATH MANAGEMENT.....1ST APPLICANT
BENRODGERS NGARE MATHU.....2ND APPLICANT
RUFUS MWANGI.....3RD APPLICANT
HELLEN WANJA KARIUKI.....4TH APPLICANT
RACHEAL WANJIKU MAINA.....5TH APPLICANT
MUKAMI KIMANI.....6TH APPLICANT
ELIUD GATHECHE KARANJA.....7TH APPLICANT
PAUL NDUNGU NGATAARA.....8TH APPLICANT
JOSEPH GITHARA NDIBA.....9TH APPLICANT
GABRIEL WASYA KAVILA.....10TH APPLICANT
HENRY GIKUNJU NJAU.....11TH APPLICANT
ISABELA WANJIKU KARANJA.....12TH APPLICANT
JULIUS KIARIE NJUGUNA.....13TH APPLICANT
JAMES NJOROGE NGARI & MIRIAM K.....14TH APPLICANT
MARY MWIHAKI MIKUNA.....15TH APPLICANT
PETER NGUGI.....16TH APPLICANT
JANE WANJIRU NGANGA.....17TH APPLICANT
PETER WANJIRU NGANGA.....18TH APPLICANT
PETER KURIA CHEGE.....19TH APPLICANT
MARGARET WANGARI KIRAGU.....20TH APPLICANT
HARLLAN KAMWERU NJUGUNA.....21ST APPLICANT

JACKSON MWITA.....22ND APPLICANT

AMBROSE MACHARIA MWANGLI.....23RD APPLICANT

WILLIAM GITHAGA.....24TH APPLICANT

FRANCIS MARARA.....25TH APPLICANT

MICHAEL NJOROGE MBILO.....26TH APPLICANT

VERSUS

INKOM INVESTMENT LIMITED.....RESPONDENT

RULING

The applicants were defendants in Thika Chief Magistrate’s Court Civil Case No. 36 of 2011 (hereinafter referred to as “the lower court suit”) that was filed against them by the respondent herein as the plaintiff. The dispute in the lower court suit revolved around the ownership of all that parcel of land known as L.R No. 61/16 (hereinafter referred to as “the suit property”). In the lower court, the respondent herein had claimed that it was the registered proprietor of the suit property and that the applicants herein had entered into the property without its permission and occupied the same. The respondent sought judgment against the applicants for; a permanent injunction restraining the applicants from alienating, selling and/or constructing buildings on the portions of the suit property which were occupied by them, an order of eviction from the suit property or in the alternative, an order compelling them to purchase portions of the suit property occupied by them at market value, and mense profits.

The applicants filed a defence and a counter-claim against the respondent. The applicants claimed that they had lawfully purchased portions of the suit property which they occupied from the 1st applicant who acted as the respondent’s agent and were therefore entitled to occupy the said portions of land peacefully. The applicants sought judgment against the respondent for; a permanent injunction restraining the respondent from evicting, alienating, disposing of, demolishing or in any other manner interfering with their peaceful enjoyment of the portions of the suit property which were occupied by them and an order compelling the respondent to issue them with title documents in respect of the said portions of the suit property.

The lower court heard the parties’ respective claims and delivered a judgment on 27th July, 2015. In the judgment, the lower court found that the respondent was the registered proprietor of the suit property and that the 1st applicant had no proprietary interest in the suit property that he could convey to the other applicants through sale or otherwise. The lower court found further that the respondent was not bound by the agreements for sale which the 1st applicant had entered into with the other applicants in respect of the portions of the suit property which were occupied by them. The lower court held that the applicants had not acquired any legal rights over the suit property and as such were trespassers on the property. In conclusion, the lower court entered judgment for the respondent against the applicants as prayed in the plaint and ordered the applicants to vacate the suit property and handover the same to the respondent if they were not ready to purchase the same at market price within 90 days from the date of the judgment.

The applicants were represented in the lower court by the firms of S. W. Ndegwa & Company Advocates and Kanyi Kiruchi & Company Advocates. What is now before the court is the applicants’ application brought by way of Notice of Motion dated 16th October, 2015 seeking a stay of execution of the said lower court judgment that was delivered on 27th July, 2015 pending the hearing and determination of the intended appeal against the same to this court and leave to file the intended appeal out of time. The application was brought on the grounds set out on the face thereof and on the affidavit of the 2nd applicant, Benrodgers Ngare Mathu sworn on 16th October, 2015.

In summary, the applicants averred that they were dissatisfied with the decision of the lower court and had instructed the advocates who were acting for them in the lower court to appeal against the same to this court. The applicants averred that following the said instructions, their said advocates informed them that they had filed an appeal in this court on 13th August, 2015 against the said decision of the lower court namely, ELC Appeal No. 555 of 2015. The applicants averred that they were advised thereafter by their said advocates that it had become necessary to amend the memorandum of appeal which they were assured was done. The applicants annexed to their affidavit in support of the application copies of receipts for the payments which they made to the firms of S.W Ndegwa & Co. Advocates and Kanyi Kiruchi & Co. Advocates on account of the legal fees for the said appeal, and memorandum of appeal and amended memorandum of appeal said to have been filed by the said advocates in ELC Appeal No. 555 of 2015 on 19th August, 2015 and 30th September, 2015 respectively on behalf of the applicants.

