



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 27 OF 2000**

STEPHEN MUNA MUGO.....1<sup>ST</sup> APPELLANT/RESPONDENT

MUGO NYAGA.....2<sup>ND</sup> APPELLANT/RESPONDENT

ANTHONY MBIRI NDWIGA.....3<sup>RD</sup> APPELLANT/RESPONDENT

**VERSUS**

EDWARD NJAGI MUGO.....1<sup>ST</sup> RESPONDENT/APPLICANT

GIDEON KIURA MUGO.....2<sup>ND</sup> RESPONDENT/APPLICANT

**AND**

JAMES NDEGWA.....1<sup>ST</sup> INTERESTED PARTY

ANTONY WAWERU NDAMBIRI.....2<sup>ND</sup> INTERESTED PARTY

**J U D G M N T**

**A. Introduction**

1. Coming up for ruling is the applicants' application dated 12<sup>th</sup> June 2018 seeking the following orders;

**a. That JAMES NDEGWA and ANTONY WAWERU NDAMBIRI be made parties to this application.**

**b. That this Honourable Court be pleased to order one JAMES NDEGWA and ANTONY WAWERU NDAMBIRI, their agents, servants and assigns to be restrained from damaging, entering, interfering or disposing off the land in issue or chasing the applicants from Land Parcel Number BARAGWI/THUMAITA /1587 and 1588 until the case pending at the Court of Appeal is heard and determined.**

**c. That a prohibitory order be issued against LR. No. BARAGWI/THUMAITA/1587 and 1588 protecting the land from further transfers.**

2. The three (3) appellants are the respondents in this application brought by Edward Njagi Mugo and Gideon Kiura Mugo against the respondents/appellants. It is important to note that the appellants were successful in this appeal in which Okwengu, J. as she then was rendered her judgment on 16/11/2011 overturning the judgment of Senior Resident Magistrate Kerugoya which was in favour of the respondents. Being dissatisfied with the judgment of Okwengu, J. the respondents lodged an appeal in the Court of Appeal at Nyeri.

**B. Applicant's Case**

3. The applicants deponed in support of their application that the suit land, BARAGWI/THUMAITA/1587 and 1588 were registered in the name of the 1<sup>st</sup> appellant respondent, who is their brother, to hold in trust for the applicants, their father, the 2<sup>nd</sup> respondent, and their mother.

4. They further deponed that the 1<sup>st</sup> respondent had subdivided and transferred the said parcel BARAGWI/ THUMAITA/1587 to the 3<sup>rd</sup> respondent and as such it was their fear that the 3<sup>rd</sup> respondent might interfere with the properties standing on BARAGWI/THUMAITA/1587.

5. The applicants further deponed that the 3<sup>rd</sup> respondent purchased the land while being aware of their interests and occupation of the land and thus they sought the court to restrain the respondents from doing anything on the land pending determination of the appeal.

6. The applicants further submitted that they had filed an appeal against the orders issued by this court on the 16<sup>th</sup> November 2011 and unless the orders of stay were granted the appeal would be rendered nugatory.

### **C. Interested Parties' Case**

7. The interested parties filed a replying affidavit dated 25<sup>th</sup> June 2018 opposing this application. In the affidavit sworn by the 1<sup>st</sup> interested party, it is deposed that the applicants have not shown any reason why the proposed as interested parties should be enjoined to the suit.

8. It was further stated that one of the suit properties, BARAGWI/ THUMAITA/1587 was distributed to one Kenneth Kariuki Mbiiri in Kerugoya H.C. Succession No. 24 of 2017 who is not party to this suit.

9. That consequently, the 1<sup>st</sup> interested party deponed that the application lacked merits and ought to be dismissed.

### **D. Applicants' Submissions**

10. The applicant submitted that the interested parties did not come from the suit land but from BARAGWA/THUMAITA/590 and ought to have enquired as to the interests of those who occupy that land given that the applicants had developed the land extensively.

11. It was further submitted that the respondents ought to be prevented from any entry into the land until the appeal pending in the Court of Appeal was completed. It was contended that a letter showing that the appeal was still pending ought to have been annexed.

### **E. Interested Parties' Submission**

12. It was submitted that the applicants had failed to demonstrate as to why the interested parties should be enjoined in the suit and urged the court to reject this prayer.

13. On stay pending appeal, the interested parties submitted that they were not the right parties to be served with that prayer as they were not a party in this appeal.

