



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 166 OF 2016

EUNICE NYAMBURA MUTHUCI.....1ST PLAINTIFF

EVANS GITONGA KIMENDERO.....2ND PLAINTIFF

MOSES MURIITHI WACHIRA.....3RD PLAINTIFF

JAMES KARIUKI MUTHUCHI.....4TH PLAINTIFF

MARGARET WANGARI WARUI.....5TH PLAINTIFF

JANE NJOKI MUTHUSI.....6TH PLAINTIFF

VERSUS

KENNETH KINYUA WABETTA.....1ST DEFENDANT

IRENE NYAWIRA WABETTA.....2ND DEFENDANT

PAUL WACHIRA WABETTA.....3RD DEFENDANT

EDWIN TITUS MWAURA WABETTA.....4TH DEFENDANT

ERIC GIBSON WABETTA.....5TH DEFENDANT

DANSON KIMANI WABETTA.....6TH DEFENDANT

JUDGMENT

The application before me is the Notice of Motion dated 18th July 2019 brought under *Section 1A, 1B and 3A CPA, Order 42 Rule 6 CPR*. The applicants seek the following orders:

1. Spent.

2. Spent.

3. That the Honourable Court be pleased to grant an order of stay of execution of the judgment and decree as issued by this Court on 28th June 2019 pending the hearing and determination of the intended Appeal.

4. The costs herein be borne by the respondents.

The application is supported by the affidavit of Moses Muruthi Wachira, the 3rd applicant on behalf of the five other applicants and on his own behalf. The respondents filed a replying affidavit sworn on 16th October 2019.

APPLICANTS CASE

The applicants in their supporting affidavit contend that after the claim was dismissed by this Honourable Court on 28th June 2019, they were aggrieved and they filed a Notice of Appeal dated 4th July 2019. They stated that they have lived in the suit property all their lives and are at the risk of being evicted from where they know as home. The applicants also contend that they have extensively developed the suit land and stand to suffer irreparably should the judgment remain. The applicants argued that there is an urgent need for Court's intervention to preserve the suit property otherwise the intended Appeal will be rendered nugatory and an academic exercise.

RESPONDENTS CASE

The respondents in their replying affidavit sworn on 16th October 2019 sought to have the Notice of Motion struck out for having been drawn by an unqualified person. The respondents through their advocate on record stated that Charles Mbugua who is acting for the applicants last took out Practicing Certificate in the year 2017 and has been inactive to-date. She stated that the said advocate did not possess a practicing certificate at the time he drew the documents.

APPLICANTS REJOINDER

By way of a further affidavit, Charles Mbugua Advocate who is instructed by the applicants stated that contrary to the allegations raised by counsel for the respondents in the replying affidavit, he has a current Practicing Certificate for the year under review a copy of which he attached to the said further affidavit.

SUBMISSIONS BY THE APPLICANTS

The applicants submitted that **Order 42 Rule 6 (1) CPR** empowers this Court to grant the orders of stay of execution, either of its judgment, or that of a Court whose decision is being appealed from pending appeal. He cited the following authorities in support thereof:

1. Amal Hauliers Ltd Vs Abdul Nasir Hassan (2017) e K.L.R.
2. Nairobi Women's Hospital Vs Purity Kemunto (2018) e K.L.R.
3. Housing Finance Company of Kenya Vs Sharok Kher Mohammed Ali Harji & Another (2015) e K.L.R.
4. National Bank of Kenya Ltd Vs Anaj Waze Housing Ltd (1915) e K.L.R.
5. Republic Vs Resident Magistrate's Court at Kiambu, Ex-parte Geoffrey Kariuki Njuguna & 9 others (2016) e K.L.R.
6. Peterson O. Malombo t/a O.M. Robinson & Co. Advocates Vs Disciplinary Tribunal of the Law Society of Kenya & 36 others (2015) e K.L.R.

RESPONDENTS SUBMISSIONS

The respondents submitted that for the orders of stay pending Appeal to be granted, the applicant MUST satisfy all the three conditions set out under **Order 42 Rule 6 CPR**. They submitted that judgment was delivered on 28th June 2019 and after the judgment, the applicants filed a Notice of Appeal but no appeal has been filed by the applicants since then. They argued that there is nothing to show that they have even made a request for typed proceedings to be issued. The respondents also contend that the applicants have not provided security or even undertook to comply with any conditions that the Court may set as regarding security for the due performance of the decree. They

submitted that the applicants have not met the threshold required under **Order 42 Rule 6 CPR** and that the application should be dismissed. They cited the following authority in opposing the application:

1. Simon Mbocha Kinyati & another Vs Phobe Njeri Kamau & another (2019) e K.L.R.

ANALYSI AND DECISION

I have considered the application dated 18th July 2019, the affidavit both in support and in opposition thereto and the submissions by the parties. The applicants in the said application are seeking a stay of execution pending appeal. The grounds for the grant of such orders are set out under **Order 42 Rule 6 (2)** which provides as follows:

“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.**
- b. Such security as the Court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant”.**

The Court record indicated that the judgment of this Honourable Court which is the subject of the intended Appeal was delivered on 28th

June 2019. On 11th July 2019, the applicants lodged a Notice of Appeal and on 18th July 2019, this application was filed by the applicants. On the first issue on whether the application was filed without unreasonable delay, I can confirm in the affirmative. On whether substantial loss may result to the applicants unless the order was made is a matter of evidence. The applicants in the supporting affidavit have deponed that they have lived in the suit property all their lives and are at the risk of being evicted. They also contend that they have extensively developed the suit land and stand to suffer irreparably should the orders not be granted. In the adversarial system of litigation, such as ours, the winner normally takes it all unlike the arbitration system where there can be some leeway for continuity and mutual co-existence. This Court after hearing the parties and the witnesses held in favour of the respondents. Any imminent execution of the decree of this Court is a lawful process and not regarded as a substantial loss to the applicants. The Court must balance between the compelling rights of a successful litigant and the applicants in exercise of their undoubted right of appeal before the higher Court. On the last conditions for the grant of stay orders, the applicants have not given any security or undertaking to comply with any order that this Honourable Court may give for the due performance of the decree as may ultimately be binding on them. Failure by the applicants to satisfy the Court on the two grounds that is substantial loss and security for the due performance as may ultimately be binding is fatal.

Having said that and considering that the Court of Appeal sitting at Nyeri has been suspended and that the only Court of Appeal sitting at the moment are conducted in Nairobi and considering the covid-19 pandemic that has ravaged the world and has not spared the country with Nairobi being on lock-down, I exercise the Court's discretion and grant the applicants a stay of execution for only two (2) months from today after which the same shall lapse.

For the avoidance of doubt, I have also considered the issue raised on whether the proceedings and the impugned judgment in this Court together with the present application should be struck out for being drawn by an unqualified lawyer. I have looked at the further affidavit sworn by Charles Mbugua W. Advocate where he deponed that he has a Practicing Certificate for the year under review. I find that this was not appropriate to consider such a weighty issue. If the respondents are not

satisfied, they may apply. Otherwise the issue for now shall remain moot. As regards costs, I order that the costs of this application to abide the intended Appeal. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 29th day of May, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Mbugua for Applicant
2. Mr. Muriithi holding brief for Ms Makworo for Respondent
3. Mbogo – Court clerk