



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C.A. NO. 17 OF 2018

OCTAVIO NDAMBIRI.....1ST APPELLANT /APPLICANT

FREDRICK MAGOTO.....2ND APPELLANT/APPLICANT

MBOGO NGARI.....3RD APPELLANT/APPLICANT

JAELI WARIGIA MAGONDU.....4TH APPELLANT/APPLICANT

VERSUS

SIMON GACHOKI MUGO.....RESPONDENT

RULING

The application before me is the Notice of Motion dated 16th August 2018 brought under **Order 45 Rule 1 (a) CPR**. The Applicant is seeking the following eight (8) prayers:

- (1) *Spent.*
- (2) *That the Honourable Court be pleased to transfer the appeal herein to the ELC Court Kerugoya.*
- (3) *That the Honourable Court be pleased to issue an interim order of stay of execution of the judgment made against the Appellant in Kerugoya Chief Magistrate's Court Civil Case No. 296 of 2012 on 6th December 2017 pending hearing and determination of the appeal herein.*
- (4) *That the Honourable Court be pleased to issue an interim order that status quo on Plot 6, Karumandi be maintained pending the hearing and determination of prayer 5, 6, 7 and 8 here below.*
- (5) *That the Honourable Court be pleased to issue an order of stay of execution of the judgment made against the Appellants in Kerugoya Chief Magistrate's Court Civil Case No. 296 of 2012 on 6th December 2017 pending hearing and determination of the appeal herein.*
- (6) *That the Honourable Court be pleased to issue an order that status quo on Plot 6, Karumandi be maintained pending hearing and determination of the appeal herein.*
- (7) *That the Honourable Court be pleased to give such further or relief as it may deem fit and just to.*
- (8) *That the costs of the application be in the appeal.*

The application is premised on ten grounds shown on the face of the said application and the affidavit of Jaeli Warigia Magondu sworn on 16th August 2018. The application is further supported by numerous annextures to the said supporting affidavit.

In brief, the Applicants stated that the Respondent had filed a suit in the lower Court against them being CMCC No. 296 of 2012 which was heard and on 6th December 2017 and that the trial Court rendered itself in the impugned judgment which they were dissatisfied and have preferred an appeal to this Honourable Court. They have attached a copy of the judgment and the Memorandum of Appeal as **JWM 2** and **3** respectively. Pending the hearing and determination, the Applicants are seeking the orders in the present application.

From the decision by the trial Court, the names of the right owners were ordered to be cancelled from plot No. 6 Karumandi. The Applicants contend that if the order cancelling the names of the owners are executed, their Constitutional right to property would be violated and that they will suffer substantial loss. The Applicants also argued that the Respondent has started harassing their tenants from the suit premises demanding that they either pay him rent or vacate. They further allege that they are elderly people who depend on the income from the rent generated from the suit premises.

In his replying affidavit sworn on 19th September 2018, the Respondent opposed the application stating that upon the judgment and decree being delivered, he took the same to the County Government of Kirinyaga where the names of the Applicants were cancelled and minutes were issued showing that he was the legal owner of plot No. 6 at Karumandi. He also confirmed that he issued notices to the tenants who occupy the suit premises to pay rent directly to him. The Respondent stated that the application has been overtaken by events since the decree has been implemented and that there is nothing to stay.

APPLICANTS SUBMISSIONS

The Applicants through the firm of Magee Wa Magee & Co. Advocates submitted that the application for stay of execution is brought under **Order 42 Rule 6 CPR** which provides that for an applicant to succeed, he must satisfy the following conditions:

- (a) ***Must show that he will suffer substantial loss.***
- (b) ***The application has been made without unreasonable delay and***
- (c) ***Should give such security for the due performance of the decree or order as may be binding on him.***

The Applicants submitted that the appeal and the present application has been brought timeously without undue delay. On the second condition, the Applicants submitted that they have joint possession of plot No. 6 Karumandi with the Respondent where each has rental premises and that should their names be cancelled from the suit premises, they will stand to suffer substantial loss as the income from the rentals will be stopped and being elderly citizens of this country, they will suffer immensely.

On the third condition, the Applicants submitted that they are willing to abide by any condition that this Honourable Court may require as security. He cited the case of ***Alex Simiyu & 2 others Vs Francis Simiyu Simula (2017) e K.L.R.***

RESPONDENT'S SUBMISSIONS

The Respondent through the firm of J. Ndana & Co. Advocates submitted that the application has been overtaken by events since the Respondent has already presented the decree to the County Government of Kirinyaga who effected the said decree and the minutes were issued showing that the Respondent is the owner of the suit plot. The Respondent also submitted that the tenants who had been leased the suit premises have vacated and the Respondent taken possession of the same. The learned counsel also argued that the application has been made over nine months and that the Applicant is guilty of inordinate delay. In conclusion, the Respondent submitted that the application lacks merit and the same should be dismissed with costs.

DISPOSITION

The Applicant is seeking stay of execution of the judgment and decree of the lower Court CMCC No. 296 of 2012 delivered on 6th December 2017 pending the hearing and determination of an intended appeal. **Order 42 Rule 6 CPR** provides the following conditions for the grant of such orders:

- (a) ***That an applicant will suffer substantial loss.***
- (b) ***The application has been made without unreasonable delay and***
- (c) ***Such security has been given for the due performance of the decree or order as may be binding on the applicant.***

The Applicant has stated that the impugned judgment was delivered on 6th December 2017 and on 26th January 2018, he filed and served the Memorandum of Appeal. The Applicant also filed this application on 16th August 2018. Considering that the Applicant appointed a new advocate who had to make the necessary interlocutory applications to come on record, the application has been made without undue delay. I am therefore satisfied that the first condition has been made. On the second condition, the Applicants have stated that the trial Court's decision to remove them from the ownership of the suit property which they have owned for many years and which they collect income from rent will be substantial loss to them and their families. The Applicants also state that being elderly citizens of this county, they will be affected if the orders of stay are not granted. I agree with the submissions by Mr. Magee that the Applicants will suffer substantial loss unless the orders are granted. I also find that the Applicants have satisfied the second condition for the grant of the application. As regards the third condition, the Applicants have deponed that they are ready and willing to deposit such security as the Court may direct for the due performance of the decree as may be binding on them. Again, I am satisfied that the third condition has been complied with.

In the upshot, I find the application dated 16th August 2018 merited and the same is hereby allowed in the following terms:

- (1) ***The judgment and decree made against the Applicants in CMCC No. 296 of 2012 (Kerugoya) on 6th December 2017 be and is hereby stayed pending hearing and determination of this appeal.***

(2) That the status quo on plot No. 6 Karumandi as obtained on 6th December 2017 to be maintained pending the hearing and determination of the intended appeal.

(3) The Appellants to take steps to fast track the intended appeal to be heard within six (6) months failing which the stay orders will lapse.

(4) The costs of this application shall abide the event.

READ and SIGNED in open Court at Kerugoya this 15th day of February, 2019.

E.C. CHERONO

ELC JUDGE

15TH FEBRUARY, 2019

In the presence of:

1. Mr. Asimwe for Mr. Magee
2. Mr. Ndana for Respondent
3. Mr. Kabuta, Court clerk – present