



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO.421 OF 2017

FRANCIS MBURU KAMAU.....PLAINTIFF/RESPONDENT

VS

METHI & SWANI FARMERS COOPERATIVE SOCIETY.....1ST DEFENDANT/RESPONDENT

PETER NGUGI MUNGAL.....2ND REDEFENDANT/RESPONDENT

ELIJAH KIMANU KIMUYU.....3RD DEFENDANT/APPLICANT

PETER NDEGWA MACHARIA.....4TH DEFENDANT/APPLICANT

STANLEY THUO.....5TH DEFENDANT/APPLICANT

HON ATTORNEY GENERAL.....6TH DEFENDANT/RESPONDENT

RULING

1. This Motion filed on the 3/10/19 is brought under Section 3A of the Civil Procedure Act, Order 42 Rule 6(1), Order 51 Rule 1 and 4 of the Civil Procedure Rules. The Applicant sought the following orders;

a. Spent

b. There be stay of execution of the judgment entered on the 30/4/19 and the decree issued on the 17/5/19 pending the hearing and determination of the 3rd and 5th Defendants Appeal.

c. Costs of the application.

2. The application is premised on the grounds that; That the Applicants / Defendants have filed notice of appeal against the judgment delivered on 30th April,2019. They aver that they were supplied with copies of the proceedings, judgment and decree on 15/08/2019 and claim that the Plaintiff is already threatening to evict them from the land parcel number MITUBIRI WEMPA/ BLOCK 2/241. They are apprehensive that the plaintiff may deal with the suit land in various ways before the hearing and determination of the intended appeal causing irreparable loss to the Appellant and render the appeal nugatory. That the grant of the application would not be prejudicial to the Respondents in any way and prayed for it to be granted in the interest of justice.

3. In support to the application the 4th Defendant with authority from the other Applicants did swear a supporting affidavit to the application and explains there was a delay in issuance of the copies of documents necessary for filing of an appeal to his Advocates on record for a period of nearly 4 months from the date of judgment. That they have since filed an appeal which he believes has high chances of success and that if the Respondent proceeds with execution of the orders granted by the Honourable Court in its judgment of 30/04/2019 the Applicants risk suffering irreparably as they shall be evicted from the suit land and the intended appeal shall also be rendered nugatory. That the Respondent has already issued notices to the Respondents requiring them to vacate from the suit land vide a demand letter dated 03.10.2019.

4.The application was canvassed on 22/10/2019 when parties opted to dispose it off by way of written submissions.

5. The Applicants submit that the present application and the intended appeal have not been brought with undue delay. That after the delivery on 30/04/2019 the Applicants applied for copies of the judgement and the proceedings in order to file an appeal but the same were not

supplied to them until 15/08/2019. They thereafter filed the instant application for stay on 03/10/2016 and filed a memorandum of appeal on 07/10/2019.

6. That unless the stay orders are granted the Applicants risk being evicted from the suit land in effect stand to suffer irreparably. That the Respondent has in fact already issued to the Respondents' eviction notices dated 01/10/2019 requiring them to vacate from the suit land. That the instant application seeks the aid of the Court in preserving the status quo pending the hearing and determination of their Appeal before the Court of last resort. That their appeal has high chances of success and of successful the appellate decision would be rendered nugatory. The Applicants have also indicated their willingness and readiness to deposit security for costs if so ordered.

7. The Respondent did not file any written submissions. There are none on record by the date of writing this Ruling, the application is thus unopposed.

8. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the motion.

9. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(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.

(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.”

10. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

(a) The application was brought without delay;

(b) Substantial loss may result to the Applicant unless the stay is granted; and

(c) Security for the due performance of the order or decree has been provided.

11. Going by the record the judgment complained of was delivered on the 25/4/19. This application was filed on the 31/5/19, a period of 35 days. The Court finds and holds that there is no delay in bringing this application.

12. In respect to the 2nd requirement of proof of substantial loss, the Applicant has submitted that the Respondent has threatened to evict them and has adduced a notice to vacate dated the 1/10/19 from the Plaintiffs lawyers giving the Applicants 3 days to vacate the premises in default risk forceful eviction thus rendering the appeal nugatory. The Applicants have informed the Court that they have constructed permanent homes on the suit land and they risk demolition of the structures thus occasioning them irreparable loss and harm

13. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

14. In this case and going by the decision in **Machira** above the Applicants have proved substantial the loss that they stand to suffer if the Court does not grant stay of execution orders.

15. The Court is alive to the duty to balance the two competing rights as noted by Gacheru J. in **John Gacunja Njoroge –Vs – Joseph Njoroge (supra)**. Also see **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR** Ombwayo J **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** Mabeya, J and **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** where the Court set out thus;

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal.

16. In respect to the requirement of security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered.

17. In this case the Applicants have stated that they are willing to abide by the conditions of this Court in respect to security of costs. The Applicants have however not indicated nor disclosed the quantum. I find and hold that the sum of Kshs. 500,000/- is sufficient security for costs.

16. Balancing the rights of the parties and doing the best I can, the motion dated the 3/10/19 is allowed in the following terms;

- a. The stay of execution is granted provided that the appeal is filed within 60 days from the date of this ruling.
- b. The Applicant to provide security for the due performance of the decree in the sum of Kshs. 500,000/- (Five Hundred Thousand only) within 60 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both Advocates of the parties or a bank guarantee of a similar amount.
- c. If the Applicant fails to comply with either of a)-b) above the stay lapses and the Application stands dismissed, 60 days from this date.
- d. Costs of the application shall be met by the Applicant.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Respondent: Absent

Mwangi Ben for the 1st Defendant/Applicant

2nd Defendant/Applicant: Absent

Mwangi Ben HB for Waithira Mwangi for the 3rd – 5th Defendants/Applicants

6th Defendant/Applicant: Absent

Irene and Kuyiyaki, Court Assistants