



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC APPEAL NO. 18 OF 2019**

**SARAH NANDACHA MAYEKU.....APPELLANT/APPLICANT**

**VERSUS**

**ADEN NOOR ADEN.....RESPONDENT**

**RULING**

The Application before me for determination is the Appellant's Notice of Motion dated the 26<sup>th</sup> August, 2019 brought pursuant to section 3, 13, and 16 A (1) of the Environment and Land Court Act, and Order 42 Rule 6 of the Civil Procedure Rules. The Appellant seeks the following orders:

1. Spent
2. Spent
3. That a stay of execution of the judgment delivered on 15<sup>th</sup> August, 2019 by Hon. A.K. Ithuku Chief Magistrate in CMCC 219 'A' of 2018 be granted and in particular an order restraining the Respondent whether by himself, his agents, Court Bailiffs or licensed Auctioneer or in any way howsoever from evicting the Appellant/ Applicant from the suit property Ngong/ Ngong Township Block 2/ 376 pending the hearing and determination of this application inter partes.
4. That a stay of execution of the judgment delivered on 15<sup>th</sup> August, 2019 by the Hon. A. K. Ithuku Chief Magistrate in CMCC 219 ' A' OF 2018 and any further enforcement proceedings that would interfere with the Appellant's ownership and possession of the proprietary title, be granted pending the hearing and determination of the appeal filed herein.
5. That an order be issued restraining the Respondent from taking possession, transferring, alienating, charging, entering into or in any other way interfering with the Appellant's possession and ownership of Ngong/ Ngong Township Block 2/ 376.
6. That costs of this application be provided for.

The application is premised on the grounds on the face of it and the affidavit of SARAH NANDACHA MAYEKU where she deposes that she is the rightful owner and in possession of an indefeasible title over parcel of land known as Ngong/ Ngong Township Block 2/ 376 hereinafter referred to as the ' suit land'. She explains that a letter of allotment dated the 25<sup>th</sup> May, 1992 was issued to one Samson Mankuleyo in respect to the suit land. Further, on 14<sup>th</sup> April, 1998, he transferred all his rights and interests to her and consented to registration of the first lease from the Government for a consideration of Kshs. 200,000/=. She confirms that by a Lease dated the 12<sup>th</sup> May, 2004, the Government of Kenya leased the suit land to her for a period of 99 years from 1<sup>st</sup> June, 1998. She avers that by a letter dated the 28<sup>th</sup> August, 2012, Mr. G. W. Mumo on behalf of the District Land Registrar Kajiado North District wrote to the Commissioner of Lands informing him that she had lodged a complaint with the District Land Registry that there was another person claiming ownership of the suit land. She states that the Respondent's Lease was issued on 29<sup>th</sup> September, 2005. Further, that she has resided on the suit land for over 9 years. She insists her title prevails over the Respondent's. Further, that the Respondent filed a suit on 24<sup>th</sup> March, 2014 and she filed her Defence on 5<sup>th</sup> June, 2014. She claims by a judgement delivered on 15<sup>th</sup> August, 2019 the Hon. Chief Magistrate A. K. Ithuku allowed the Respondent's prayers as per the Plaint and ordered that she should be evicted from the suit land, yet it is a property she has built wherein she lives with her family. Further, the Chief Magistrate also ordered that her house should be removed from the suit land. She has lodged an Appeal challenging the entire decision and managed to obtain a certified copy of the judgment but is yet to be furnished with the certified proceedings. She contends that the Respondent visited the suit land with a number of goons, threatened to evict her and has now applied to the Chief Magistrate Ngong for an order of eviction to be enforced against her. She reiterates that there is real danger that the Respondent may enforce the impugned judgment by taking possession, transferring, alienating or entering into the suit land and removing her house therefrom and in the event her appeal is successful, it may be rendered nugatory.

The Respondent ADEN NOOR ADEN opposed the application by filing a replying affidavit where he deposes that the Applicant is

undeserving of any or the orders sought and the Application should be dismissed with costs. He contends that the Applicant has misled the Court to obtain ex parte interim orders as she has never been the owner of the suit land. He insists the alleged ownership documents relied on by the Applicant and presented to this court as evidence in support of this application are forgeries. He claims the Applicant has misled the Court that she resides on the suit land and yet she only has a farm hand staying thereon. Further, that there is a temporary structure built on suit land. He states that the Applicant had previously filed ELC 1133 of 2014 at Nairobi on the same matter, which was struck out. Further, that an application for stay was made at the Magistrate's Court but was dismissed by the Principal Magistrate as it lacked merit. He reiterates that the Magistrate in his judgment provided a 90 days eviction period for the Applicant who is a trespasser and this is fair. Further, that the Applicant has abused the status quo orders issued during the pendency of the suit as the suit land is now occupied by a third party who claims that the Applicant sold the same to him way back in December, 2016 and he has paid three quarters of the purchase price. He insists allowing the Application will be gravely prejudicial to him as it will deny him the fruits of justice after 5 years of delay. He sought for the interim orders granted ex parte by the Court to be vacated as they were procured by material non – disclosure, falsities and perjury by the Applicant.

