



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 5 OF 2019

MIRIAM WAITHIRA GITHENGI MWICIGI...1ST PLAINTIFF /APPLICANT

GEORGE MWICIGI GITHENGI.....2ND PLAINTIFF/APPLICANT

VS

JOHN BAPTISTA MURIRA KWERI.....DEFENDANT/RESPONDENT

RULING

1. The Applicants filed this motion seeking the following orders;

- a. spent
- b. there be stay of execution till application is heard and determined and thereafter till the intended Appeal is heard and determined
- c. the status quo existing before the suit was demised be restored till the intended Appeal is heard and determined

2. The grounds on which the motion is premised are summed as; the Applicants have lodged an Appeal; the Applicants are in possession of the suit land; a consent order had been adopted allowing the Applicants to so remain on the suit land; suit was dismissed before the parties gave their evidence and this has caught the Applicants unaware; they stand to suffer irreparable loss if the application is not granted Appeal shall be rendered nugatory if stay and status quo are not granted.

3. The application is opposed by the Respondent who deponed that the status quo orders of the 11/3/19 was to facilitate the expeditious hearing of the suit but not that the Applicants were conferred any rights in the suit land. That the Applicants are not in possession of the suit land as they live on parcel LOC16/KIARUTARA/44 and are only interested to trespassing onto the suit land LOC16/KIARUTARA/43 (suit land). The suit was heard and found to be resjudicata and the Applicants were duly heard before the Court delivered its considered decision. In addition, he urged the Court to dismiss the application.

4. On the 28/1/2020 the parties argued the application in open Court. The Applicants through their learned Counsel, Mr Kimwere submitted that the Applicants have filed a notice of Appeal against the ruling of the hon Court delivered on the 11/12/19, which Appeal has a high chance of succeeding. That the Applicants are in possession of the suit land and the Applicants will suffer irreparable loss if evicted before the Appeal is heard and determined. That the Applicants are ready to abide by the terms of the Court in respect to security.

5. The Applicants are aggrieved with the judgement delivered on the 22/7/19 and are intending to file an Appeal and are awaiting for the typed proceedings to be availed; if stay is not granted the Applicants Appeal shall be rendered nugatory and the Applicants shall stand to suffer irreparable damage; the Applicants are willing to abide by any of the conditions set by the Court in respect to the stay orders including any order for security.

6. Counsel for the Respondent, Ms Wangari opposed the application on the grounds interalia that the Applicants are not in possession but live on parcel LOC16/KIARUTARA/44. That the consent entered on the 11/3/19 was to allow the Plaintiffs to continue harvesting tea on the suit land pending the hearing and determination of the suit, which suit was determined to be resjudicata and dismissed. That allowing the motion will deny the Respondent the fruits of his judgment. That the respondent was fully heard on the Preliminary Objection and they cannot claim that they were not heard. Further that the Applicants have not sought the leave of the Court to file the Appeal as provided for under section 75 and 76 of the Civil Procedure Act. She urged the Court to dismiss the application.

7. In a rejoinder the Applicants conceded that they do not live on the suit land but had been allowed to harvest tea on the said land. That the orders of the Court are Appealable as of right and therefore there is no requirement for leave to be sought.

8. The key issue for determination is whether the orders of stay of execution should be granted.

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 Applicants 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 Applicants.

(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 Applicants 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 Ruling complained of was delivered on the 11/12/19. This application was filed on the 16/12/19, a period of 6 days. The Court finds and holds that there is no delay in bringing this application. It was filed timeously.

12. In respect to the second limb, it is not sufficient to simply aver that they shall suffer loss and that they have an arguable Appeal with chances of success which shall be rendered nugatory. In the case of In **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** (Gikonyo J stated that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.

13. Equally in the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR** the Court held “that in such applications for stay it is not enough for the Applicants 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. Further in the case of **Antoine Ndiaye v African Virtual University [2015] eKLR**, learned judge Gikonyo J. cited the holding in **Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001, (unreported)** where it was held that;

“substantial loss is what is likely to be suffered by the Applicants if the stay order is not granted, she was bound to place before the Court such material and information that should lead this Court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay.”

15. In the case of Charles **Wahome Gethi -vs. Angela Wairimu Gethi (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007)**, 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.” The Court held that Applicants have not shown or suggested that they would suffer substantial loss rendering the Appeal nugatory if the land were sold before the Appeal were determined. On the balance there is no evidence that the Applicants would suffer substantial loss if a stay was not granted.

16. In the case of **Leonard Mambo Kuria v Ann Wanjiru Mambo [2017] EKLK**, the Court of Appeal Justices Kiage Waki Nambuye JJA held that Whether or not an Appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

17. In this case the Applicants have not disclosed the substantial loss that they will suffer if the orders are declined. It is admitted in submissions that they do not live on the land. During the course of the suit the parties agreed to a consent to the effect that the Applicants were to continue picking tea on the land until the hearing and determination of the suit. The suit was adjudged resjudicata and therefore came to an end. The parties were duly heard through their counsels on record on the plea of resjudicata. My perusal of the file shows that they filed written submissions and made their arguments which were duly considered by the Court in arriving at the decision of the 11/12/19. It is therefore misleading for the Applicants to firstly inform the Court that they are in possession and secondly that they were not heard. The Applicants have commissioned the services of counsel and it is not that they are unaware that they were heard.

18. I have reviewed the consent orders of the parties dated the 11/3/19 and the same were to subsist pending the hearing and determination of the suit. Now that the suit was determined and adjudged resjudicata, it follows that the said orders have consequently lapsed.

19. The Applicants have therefore not demonstrated the substantial loss that they will suffer if the application is not granted. Substantial loss being the cornerstone in an application such as this, the Court finds that the Applicants have failed in their plea.

Substantial loss is a matter of tangible evidence of its existence and cannot be left to the conjecture of the Court.

20. 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 Applicants should give as may ultimately be binding on the Applicants. This is to ensure that the discretion bestowed on the Court is not fettered.

21. 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.

22. Having failed in their application for stay of execution, I find no ground to consider the prayer for status quo. In any event the Applicants did not prosecute this prayer.

23. Having failed to proof substantial loss, this Court is not persuaded that the application is for granting.

24. The application dated the 16/12/19 be and is hereby dismissed with costs to the Respondent.

25. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF FEBRUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Gachuru HB for Kimwere for the 1st & 2nd Plaintiffs/Applicants

Ms Wangari for the Defendant/Respondent

Irene and Njeri, Court Assistants