



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 27 OF 2019**

**JOHN KIMANI MWANGI.....APPELLANT/APPLICANT**

**VERSUS**

**PERIS OWALA.....1<sup>ST</sup> RESPONDENT**

**LUCKY SUMMER ESTATE CO. LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is the notice of motion dated 29<sup>th</sup> July 2019 brought under Article 159 of the Constitution of Kenya, order 40, 42 and 50 of the Civil procedure Rules 2010 and all enabling provisions of the law.

2. It seeks orders:-

*(1) Spent.*

*(2) The honourable court be pleased to issue order for the preservation of the property known as Plot No. 913, restraining its sale, disposition, delineation, construction and/or any interference pending hearing and determination of this motion.*

*(3) The honourable court be pleased to issue orders for the preservation of the property known as Plot No. 913 restraining its sale, disposition, delineation, construction and/or any interference pending hearing and determination of the present appeal.*

*(4) The honourable court be pleased to grant such further orders to secure the ends of justice.*

*(5) Costs of this application be provided for.*

3. The grounds are on the face of the application and are:-

*(a) The appellant/applicant is aggrieved by the entire judgment of trial court rendered on 3<sup>rd</sup> April, 2019 dismissing his case.*

*(b) The appellant/applicant at the first instance sought stay/preservatory and/or injunctive orders at the court appealed from but the same was denied through a ruling rendered on 12<sup>th</sup> April 2019.*

*(c) The subject matter of this appeal concerns land whose ownership is strenuously contested by the parties.*

*(d) There is a real likelihood that the respondents will interfere with the suit property.*

*(e) The intended appeal has overwhelming chances of success.*

*(f) The respondents would not suffer much prejudice by the grant of the temporary reliefs sought.*

*(g) The present application is made timeously without unreasonable delay.*

*(h) It is in the interests of justice for the subject matter of the appeal to be preserved.*

*(i) Unless the honourable court intervenes the intended appeal will be rendered nugatory.*

4. The application is supported by the affidavit of John Kamani Mwangi sworn on the 29<sup>th</sup> July 2019.
5. The application is opposed. There are grounds of opposition filed by the 1<sup>st</sup> respondent, dated 9<sup>th</sup> September 2019.
6. On the 12<sup>th</sup> March 2020, the application proceeded by way of oral submissions.
7. It is the applicant's case that he will suffer substantial loss if the orders sought are not granted. That this being a claim on land it is unique by its very nature. Further that the appeal will be rendered nugatory if the orders sought are not granted as the subject matter will be unavailable. The application has been brought without unreasonable delay. He finally submitted that he is willing to abide by any condition set by this honourable court.
8. The 1<sup>st</sup> respondent on the other hand contends that the applicant has not met the conditions for grant of temporary injunctions. That the orders sought cannot be granted as framed as prayer 3 seeks preservation of plot 913. The description of the said property is not given. The applicant's suit in the lower court was dismissed hence there is nothing to stay or execute. No action needs to be taken. She prays that the application be found not to be merited and be dismissed with costs.
9. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the grounds of opposition and the oral submissions. The issue for determination is whether this application is merited.
10. **Order 42 rule 6(2)** of the Civil Procedure Rules provides that:-

***“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.***

It is clear from the above provisions that it requires specific conditions to be met by the applicant in order for orders of stay to be granted..

11. In the case of **Peter Ondande t/a Spreadwith Chemist vs Josephine Wangari Karanja [2006] eKLR**, L. Kimaru J stated as follows:-

***“The issue for determination by the court is whether the applicant has established a case to enable the court to grant stay of execution sought. For the court to grant stay of execution it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding on him”.***

Also in the case of **Feisal Amm Jan Mohammed t/a Dunvia Forwarders vs Shami Trading Co. Ltd Mombasa HC Civil Appeal No. 65 of 2013 [2014] eKLR Kasango J** stated as follows:-

***“It is trite law therefore that a stay of execution order is generally granted if the applicant has successfully demonstrated that a substantial loss may result to him unless the order is made, that the application was made without unreasonable delay and that the applicant has offered proper security”.***

I am guided by the above authorities. I have considered the notice of motion herein. I find that it has been brought without undue delay. It is the applicant's case that the subject matter ought to be preserved so that the appeal is not rendered nugatory.

12. In prayer 3 of the notice of motion the application seeks:-

***“That the honourable court be pleased to issue orders for preservation of property known as Plot NO. 913 restraining its sale, disposition, delianation, construction and/or any interference pending hearing and determination of the present appeal”***

13. The applicant has not given a full description of the property. He has also failed to annex any documents to properly describe the subject matter. I find that he has failed to demonstrate that he will suffer substantial loss if these orders are not granted.

13. I also agree with the 1<sup>st</sup> respondent's submissions that there is nothing to stay as no action was required to be taken after the lower court delivered its judgment. The applicant's suit was dismissed. There is nothing to be enforced.

14. I have also gone through the application herein and I find that the applicant has failed to attach the decree that is being appealed against.

15. In conclusion, I find that the applicant's application has failed to satisfy the requirements set out under order 42 rule 6(2) of the Civil Procedure Rules. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the appeal.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 14<sup>TH</sup> day of MAY 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Appellant

No appearance for the Respondents

Kajuju -Court Assistant