



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC 276 OF 2017

ELIJAH NJUGUNA NJOKI - APPLICANT /PLAINTIFF

VS

ELIJAH MUIRURI NJUGUNA - 1ST RESPONDENT/DEFENDANT

STANLEY KARANJA NJOKI - 2ND RESPONDENT/DEFENDANT

GLADYS WANGUI NJOKI - 3RD RESPONDENT/DEFENDANT

REBECCA NYAMBURA NJOKI - 4TH RESPONDENT/DEFENDANT

AGNES NJERI KIRAGU - 5TH RESPONDENT/ DEFENDANT

RULING

1. This ruling is in respect to the Notice of Motion dated 11/11/2019 filed under certificate of urgency on the 15/1/2019 by the Applicant seeking the following orders;

a. Spent.

b. That stay of execution be granted maintaining the status quo herein pending the hearing and determination of this application.

c. That the Court be pleased to grant stay of execution by maintaining the status quo of the suit land LOC 2/GACHARAGE/1129 pending hearing and determination of the Appeal against the ruling and subsequent order made by Hon. J.G Kemei on the 2nd of May 2019.

2. The application is premised on the following grounds;

a. That Judgment was delivered on 2nd May 2019 in favour of the Respondents that the Applicant allow for the subdivision of the suit land LOC 2/GACHARAGE/1129.

b. That the Applicant has appealed against the whole judgment herein and if the Respondents are allowed to execute against it, the appeal will be rendered nugatory.

c. That, if a stay of all proceedings is not granted, irreparable damage, may result to the Appellant, as the order for sub-division may be executed thus rendering the Appeal herein nugatory.

d. That the plaintiff/ Applicant herein has moved to this Court without undue delay.

e. That the Applicant is ready and willing to provide such security as the Court may order for the due performance of such decree as may ultimately be binding upon me. In addition, that the Applicant is ready and willing to deposit such sums of money as may be ordered in a joint interest earning account in the name of my advocates on records and those of the Defendant's advocates.

f. That the orders sought herein are just and proper for purposes of justice and the same will not prejudice the litigants in the suit.

3. In his supporting affidavit the Applicant avers that his previous advocates mistakenly failed to file the Notice of appeal in time, but the same has since been filed by his current advocates albeit out of time. That he has also filed an application seeking leave for expansion of time within which he can file his appeal. That the 1st and 2nd defendants have filed party and party bill of costs on 13/5/2019 claiming Kshs 535,155/- as costs of the suit and is apprehensive that the same shall be executed against him any time after issuance of the certificate of taxation.
4. That the Respondents have begun subdividing the suit land without involving the Applicant contrary to the decree of this Court. That the outcome of his intended appeal would be rendered nugatory if stay orders are not granted. That he stands to suffer irreparably as he may not be able to recover the suit land after its subdivision and the costs thereof because the Respondents are men of straw. He reiterates his willingness to deposit security against costs for the stay of execution. That his application has been brought without undue delay.
5. The application is opposed via the replying affidavit of the 2nd Respondent who deposes that the Applicant admitted to have failed in filing the notice of appeal and indeed went ahead to file an application for leave to do so, the notice of appeal filed before this Court is thus defective. Further that the current advocates on record for the Applicant appear to have filed the Notice of appeal before coming on record. That the notice of appeal fails to comply with the rules of Court of Appeal (rule 75(2) thereof) as required under Order 42 rule 2(4) of the Civil Procedure Rules.
6. That the injunctive orders in the manner requested by the Applicant speaks into orders for status quo which this Court lacks powers to grant in its original jurisdiction under Order 42 rule 6(6) of the Civil Procedure Rules. That the execution process has not even begun to warrant the grant of the orders sought, the Court cannot be asked to stop prospective execution proceedings. Additionally, that there is no good reason given for stopping the taxation of the 1st and 2nd defendants' bill of costs. No good explanation has been offered on how the Applicant stands to be prejudiced if the application is declined and neither has, he disclosed the substantial loss to be suffered if the land is subdivided between his six siblings and if the costs are taxed as ordered by the Court. The Applicant has not given any actual security. That the application has been lodged after an inordinately long period of 6 ½ months. He opines that it's in the interest of justice for the unmerited application to be dismissed.
7. The application was canvassed through written submissions
8. In his submissions the Applicant avers that the Respondents replying affidavit largely addresses the documents filed before the Court of appeal by the Applicant herein which are beyond the jurisdiction of this Court. That the Respondents have also failed to demonstrate how the Applicant has failed to establish the grounds for the grant of stay of execution. That despite the grounds set under the procedural rules for the grant of stay orders the Court has discretionary powers to issue stay of execution orders and has quoted various reasoning advanced by the Courts one such is the Court of appeal in the case of **Butt vs. Rent Restriction Tribunal [1982] KLR417** where the Court observed as thus;