The Applicant filed a further affidavit where she reiterates her claim and contended that the Chief Land Registrar vide a letter dated the 3<sup>rd</sup> September, 2019 acknowledges that she was issued with a Lease on 12<sup>th</sup> May, 2004 in respect to the suit land. She insists the Lease issued to her is not a forgery. She contends that there was no evidence of investigation done by the Land Registrar in respect to the suit land as he never swore an affidavit confirming that the same was conducted. She denies having transferred the suit land to a third party as alleged by the Respondent and insists she is still in possession of the same. She denies having violated any status quo order and contends that her application for a stay of execution pending appeal is meritorious. Further, that the said application is not an abuse of the process of the court.

Both the Appellant and the Respondent filed their respective submissions to canvass the instant application.

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 26<sup>th</sup> August, 2019 including the respective affidavits and submissions, the only issue for determination is whether there should be a stay of execution of the Judgement delivered on 15<sup>th</sup> August, 2019 by the Hon. A. K. Ithuku Chief Magistrate in CMCC 219 ' A ' OF 2018.

The Appellant in her submissions reiterated her claim above and submitted that she will suffer substantial loss as she has been in possession of the suit land from May 2004. Further, she has made the application without unreasonable delay and since it is a land matter there is no need for deposit of security She relied on the following cases: **Butt Vs Rent Restriction Tribunal ( 1979) eKLR; Benja Properties Limited Vs Syedna Mohammed Burhannudin Sahed & 4 Others ( 2015) and David Oyiare Ntungani Vs Matuiya Ole Naisuaki Orket** to support her arguments. The Respondent submitted that the stay of execution is not merited as the Applicant misled the Court through material non-disclosure, falsities and perjury in order to attain the unmerited orders. He relied on the cases of **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 Others Civil Application No. Nai. 140 of 1995; Tate Access Floor Vs Boswell (1990) 3 All ER 303; Republic V Kenya Medical Training College & Another Ex Parte Kenya Universities and Colleges Central Placement Service (2015) eKLR; and Machira t/a Machira & Co. Advocates Vs East African Standard ( 2002) KLR 63** to buttress his arguments.

Order 42 Rule 6(2) provides that: ' **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.**'

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:'

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.'**

In the current scenario the Appellant seeks a stay of execution which has been vehemently opposed by the Respondent. Both parties admit that the Appellant has been on the suit land with the Respondent contending that she trespassed thereon. The Respondent states that a stay should not be granted as the Appellant only has a farm hand residing on the suit land and which has a temporary structure thereon. He insists the Appellant has failed to disclose material facts that she has transferred suit land to third party hence the stay sought should not be granted. I note the Appellant brought the instant application without unreasonable delay and also filed an Appeal. Order 42 Rule 6 is clear that filing an Appeal alone does not operate as a stay of execution. Further, the Appellant lodged the Application before the Respondent went through the motions of executing the Decree herein. I opine that since a right of Appeal is a Constitutional right of an aggrieved party and a right to fair hearing can only be guaranteed if stay pending appeal is granted to the Appellant; except for the Respondent's averments, and certain correspondence to the effect that the Appellant is guilty of material non – disclosure, falsities and perjury, the Respondent has not furnished court with tangible evidence that she indeed sold the suit land to a third party. I note the Respondent annexed various letters from his advocates and the Land Registrar and Chief Land Registrar which are subject to the Appeal herein as they touch on the dispute relating to the two Certificates of Lease to oppose this application. It is my considered view that the Respondent's aforementioned averments are not

sufficient to confirm that the Appellant attempted to steal a match on him. The Respondent has filed various authorities insisting that since the Appellant failed to disclose material facts, she is hence not entitled to an order of stay pending Appeal but based on my analysis above, I will disregard the same. Since it is the Appellant who has been on the suit land for a while, with the Respondent having admitted in his evidence that he had never taken possession of the same and being that the Appeal revolves around dispute over title to the said land, I opine that she is indeed the disadvantaged party herein. Based on the standards set in the above cited case and in applying them to the circumstances at hand, I find that the Appellant has met the threshold for stay of execution and will grant her the same.

It is against the foregoing that I find the Appellant's Notice of Motion dated the 26<sup>th</sup> August, 2019 merited and will allow it. I will proceed to make the following final Orders:

- i. That a stay of execution of the judgment delivered on 15<sup>th</sup> August, 2019 by the Hon. A. K. Ithuku Chief Magistrate in CMCC 219 ' A' OF 2018 and any further enforcement proceedings, be and is hereby granted pending the hearing and determination of the appeal filed herein.
- ii. That the Respondent be and is hereby restrained from taking possession, transferring, alienating, charging, entering into or in any other way interfering with the Appellant's possession and ownership of Ngong/ Ngong Township Block 2/ 376 pending the determination of the Appeal filed herein
- iii. That costs of this application be in the cause.

**Dated Signed and delivered via email this 29<sup>th</sup> Day of April 2020.**

**CHRISTINE OCHIENG**

**JUDGE**