



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 145 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE KOISANDO GATERU MWANIKI (DECEASED)

SIMON MWANIKI GATERU.....APPLICANT

VERSUS

CEASAR WAWERU GATERU.....1ST RESPONDENT

JOSEPH WARUTHI GATERU.....2ND RESPONDENT

RULING

1. Before court is the application dated 20/4/2018. Simon Mwaniki Gateru (applicant) seeks orders;

1. Spent

2. THAT pending the hearing and determination of the appeal, Civil Appeal No. 196 of 2016 – Simon Mwaniki Gateru versus Ceasar Waweru Gateru and Joseph Waruthi Gateru an order of injunction be issued restraining the respondents whether by itself, its agents and its servants from selling, offering for sale, transferring, pledging, alienating, borrowing or disposing of all the parcels of land known as Nyandarua/Sabugo/7277 and Nyandarua/Sabugo/7278.

3. THAT the costs of this application be provided for.

2. The application is premised on grounds;

a. The applicant has filed an appeal in the Court of Appeal being Civil Appeal Number 196 of 2016 – Simon Mwaniki Gateru versus Ceasar Waweru Gateru and Joseph Waruthi Gateru.

b. The applicant has filed a record of appeal and has served the respondents.

c. Land is a very unique and precious commodity, unless the application is heard urgently and on priority basis, the suit premises, will be transferred by the respondent to 3rd parties rendering the same forever out of the applicant's reach. In such event, the applicant would suffer substantial irreparable and irredeemable loss not compensable by any award of damages.

d. If the said injunction is not granted, the object of this application and of the appeal will be defeated and rendered nugatory.

e. The applicant has a valid appeal with good chances of success notwithstanding the grant of stay on orders issued on 2nd February, 2016.

f. That the proposed respondent is unlikely to suffer any prejudice which will likely render the appeal nugatory.

3. It is the applicant's case that he has filed an appeal in the **Court of Appeal**, being **Civil Appeal Number 196 of 2016, Simon Mwaniki Gateru vs. Ceasar Wawery Gateru and Joseph Wamuthi Gateru.**

4. The applicant is apprehensive that Ceasar Waweru Gateru who holds title to parcel of land number Nyandarua/Sabugo/7277 and Joseph Waruthi Gateri who holds title number Nyandarua/Sabugo 7278 have shown indications of selling the land and are planning to use their

properties as security for a bank loan. Substantial loss is thus apprehended since land is a precious and unique commodity and if transferred to other parties it will be completely out of reach by the applicant.

5. The application is opposed. Ceaser Waweru Gateru and Joseph Waruthi (respondents) have sworn a joint replying affidavit in response to the application.

6. They confirm they are registered owners of parcel of land Nyandarua/Sabugo/7277 and Nyandarua/Sabugo/7278 respectively.

7. It is urged that the applicant will not suffer any substantial loss because the evidence on record clearly oscillates against his purported rights over the suit lands and no amount of strength of his appeal, which is doubted, can surpass the overwhelming evidence on record.

8. I have considered the application, the supporting affidavit and the opposition thereto.

9. The application as drawn is fatally defective. It seeks to invoke the court's original jurisdiction to issue an injunctive order when in fact the matter has been concluded. At this stage of the proceedings, the only available remedy for the applicant could be a stay of execution of the orders issued by court.

10. The granting of a stay of execution pending appeal is a discretionary power bestowed on the court. Like all discretionary powers, it must be exercised judiciously.

11. The principles applicable in an application of this nature are well summarized in this court's decision (*Kuloba J*) in MACHIRA T/A MACHIRA & CO. ADVOCATES VS. EAST AFRICAN STANDARD, NAIROBI HCCC NO. 612 OF 1996 thus;

“1. In such applications for stay of proceedings, the court cannot proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is the preferred party. The matter must remain in the discretion of the court to be exercised upon considering all material circumstances and not the interest of one party.

2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruit of his judgment or of any decision of the court giving him success at any stage.

3. A successful party at whatever stage should have access to the consequences of that judicial finding and decision. Any subsequent decision which tends to impede the normal flow of justice by suspending the enjoyment of the consequential orders can only be rendered in exceptional circumstances.

4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or other evidential material that substantial loss may result.

5. In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must provide specific details and particulars.

6. Where no pecuniary tangible loss is shown to the satisfaction of the court, the court will not grant a stay.

7. The applicant will obtain a stay of further proceedings if he can show that an impecunious party may squander what may be needed restitution or that the subject matter may be destroyed if the appeal succeeds.

8. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for due performance.”

12. Even ignoring the form in which the application herein has been brought and treating it as an application for stay, it is worthy of note that the judgment of court dated 31/7/2015 has since been executed. Titles to the subject properties passed to the respondents on 22/2/2016. There is therefore nothing to stay. The applicant is not entirely innocent in the current state of affairs.

13. This for the reason that it is only on 3/5/2018 that the applicant moved the court for an injunction (ought to have been for a stay of execution) almost 3 years after the delivery of judgment.

14. In granting stay, a court considers any delay in the making of the application. The applicant in this case is guilty of an inordinate unexplained delay.

15. On the material before me, I am persuaded that the application before court is fatally defective and even ignoring form and considering the substance, the order sought is not available to the applicant for reasons stated above.

16. I proceed to dismiss the application dated 20/4/2018. In view of the relationship of the parties and in order to avoid further schisms in the family, each party to bear its own costs.

Dated and Signed at Nakuru this 13th day of February, 2019.

A. K. NDUNG’U

JUDGE