



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CASE NO. 256 OF 1995**

**IN THE MATTER OF THE ESTATE OF THE**

**LATE JOHN GAKUNGA NJOROGE (DECEASED)**

**JOHN KINYANJUI GAKUNGA.....PETITIONER/RESPONDENT**

**JOHN MUINDEGAKUNGA.....PETITIONER/RESPONDENT**

**VERSUS**

**JACKSON MUSAU MANG'EE.....1<sup>st</sup> INTERESTED PARTY/APPLICANT**

**DAVID MUSAU WAMBUA.....2<sup>nd</sup> INTERESTED PARTY/APPLICANT**

**MUNEE MUTISO.....3<sup>rd</sup> INTERESTED PARTY/APPLICANT**

**BETH MUENI MUIITHYA.....4<sup>th</sup> INTERESTED PARTY/APPLICANT**

**RONALD MAKAU.....5<sup>th</sup> INTERESTED PARTY/APPLICANT**

**DANIEL KING'OO KITAKA.....6<sup>th</sup> INTERESTED PARTY/APPLICANT**

**JAMES KIILU.....7<sup>th</sup> INTERESTED PARTY/APPLICANT**

**SALOME KIILU.....8<sup>th</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. The 4th Interested Party/Applicant has filed an application dated 16th May 2016 pursuant to the provisions Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules, Section A, 1B and 3A of the Civil Procedure Act and other enabling provisions of the law for the following reliefs namely:

**i) (Spent)**

***ii) That this honourable court be pleased to grant a stay of execution and orders of the ruling issued by this honourable court on 16th November 2015 pending the hearing and determination of the Appeal.***

***iii) That the honourable court be pleased to grant an extension of the orders staying eviction as stated in the ruling dated 16-11-2015 by the honourable justice Edward Muriithi in the interim pending the hearing of this application in the Court of Appeal for leave to file the notice of appeal out of time.***

***iv) That the costs of this application be provided for.***

2. The application is supported by the annexed affidavit of Christine O. Oseko sworn on even date and further on the following grounds:

**i) The 4th Interested Party/Applicant will suffer substantial loss if the orders of stay are not granted as she has lived with her family in occupation of the property and developed it since on or about the year 1992 and shall be evicted any time.**

**ii) The execution of the eviction orders shall render the 4th Interested Party/Applicant homeless as she and her family do not have any place to go.**

**iii) The 4th Interested Party/Applicant is in the process of preferring an appeal against the ruling of Justice Edward Muriithi on two consolidated applications dated 30-11-2004 and 31-12-2004 in Succession Cause No. 256 of 1995 at the High Court in Machakos.**

**iv) The intended appeal has high chances of success and which shall be rendered nugatory unless this application is granted.**

**v) The 4th Interested Party/Applicant will suffer substantial loss and damage unless the respondent is in the meantime restrained from executing the eviction orders.**

**vi) The application has been filed without unreasonable delay as the parties were given six months to negotiate on settlement ending the 16-5-2016. The said negotiations have however borne no fruits.**

**vii) The Interested Party/Applicant seeks the court's guidance on reasonable conditions for security and is willing to abide by any such order upon the grant of the order of stay of execution.**

**vii) It is in the interest of justice and saving judicial time to hear this application.**

3. The application was not opposed by the respondents as no replying affidavits or grounds of opposition were filed in response to the application. No reasons were given on the part of the respondents for failure to file a reply to the application despite the fact that they had been aware of the application since the parties had been engaged in negotiations to settle the matter. It would appear therefore that the 4th interested party/Applicant's application is unopposed.

4. Parties had been directed to file written submission. However, it is noted that it is only the 4th Interested Party's counsel who filed submissions. It was submitted for the Interested Party/Applicant that pursuant to the ruling dated 16-11-2015 this court had give a six month window period within which the applicant could negotiate with the respondents over the property she occupied and that the said six months have since elapsed with the respondents intent on evicting the applicant from the land that she had purchased. It was submitted that the applicant is now desirous of lodging an appeal to the Court of Appeal as indicated in the draft Notice of Appeal. It was submitted that the application for stay of execution had been made without unreasonable delay since the parties had been engaged in negotiations within six months period granted by this court vide ruling dated 16-11-2015. It was also submitted that the applicant will suffer substantial loss if the stay is not granted since the applicant has lived with her family on the land for the last 26 years where she has erected permanent structures and the threatened eviction would render her and her family destitute. Reliance was placed in the cases of **Mary Cheptoo Sote -VS- Samson Cheruiyot Barngwach & Another [2015] eKLR** where it was held that an order of stay was appropriate where the applicant had been in occupation and possession of the suit property for 50 years would suffer greatly if stay was not granted. Learned counsel for the applicant further submitted that the intended appeal is arguable and would be rendered nugatory if stay is not granted. It was also submitted that the applicant is willing to furnish to court security for due performance of the decree as may be directed by the court. It was contended for the applicant that she had bought the property whereby the respondents received the full purchase consideration and are not likely to suffer any financial loss and therefore if any order on security are to be imposed then they should be reasonable in the circumstance.