...“The Court’s discretion ought to be exercised in a manner that would not prevent an appeal.... The purpose of stay of execution pending appeal is to preserve the subject matter so that the right of appeal can be exercised without prejudicing the Applicant as the appeal would be rendered nugatory if there is no stay...”
9. That following this Court’s judgement the Applicant’s land shall be subdivided and shared among his siblings thus he stands to lose his land. That the loss of his land amounts to breach of the right to property which is protected by the Constitution. That subdivision would lower the market value of his land being an agricultural land. Further that the subdivision of the land will cause him to lose his family home and be rendered destitute. That the Respondents demolished his two houses on the land and it took the intervention of the local chief to stop them from demolishing his family home. That the Applicant stands to lose the amounts payable as costs to the defendants as they have no means of refunding the same should the Appellate Court rule in his favour.
10. In respect to the delay in bringing the instant application the Applicant submits that he begun by filing an application before the Court of Appeal for extension of time on 27/05/2019 while acting in person and was withdrawn by his current advocates upon coming on record and in its stead this application was filed and contends that the lapse of the six months’ period was not inordinate. He prays that the mistakes of his previous counsel should not be visited on him.
11. The Applicant closed his submissions by reiterating his willingness to furnish security for the decretal award by depositing the same in an interest earning account and or surrendering the title to the suit land, as a condition for issuance of the stay orders.
12. The Respondents submit that the notice of appeal as filed before the Court of Appeal is defective for having been filed out of time. That position is acknowledged in the Civil Appeal No. 77 of 2019 seeking for extension of time. In the premises the Respondents contend that there is no legally recognized appeal in place for this Court to issue stay orders.
13. That the Respondents failed to tender affidavit evidence over the substantial loss they stand to suffer and have sought to introduce evidence in submissions in respect to the demolition of houses and the deep in market value of the land. That the impugned judgement indeed does not interfere with the Applicant’s portion of his land, in effect the judgment did not render the Applicant destitute. That there was no order for the Applicant to cater for all the other’s costs in the subdivision process. That the costs are yet to be taxed only then can they be ascertained. That after the subdivision the Respondents will become registered land owners which are attachable to recover costs.
14. On security the Respondents suggest that after the subdivision, each party to have their own portions which may be consolidated in the event the appellate Court rules so.
15. That the delay of 6 months is inordinate and unexplained and the Applicant cannot be excused for ignorance. That injunctive orders for maintaining status quo cannot be granted by this Court at this stage of the trial.

16. Order 42, rule 6 of the Civil procedure Rules provide as follows;

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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 .

(3) Notwithstanding anything contained in subrule (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.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

17. In the case of Elena **D.Korir vs Kenyatta University {2012}eKLR** the Court had this to say:-

“the application must meet a criteria set out in precedents and the criteria is best captured in the case of **Halal & another vs Thornton & Turpin Ltd {1993} KLR 365** where the Court of Appeal held that the High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in **Hassan Guyo Wakalo vs Straman EA Ltd (2013)** as follows: -

“In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.

18. In the case of **Equity Bank Ltd vs Taiga Adams Company Ltd {2012} eKLR** it was held that:

“.....of even greater impact is the fact that an Applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought..... let me conclude by stressing

In any event the status quo being sought has not been defined by the Applicant.

24. Security for the due performance of the decree seems to have been ably canvassed by the Applicant in the manner in which he intimated his readiness and willingness to meet the security as determined by the Court including surrendering the original title for safe keeping by the Court. The other conditions having not been met; I see no need to discuss this one. In any event it is within its unfettered power that the Court issues such security as is just in the due performance of the decree.

25. Having found that there is no appeal for which an application for stay of execution /issuance of orders of status quo pending appeal would be anchored, the Court finds this application unmeritorious.

25. It is dismissed with costs to the Respondents.

26. It is so ordered.

DATED, DELIVERED AND SIGNED VIA EMAIL THIS 7TH DAY OF MAY 2020.

J.G. KEMEI

JUDGE

ORDERS

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this ruling has been delivered to the parties by electronic mail/video conferencing. In this case the parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court

J.G. KEMEI

JUDGE