The applicants averred that when they were threatened with execution by the respondent, they sought to know from the said advocates who acted for them in the lower court and who claimed to have filed an appeal on their behalf whether they had filed an application for stay of execution. The applicants averred that no response came forth from the said advocates on the issue. The applicants averred that they were forced to go to the court registry on 30th September, 2015 to peruse the court file for ELC Appeal No. 555 of 2015 to find out for themselves whether an application for stay of execution had been filed on their behalf.

The applicants averred that it was at this point that they learnt that ELC Appeal No. 555 of 2015 did not exist and that the number of appeals registered in that year had not reached 555. The applicants also leant that their former advocates had not filed an application for stay of execution of the lower court judgment. The applicants averred that it was these discoveries that prompted the filing of the present application. The applicants averred that the respondent had extracted the lower court decree and that execution of the same was imminent.

The applicants averred that many of them had constructed residential houses on the suit property at a huge cost which were likely to be destroyed if they were evicted from the property. The applicants averred that the delay in the filing of the intended appeal was as a result of the mistake of their previous advocates which should not be visited upon them.

The applicants' application was opposed by the respondent through grounds of opposition dated 21st February, 2019. The respondent contended that the application was an afterthought the same having been brought after inordinate delay that had not been adequately explained. The respondent averred further that the intended appeal by the applicants was not arguable and had no chances of success. The respondent averred further that the applicants had not offered any security for the performance of the decree against them and that the respondent would suffer serious prejudice if the application was allowed as it will be delayed in realising the fruits of its judgment.

The application was argued on 30th April, 2019 when Ms. Opiyo advocate appeared for the applicants while Mr. Munawa advocate appeared for the respondent. I have considered the application together with the supporting affidavit. I have also considered the grounds of opposition by the respondent and the submissions of counsels. The applicants have sought two reliefs namely; extension of time within which to file appeal against the decision of the lower court and a stay of execution of the judgment of the lower court pending the hearing and determination of the intended appeal. I will consider the prayer for extension of time first because if it is denied, it would not be necessary to consider the prayer for stay of execution. Section 16A (1) of the Environment and Land Court Act, 2011(hereinafter referred to as "the ELC Act") provides that all appeals from subordinate courts and local tribunals to the Environment and Land Court (ELC) shall be filed within thirty (30) days from the date of the decree or order appealed against. Section 16A (2) of the ELC Act provides that:

“an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

I am satisfied from the evidence before the court that the applicants have established good and sufficient cause for their failure to file the intended appeal within time. It was not disputed that the applicants were represented by two law firms in the lower court. From the material before the court, I am satisfied that the applicants instructed the said firms of advocates to appeal against the decision of the lower court and paid them fees for the same. The evidence on record shows that the applicants were made to believe that the appeal was duly lodged in accordance with their instructions. The evidence before the court shows further that it was not until 30th September, 2015 after the expiry of the time within which the appeal was to be filed that the applicants learnt that no appeal had been filed by their previous advocates. In the circumstances, I am of the view that the applicants had done what was expected of a prudent litigant and as such they were not to blame for the failure of their previous advocates to file the appeal as instructed. As an indication of their interest in pursuing the appeal, the applicants took steps soon after discovering that their previous advocates had not filed the appeal to instruct a new law firm which brought the present application within two (2) weeks of that discovery.

I am not in agreement with the respondent's argument that the application for extension of time was an afterthought and that the delay in bringing the same was not explained. The delay in bringing the application cannot be said to have been inordinate in the circumstances and in any event, sufficient explanation for the delay was tendered by the applicants. Due to the foregoing, I am satisfied that the applicants have met the condition for grant of extension of time to file appeal to this court.

The second limb of the application as mentioned earlier concerned stay of execution pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules provides that no order for stay of execution shall be made unless; the court is satisfied that substantial loss may result to the applicant, the application is made without unreasonable delay and such security as the court may order has been given by the applicant. It was not disputed that the lower court had ordered that the applicants be evicted from the suit property. It was also not disputed that many of the applicants were residing on the suit property and that their eviction from the suit property would involve demolition of their houses before their intended appeal is heard and determined.

I am satisfied that the applicants would suffer substantial loss unless the stay order sought is granted and that in the circumstances of this case, the application for stay of execution was brought without unreasonable delay. In their submissions, the applicants' advocate expressed the applicants' willingness to furnish security as may be ordered by the court. I am satisfied that the conditions for grant of a stay of execution pending appeal have been met.

In conclusion, I hereby make the following orders;

1. The time within which the applicants were to file appeal against the judgment and decree of Hon. M. W. Mutuku (SPM) delivered on 27th July, 2015 by Hon. B. J. Bartoo (RM) is extended up to and including 14th February, 2020.
2. The appeal shall be filed at the Environment and Land Court at Thika.
3. Pending the hearing and determination of the intended appeal, there shall be a stay of execution of the said judgment and decree of Hon. M. W. Mutuku (SPM) delivered on 27th July, 2015 by Hon. B. J. Bartoo (RM).
4. The applicants jointly and severally shall deposit in court as security a sum of Kshs. 480,000/= within sixty (60) days from the date hereof in default of which the stay granted in the preceding paragraph shall lapse automatically without any further reference to the court.
5. Pending the hearing and determination of the intended appeal, the applicants shall not sell or construct new buildings or houses on L.R No. 61/16 or any portion thereof.
6. Each party shall bear its own costs of the application.

Dated and delivered at Nairobi this 30th Day of January, 2020

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

Ms. Owore h/b for Ms. Opiyo for the Applicants

Ms. Wairimu h/b for Mr. Munawa for the Respondent

C. Nyokabi-Court Assistant