



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 5 OF 2017**

**(FORMERLY SIAKAGO CIVIL CASE NO. 48 OF 2013)**

**JULIANA MBUYA NJIRU.....PLAINTIFF**

**VERSUS**

**PITHON NJIRU NGIRI.....1<sup>ST</sup> DEFENDANT**

**NGUYU KARANJA.....2<sup>ND</sup> DEFENDANT**

**ADRIANO MATHURI NGONDI.....3<sup>RD</sup> DEFENDANT**

(Survived by **MARGARET MBUCU MATHURI**)

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 24<sup>th</sup> March 2020 and amended on 19<sup>th</sup> May 2020 brought under **Order 42 Rule 6** and **Order 9 Rule 10** of the **Civil Procedure Rules** (*the Rules*) the Plaintiff sought the following orders:

- a. Spent
- b. That this court do grant leave to Anne Thungu & Co. Advocates to come on record for the Plaintiff in place of Rose Njeru & Co. Advocates.
- c. That this court do grant leave to Robinson Kimathi Njiru to substitute the deceased Applicant Juliana Mbuya Njiru.
- d. Spent
- e. This court do restrain and prohibit all dealings with land Parcel No. Embu/Kithunthiri/1484 (now subdivided to Embu/Kithunthiri/3569, Embu/Kithunthiri/3570 & Embu/Kithunthiri/3571 pending hearing and determination of the intended appeal and the application to file notice of appeal out of time and thereafter the appeal.
- f. That this court do grant a stay of execution of the judgement and stay the eviction order and restrain the Defendants from evicting the occupants of land Parcel No. Embu/Kithunthiri/1484 (now subdivided to Embu/Kithunthiri/3569, Embu/Kithunthiri/3570 & Embu/Kithunthiri/3571 pending hearing and determination of the intended appeal and the application to file notice of appeal out of time and thereafter the appeal.
- g. Costs be provided for.

**B. THE PLAINTIFF'S CASE**

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Robinson Kimathi Njiru on 19<sup>th</sup> May 2020. It was contended that the original Plaintiff was deceased hence the need to undertake substitution with her personal representative. It was also contended that the Plaintiff's family was dissatisfied with the judgement and decree

of the court dated 27<sup>th</sup> February 2020 hence they intended to appeal against it. It was further contended that the application could not be filed earlier due to the demise of the original Plaintiff and the Covid-19 pandemic which followed in March 2020.

3. The Plaintiff contended that he and the rest of the family members would suffer irreparable loss and damage if they were to be evicted from the suit properties before the hearing and determination of the intended appeal. It was further contended that the Defendants would not suffer any prejudice if stay of execution was granted.

### **C. THE DEFENDANTS' RESPONSE**

4. The 3<sup>rd</sup> Defendant filed a replying sworn on 15<sup>th</sup> May 2020 on her own behalf and on behalf of her co-defendants in opposition to the said application. It was contended that the decree had already been executed and the original suit property *Title No. Embu/Kithunthiri/1484* was no longer in existence as it had been sub-divided and transferred to the respective owners.

5. The 3<sup>rd</sup> Defendant contended that since the suit properties were bushy and had no structures thereon the Defendants had ploughed the same and planted some crops. It was further stated that the Plaintiff had threatened to cause a breach of the peace by chasing away the Defendants' workers who were working on the suit properties. The Defendants also contended that the Plaintiff had no arguable appeal with high chances of success and that he had not offered any security for due performance of the decree should his appeal ultimately fail.

6. The 3<sup>rd</sup> Defendant also filed a further replying affidavit sworn on 2<sup>nd</sup> June 2020 in response to the Plaintiff's amended notice of motion of 19<sup>th</sup> May 2020. It was contended that the prayer for stay of execution had already been overtaken by events since the Defendants had been in occupation since March 2020 and had already cultivated the suit properties. The Defendants further contended that this court had no jurisdiction to grant a stay of execution since the Plaintiff had not filed a valid notice of appeal as required by the **Court of Appeal Rules**. It was further stated that the Plaintiff had filed an application before the Court of Appeal at Nyeri seeking stay of execution. The court was consequently urged to dismiss the application.

### **D. DIRECTIONS ON THE HEARING OF THE APPLICATION**

7. When the said application was listed for hearing on 26<sup>th</sup> May 2020 the court granted orders for change of advocates and substitution of the deceased Plaintiff. It was directed that the rest of the prayers be canvassed through written submissions. The Plaintiff was given 7 days within which to file his written submission whereas the Defendants were granted 7 days upon the lapse of that period to file theirs. The record shows that the Plaintiff's submissions were filed on 5<sup>th</sup> June 2020 whereas the Defendants' submissions were not on record by the time of preparation of the ruling.

### **E. THE ISSUES FOR DETERMINATION**

8. The court has considered the amended application, the replying affidavit and further affidavit in opposition thereto and the submissions on record. The court is of the opinion that the following issues arise for determination:

- a. Whether the application for stay of execution is incompetent.
- b. Whether the Plaintiff has made out a case for the grant of an order of stay of execution.
- c. Whether the Plaintiff has made out a case for an order to prohibit all dealings with the suit properties.
- d. Whether the instant application has been overtaken by events.
- e. Who shall bear costs of the application.

