



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELCA NO 15 OF 2018

(FORMERLY NYAHURURU ELC 108 OF 2010)

JACKSON MAINA NDUYU.....1st APPELLANT

ESTHER WAITHIRA NDUYU.....2nd APPELLANT

TERESIAH NJERI RANGATA.....3rd APPELLANT

VERSUS

PAUL NDAIRE.....1st RESPONDENT

JULIA WAITHERA NDAIRE.....2nd RESPONDENT

BETWEEN

MARGARET WAIRIMU KIMANI.....1st INTENDED INTERESTED PARTY

GEORGE NJOROGE ALIAS NJOORO.....2nd INTENDED INTERESTED PARTY

JOHN MBUGUA.....3rd INTENDED INTERESTED PARTY

JOSEPH MAINA.....4th INTENDED INTERESTED PARTY

PETER KARONGA KURIA.....5th INTENDED INTERESTED PARTY

PETER KAGUNYU KIRAGU.....6th INTENDED INTERESTED PARTY

RULING

1. Before me for determination are two Application namely a the Notice of Motion dated 7th December 2018 brought under the provisions of Order 42 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 79G and Section 95 of the Civil Procedure Act, and Articles 159(2) (d) of the Constitution and all other enabling provisions of the law where the Applicants seeks for orders of stay of execution of the judgement and decree in Nyahururu CMC ELC No. 108 of 2018, delivered on the 14th November 2018, pending the hearing and determination of the Appeal.
2. The Second Application is dated the 11th March 2019 wherein the Applicant seeks to enjoin the intended interested parties to the suit as well as to set aside the judgement and decree delivered on the 14th November 2018.
3. These two Application are supported by the grounds set on the face of the respective Application as well as on the sworn affidavits of Jacskon Maina Nduyu and Margaret Wairimu Kimani respectively.
4. By consent, parties agreed that the two Application be disposed of by way of written submission wherein they could highlight on the same.
5. The Applicants' highlight on their Application was that judgment was delivered in the Chief Magistrates' Court in ELC No.108 of 2018

wherein they had lost the case. Their application was therefore to urge the Court to grant stay orders of that judgment, for reasons that the judgment required that they be evicted from that property by the 11th December 2018. That without these orders, it would be prejudicial to their interest if they were evicted whilst perusing the Appeal.

6. The main thrust was that the land in question was a parcel for inheritance and to that end, there existed 3 Succession Causes being;
 - i. Thika Succession Cause No. 254 of 2004 which had been confirmed on 17th May 2005.
 - ii. Succession Cause 225 of 2005 that had been confirmed on 3rd February 2010 at Thika.
 - iii. Thika Succession Cause 605 of 2012 that had been confirmed on 14th February 2013.
7. That the Applicants were purchasers of the parcel of land they were now being evicted from, pursuant to one of the Succession Causes.
8. Their 2nd ground was that the order given by the learned Magistrate in her judgment, was beyond the pleadings.
9. That both parties occupied different parcels of the property and therefore if the orders sought were granted, there would be no prejudice to either party, on the other hand if the orders were not granted, they would be prejudiced.
10. On the issue of the second application dated the 11th March 2018, that the same had been filed by the intended interested parties who were beneficiaries of the estate and who had been left out and therefore did not participate in the lower court suit yet they had been beneficiaries. That upon learning about the judgment, they had approached the lower court to be enjoined but the learned Magistrate had dismissed their application urging that it had been brought too late. The Applicants urged the court to enjoin them in the suit having been beneficiaries of the estate.
11. The Applicants further urged the Court to grant them stay orders so as to preserve the subject suit so as not to render the Appeal nugatory.
12. The Applications were opposed by the Respondents who had filed their grounds of opposition dated 23rd March 2019 and their submissions on the 10th May 2019.
13. In their highlight, the Respondents submitted that the principles upon which the discretion to stay execution of judgment/decree of the court were clearly set out in Order 42 Rule 6 of the Civil Procedure Rules. That the Applicants had not met the said conditions in their application. That they had not demonstrated what substantial loss they would suffer should the stay orders sought be denied.
14. That secondly, they had not offered any security for the due performance of the decree that may ultimately be binding on them should the instant Appeal fail.
15. That the law had set three mandatory conditions to be met before granting the stay orders whereas the Applicant had only met one condition which was filing the application without undue delay.
16. That the court had been told of 3 Succession Causes filed at Thika Chief Magistrate's Court involving the suit property. The trial Magistrate was of the correct view that the only Succession Cause that was valid was Thika CMC Succession Cause No. 254 of 2004 pursuant to which the 2nd Respondent acquired her title to the suit property. She found that the subsequent Succession Causes affecting the same estate were invalid to the extent that they were used to cancel the title issued to the 2nd Respondent, pursuant to the first Succession Cause without involving law. The said judgment was a valid judgment of the court that could only be overruled on appeal after a full hearing.
17. That the Applicants were not beneficiaries of the estate of the deceased in the first Succession Cause. They are merely purchasers who were attempting to evict the Respondents through the court proceedings sought to be appealed from. Their cause in the event of Appeal not succeeding will be to sue for return of purchase price which was not equivalent to substantial loss as it is quantifiable.
18. That in regard to the 2nd Application dated the 11th March 2019, the Applicants/intended interested parties were not parties to the suit before the trial court. They sought to be enjoined after judgment as original beneficiaries of the estate dealt with in the 3 Succession Causes in Thika Magistrate's Court. Had the original Plaintiffs required their presence in the suit appealed from, they would have enjoined them at the point of the institution of the suit. That their presence at Appeal stage would only help to muddy the waters of justice.
19. That there had been no claim against them in the trial Court and therefor adding them at this late stage would only amount to an abuse of the court process. That a party could not be joined in a suit after judgment. The Respondents sought for the Application to be denied as well.
20. In rejoinder counsel for the Applicants submitted that their application was neither incompetent and/or bad in law. That they had annexed the judgment seeking their eviction forcefully. In their view, that would amount to them being prejudiced.
21. That being evicted from one's home could not be paid with damages. As to the issue of security, that they were willing to abide by the directions of the court.
22. As to the intended interested parties, they had approached the Magistrate's court where they had been told to approach Court on Appeal.