5. I have considered the applicant's application and the submissions presented. The application is predicated upon Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

**6 (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.**

**c) notwithstanding anything contained in sub rule 2, the court shall have power without formal application made to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

The Court of Appeal in **Butt -VS- Rent Restriction Tribunal [1982] KLR 417** expounded the above conditions for grant of stay of execution namely that the application should be made without unreasonable delay, a substantial loss will be suffered by the applicant unless the order is made and lastly the applicant should give security for the due performance of the decree that will ultimately be binding upon him.

As regards the question whether the application had been made without unreasonable delay, it is noted that the ruling sought to be appealed against was made on the 16-11-2015 and that the applicant was granted stay of eviction from the property for a period of six months within which time the parties were to enter into negotiations failing which the applicant would be evicted. The present application was filed on the 16-5-2016 which was immediately after the six months grace period had expired and hence I find the application was filed without unreasonable delay.

On the question of substantial loss, I note the applicant has indicated that she has been in occupation of the property for a period of 26 years

and has erected permanent structures thereon. She has also indicated that she had fully paid the purchase price for the property and that the intended eviction will render her family destitute. The possibility of losing the land where she has called her home for the last twenty six years is not only worrisome but traumatic. Land is known to have an intrinsic value and their owners like the applicant herein usually have an attachment to it and therefore an eviction from such attachment will definitely occasion substantial loss. There is also the possibility that the applicant might not get another property of similar peculiarities. I find in the event of an order of stay being denied, the applicant stands to suffer substantial loss. In the case of **Mary Cheptoo Sote -VS- Samson Cheruiyot Barnwach & Another [2015] eKLR** the court was persuaded that an order of stay was appropriate where the applicant had been in occupation of the suit property for 50 years and thus a denial of stay of execution would have caused the applicant substantial loss by rendering them destitute and that the appeal would have been rendered nugatory. The applicant has expressly indicated that she intends to lodge appeal to the Court of Appeal against the ruling dated 16-11-2015. She has annexed draft copies of the Notice of Appeal as well as the application to lodge appeal out of time. I have perused the said draft pleadings and note that indeed the applicant is really desirous to pursue an appeal after the negotiations with the respondents hit a snag. I find there is need to protect the subject matter of the dispute that will be determined during the appeal and this therefore warrants an order of stay of execution of the eviction of the applicant from the land. In the case of **Selestica Limited -VS- Gold Rock Development Ltd [2015] eKLR** the court held as follows:

**“On the issue whether stay of execution pending appeal should be granted or the same has been overtaken by events, the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.**

If the applicant is evicted from the property and that at the end of the day it is determined on appeal that this court was wrong in arriving at its decision and that the eviction was wrongful, the applicant would have suffered substantial loss that includes loss of the property, and what she had called home all these years. I find therefore that there is good cause for the grant of stay of execution pending the intended appeal.

Lastly, on the question of security, the applicant has indicated that she is ready and willing to provide reasonable security for the due performance of the decree. The applicant has also invited this court to note that the respondents duly received the full purchase price of the property and are not in any way in danger of financial loss. However, the issue of costs cannot be side stepped by the applicant is that the outcome of the appeal will definitely entail an aspect of costs. Hence the applicant must be prepared to address herself on issue of security for the due performance of the decree which may ultimately be binding upon her. Already the respondents have obtained an order of eviction in their favour against the applicant which in essence is a decree to be satisfied by the applicant herein. The merits or demerits of the intended appeal shall await the same to be determined by the Court of Appeal once the appeal lands there. The applicant must therefore provide security for the due performance of the decree. The eviction sought to be carried out against the applicant entails expenses. I find the sum of Kshs. 300,000/= would be reasonable as security in the circumstances.

Finally, it is noted that the applicant is yet to lodge her appeal with the Court of Appeal. There is a draft notice of appeal as well as an application for leave to lodge appeal out of time. The applicant has stated that all this time she had been engaged in negotiations with the respondents and she did not lodge the appeal in time as she did not wish to jeopardize the negotiations. The merits or demerits of the intended application for leave to lodge appeal out of time will be determined by the Court of Appeal when the applicant finally knocks on its doors. This court is of the view that since the applicant has expressed a wish to pursue an appeal to the Court of Appeal, she should be allowed to do so. The right of appeal is a constitutional right and is guaranteed under Article 50 (1) of the Constitution. It is upto the appellate court to decide whether or not the appeal will be entertained. The respondent concerns at present shall be taken care of by the aspect of deposit of security for due performance of the decree.

6. In the result the applicant's application dated 16-5-2016 is allowed in the following terms:

**a) There be stay of execution and orders of the ruling by this honourable court on 16th November 2015 pending the hearing and determination of the intended appeal upon the applicant depositing the sum of Kshs. 300,000/= into a joint interest earning account to be operated by both Advocates for respective parties within 45 days from the date hereof.**

**b) The applicant is directed to ensure that her application seeking leaving to lodge appeal out of time is filed at the relevant court within 45 days from the date hereof.**

**c) In default of the above, the stay order shall lapse.**

**d) The costs hereof shall abide the outcome of the intended appeal.**

Orders accordingly.

**Dated and delivered at Machakos this 19<sup>th</sup> day of July, 2018.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

No appearance for Kitheka - for the Petitioners/Respondents

Kinyanjui - for the interested parties/applicants