14. The interested parties further submitted that on the 3<sup>rd</sup> and 4<sup>th</sup> prayers of the applicant, there was no connection demonstrated between the interested parties and the suit property herein and further that they had in their replying affidavit brought out the fact that BARAGWI/THUMAITA/1587 was distributed to Kenneth Kariuki Mbiiri, a beneficiary of the 3<sup>rd</sup> respondent in Kerugoya H.C. Succession No. 24 of 2017. Granting prohibition orders against the current owner of the land would amount to condemning him unheard.

15. The interested parties thus submitted that the application dated 12<sup>th</sup> June 2018 lacked merit and ought to be dismissed.

### **F. The Determination**

16. The application is brought under Order 42 Rule 6 and the grounds to be considered in deciding this application are as provided by **Order 42 Rule 6(2) of the Civil Procedure Rules** which states: -

**“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.”**

7. It is evident from the above provisions of law that the court has discretion to issue an order for stay of execution but the said discretion must be exercised judicially. See the case of **Canvass Manufacturers Ltd v Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**, where the Court held that: -

**“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.**

18. Further in the case of **Stephen Wanjohi v Central Glass Industries Ltd, Nairobi HCCC No. 6726 of 1991**, the Court held that: -

**“For the court to order a stay of execution there must be: -**

**i. Sufficient cause**

**ii. Substantial loss**

**iii. No unreasonable delay**

**iv. Security and the grant of stay is discretionary”.**

19. As the Court also embarks in determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation.

20. Further, the Court will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine v Nampijja & Another, Civil App.No. 93 of 1989 (Nairobi), where the Court held that: -

**“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.**

21. The conditions that the Applicants herein should satisfy is as stated in Order 42 Rule 6(2). The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the Applicant is deserving of the orders sought.

22. Firstly, the Applicants must satisfy that they will **suffer substantial loss**, unless the orders sought are issued. The applicants insist that they are in occupation of the suit property, however it is clear from the judgement entered by the Honourable Okwengu in this matter that the applicants' actions amount to trespass as they had failed to establish adverse possession over the suit property.

23. The applicants have also not demonstrated that there is a pending suit in the Court of Appeal at Nyeri as nothing to this effect has been placed on Court record despite their assertions in their submissions. Consequently, it is my view that there is no substantial loss likely to be suffered by the applicants as there is no evidence of appeal.

24. The Applicants must satisfy the Court that the application was made without **unreasonable delay**. The Court noted that the *judgment in this appeal was rendered on the 16<sup>th</sup> November 2011*. I note from the interested parties' submissions that one of the suit properties BARAGWI/THUMAITA/1587, was distributed to Kenneth Kariuki Mbiiri, a beneficiary of the 3<sup>rd</sup> respondent in Kerugoya H.C. Succession No. 24 of 2017 on the 13<sup>th</sup> day of December 2017.

25. *This application for stay was filed about eight (8) years after the judgment of the court. This is inordinate delay which has not been explained by the applicants. The title land having passed by way of transmission to a 3<sup>rd</sup> party. It would be correct to opine that this application is incompetent and that it has been overtaken by events.*

26. In the case of Jane Jeptoo Sawe Vs Estate of Sylvester Kimagut Sang Represented by Jennifer Chebet Sang, Civil App No.49 of 2015, where the Court of Appeal held that: -

**“The order of stay of execution that the Applicant seeks has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose”.**

27. It is my considered opinion that the *order* for stay of execution would not serve any useful purpose to the applicant or to anyone else.

29. The upshot of the above is that it is my opinion that considering that there has been no evidence tendered of a pending appeal in the Court of Appeal as well as the fact that the applicants have not satisfied the conditions set out in Order 42 rule 6 (2), the applicants have no basis of seeking for orders for stay of execution.

29. As for injunctive orders sought the applicants have no material placed before this court to establish a prima facie case. The appeal has already been determined herein and a temporary injunction would not issue herein for it would not serve any purpose.

30. Finally, the applicants have not shown why the two proposed interested parties should be joined in an appeal that has already been determined. If they were to be joined, then what follows? There is no pending issues in this appeal for the judgment of the court was delivered eight (8) years ago.

31. It is my finding that this application is incompetent and an abuse of the due process of the court.

32. It is hereby dismissed with no orders as to costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16<sup>TH</sup> DAY OF JANUARY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Maina for A.P. Kariithi for Applicant**

**Mr. Wachira for Maina Kagio for interested parties**