### **F. ANALYSIS AND DETERMINATIONS**

#### **a. Whether the application for stay of execution is incompetent**

9. The Defendants contended that there was no valid notice of appeal in place hence the instant application was incompetent. It was further contended that the court had no jurisdiction to grant a stay of execution in the circumstances. The Plaintiff did not address the issue of the competency of the application in his submissions. The material on record indicates that the Plaintiff has a pending application dated 24<sup>th</sup> March 2020 before the Court of Appeal at Nyeri seeking leave to file a notice of appeal out of time. There is, however, no indication on record as to when the same is slated for hearing.

10. Although this court has jurisdiction to entertain an application for stay of execution pending appeal, it is clear from a reading of **Order 42 Rules 6 (4)** of the **Rules** that an appeal is deemed to have been instituted before the Court of Appeal upon the filing of a notice of appeal in accordance with the rules of that Court. It is evident on the basis of the material on record that the Plaintiff has not filed such notice of appeal. What the Plaintiff has done is merely to lodge an application for leave to file such notice out of time. Accordingly, the court agrees with the Defendants' contention that the instant application is incompetent and that the court has no jurisdiction to entertain the same.

#### **b. Whether the Plaintiff has made out a case for the grant of a stay**

11. The court shall consider the rest of the issues in case it is wrong on the 1<sup>st</sup> issue. The court has considered the material and submissions

on record on the second issue. The requirements which an applicant for stay must satisfy are set out in **Order 42 Rule 6 (2)** of the **Rules** as follows:

**“(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.”** (emphasis added)

12. So, has the Plaintiff demonstrated what substantial loss he or his family may suffer in the absence of the stay order sought? The Plaintiff did not contend in his supporting affidavit that there were any dwelling houses on the suit properties. He, however, stated that the Defendants had ploughed the land which they were using as grazing fields and destroyed some crops thereon. The photographs which he exhibited depicted some fallen trees and a tractor ploughing some land. At the trial hereof, the original Plaintiff conceded that her dwelling houses were on a different parcel of land known as Parcel No. 318.

13. The Defendants, on the other hand, contended that the suit properties had all along been bushy and had no structures thereon. They simply cleared the bushes, ploughed the suit properties and planted some crops. They claimed to have been in possession since March 2020. The court has noted that the Plaintiff did not file any further or supplementary affidavit to controvert the Defendants’ version of events.

14. The court is consequently inclined to accept the Defendants’ version that they ploughed the suit properties and planted crops thereon in March 2020. It would, therefore, be difficult to see what substantial or irreparable loss the Plaintiff would suffer in the circumstances. It was not demonstrated that the loss of grazing fields, trees, or indeed crops, would constitute substantial loss within the meaning of **Order 42 Rules 6 (2)** of the **Rules**. It was not contended that the Plaintiff would be unable to recover the grazing fields, or indeed the suit properties, from the Defendants should he ultimately succeed on appeal. Consequently, the court finds that the Plaintiff has failed to demonstrate the elements of substantial loss within the meaning of **Order 42 Rule 6 (2)** of the **Rules**.

15. The court has considered the material and submissions on record on whether the application was filed without unreasonable delay. It is evident from the material on record that judgement was delivered on 27<sup>th</sup> February 2020. It is also evident that the instant application was filed on 16<sup>th</sup> April 2020. The material on record indicates that the original Plaintiff died on 14<sup>th</sup> February 2020 and a limited grant *ad litem* had to be obtained for the instant application to be filed. The court is thus satisfied that the instant application was filed without unreasonable delay in the circumstances. However, since the Plaintiff has failed to demonstrate the crucial requirement of substantial loss, it shall not be necessary to consider whether or not security for due performance of the decree should be given.

**c) Whether the Plaintiff has made out a case for the grant of a prohibitory order**

16. The court has considered the material on record on this issue. What the Plaintiff is seeking is, in effect, an order of inhibition to prevent any dealings with the suit properties pending the hearing and determination of the intended appeal. The court is of the opinion that it has a duty to preserve property which is the subject of a dispute pending conclusive determination thereof. However, since the Plaintiff has not filed a notice of appeal and has failed to make out a case for the grant of an order for stay of execution, the court is of the opinion that there would be no legal basis for granting an order of inhibition.

**d) Whether the application for stay has been overtaken by events**

17. The court has considered the evidence and submissions on record on this issue. The Defendants contended that the application for stay had been overtaken by events because they had already taken possession of the suit properties, cleared the bushes, and cultivated crops thereon. It was their case that there was nothing to be stayed since the decree had been fully executed and perfected. As indicated earlier, the Plaintiff did not file any further or supplementary affidavit to controvert the Defendants’ averments. In the circumstances, the court accepts that the Defendants have taken effective possession of the suit properties. Accordingly, the court finds and holds that the prayer for stay of execution has already been overtaken by events and an order for stay of execution cannot issue.

**e) Who shall bear costs of the application**

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful Defendants should not be awarded costs of the application. Accordingly, the Defendants shall be awarded costs of the application.

**G. CONCLUSION AND DISPOSAL ORDER**

19. The upshot of the foregoing is that the court finds no merit in the Plaintiff's amended application. Accordingly, the Plaintiff's notice of motion dated 23<sup>rd</sup> March 2020 and amended on 19<sup>th</sup> May 2020 is hereby dismissed with costs to the Defendants with respect to prayer Nos. 5 and 6 thereof. It is so ordered.

**RULING DATED** and **SIGNED** in Chambers at **EMBU** this **18<sup>TH</sup> DAY** of **JUNE 2020** via zoom platform in the presence of Ms. Anne Thungu for the Plaintiff and in the absence of the Defendants.

**Y.M. ANGIMA**

**JUDGE**

**18.06.2020**