23. That the defence had no counter claim and from the two pieces of pleadings, the judgment had orders to which no parties had sought. The judgment was oppressive to the effect that;

- i. No party had sought for orders of cancellation of the title deeds.
- ii. The injunction restraining the Plaintiff was an order that had not been sought for.
- iii. No party had sought for orders that the Plaintiff vacates the property.
- iv. The order for forceful eviction was not sought for either.

24. The Applicants sought that their Application be allowed and in the meantime there be orders of status quo.

Determination

25. I have considered the Applicants' Application for stay of execution of the judgement and decree in Nyahururu CMC ELC No. 108 of 2018, delivered on the 14th November 2018, pending the hearing and determination of the Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.

26. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub rule (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.

27. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- i. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

28. I find two issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this court should make

29. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicant to demonstrate what kind of substantial loss they would suffer if the stay order was not made in his favour. I note that in their supporting affidavit, the Applicants have only attacked the judgment of the trial Magistrate and have not espoused on the kind of substantial loss they would suffer if the orders were not issued.

30. Secondly the Applicants have also deponed on the issue of non-joinder of the intended interested parties to the suit and still missed the point. It is only in their submission that they tried to sneak in the issue of suffering substantial loss if they are evicted which issue had not been pleaded. It is trite law that Parties shall be bound by their pleadings.

31. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. In the application before me, the Applicants have not pleaded that they would suffer any loss and neither have they provided any evidence on the kind of irreparable loss they would suffer if the order of stay was not granted.

33. On the second condition, upon perusal of the Court record, this Court finds that the delivery of the Judgment, in the matter being appealed against, was on the 14th November 2018 wherein the Applicant applied for stay of execution on the 7th December 2018. I find that the said application is brought without undue delay.

34. On the last condition as to provision of security, I find that the Respondent has rightly submitted that the Applicant in the present application has not furnished and/or offered any security for a grant of the order for stay which was a mandatory legal requirement pursuant to the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules.

35. Section 3A. provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

36. Having found that two conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Appellant/Applicant and further, having regard to the above captioned provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this court is not inclined to grant the order of stay of execution so sought.

37. On the second application wherein the Applicants have sought to be enjoined in the Appeal after judgment had been delivered ,

38. The provisions of Order 1 rule 10(2) of the Civil Procedure Code provide as follows:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

39. The Civil Procedure Act is silent on the concept of "interested party". However, under Order 41 Rule 5 of the Civil Procedure Rules 2010, make a reference to the term "interested party" as follows;

"The court either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit"

40. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"

41. Court of Appeal in **Meme vs. Republic (2004) KLR 637** set out circumstances which would warrant grant of leave to enjoin a party to wit:-

"(i) Whether the presence of the party will result in the complete settlement of all the questions involved in the proceedings;

(ii) Whether the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and

(iii) Whether the joinder will prevent a likely course of proliferated litigation."

42. I note that the facts surrounding this application originated from Nyahururu CMC ELC 108 of 2018 wherein on the 14th November 2018, Judgment was delivered with the following orders:

i. That Registrar Laikipia County to cancel all title deeds issued contrary to the confirmed Grant issued on the 17th May 2005 pertaining to Thika Succession Cause No. 254 of 2004 pertaining to parcel of land No. Laikipia/Nyahururu/7197.

ii. There was also an order of permanent injunction restraining the Applicants from dealing with parcel of land No. Laikipia/Nyahururu/7197.

iii. The Applicants were further ordered to vacate and deliver vacant possession of the parcel of land No. Laikipia/Nyahururu/7197 in default they would be forcefully evicted

iv. The Respondents herein were awarded Kenya shillings 200,000/= as general damages for trespass together with interest at court rates from the date of judgment until final payment.

43. Up to this point, it must be noted that the Proposed Interested Parties were not in the picture. It therefore follows that even though the intended interested parties may have substantial interest in the suit, an application for joinder at this stage is of no use for reasons that the case has been concluded, and Judgment entered

44. **The circumstances surrounding this case do not** warrant grant of leave to enjoin the Proposed Interested Party as is stipulated in the case of **Meme vs. Republic (supra)**. For the foregoing reasons, the court finds that the Proposed Interested Party's Notice of Motion dated the 11th March 2019 and filed on 12th March 2019 is not merited.

45. Having found as herein above, I now make the following orders in conclusion.

- i. The Application for stay of execution of the Judgment and Decree issued on the 11th November 2018 pending the hearing and determination of the Appeal is herein denied
- ii. The Application dated the 11th March 2019 seeking to enjoin the intended interested parties to the suit is herein denied.
- iii. The Applicants are granted leave to file and serve their record of Appeal within thirty (30) days from the date of this ruling.
- iv. If the Applicant does not file their record of Appeal within the time stipulated in (iii) above, the window granted to file the Appeal shall automatically lapse.
- v. Cost of these Application shall be borne by the Applicants.

It is so ordered.

Dated and delivered at Nyahururu this 4th day of February 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE