



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYAHURURU
ELC NO. 245 OF 2017

(FORMERLY ELC (NAKURU) 41 OF 2016)

PETER NGUGI KAINAMIA.....1ST PLAINTIFF

JOHN MURAYA KAINAMIA.....2ND PLAINTIFF

VERSUS

TABITHA WAMBUI MUNYAO.....1ST DEFENDANT

GEOFFREY KANIA MUNYAO.....2ND DEFENDANT

ISAAC NJENGA MUYAO.....3RD DEFENDANT

PETER GITHINJI MUNYAO.....4TH DEFENDANT

JOHN MURAGE.....5TH DEFENDANT

NGOTHO MUNYAO.....6TH DEFENDANT

CHARLES KINUTHIA MUNYAO.....7TH DEFENDANT

SAMWUEL NDUNGU MUNYAO.....8TH DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 23rd December 2019 brought under Order 42 Rule 6(1) and (2) and Order 51 Rule 1 the Civil Procedure Rules, Sections 1A, and 3A of the Civil Procedure Act, and all other enabling provisions of the law where the Applicant seeks for Orders that;

i. Spent

ii. Spent

iii. That pending the hearing and determination of the appellant's intended Appeal, this honorable Court be (sic) grant a stay of execution of the judgment issued on 10th December 2019 together with all the consequential Orders thereof.

iv. That cost of this application be provided for.

2. The said application is premised on the grounds on the face of it as well as the sworn affidavit of Tabitha Wambui Munyao the Applicant/Defendant herein on her behalf and on behalf of her Co-Defendants/Applicants, sworn on the 23rd December 2019.

3. The Application was opposed by the Respondents herein vide their Replying affidavit sworn on the 10th February 2020 wherein they deponed that the Applicants have been using delaying tactics since the year 1969 when the 1st suit was filed. That the Applicants were out on

a forum shopping mission thereby denying them the fruits of their judgment.

4. By consent, Counsel for the parties agreed to have the present application disposed of by way of written submissions and filed their respective written submissions which I shall discuss as follows:

The Applicants' Submission.

5. The Applicants' submission was that the Orders sought were discretionary Orders as provided for under Order 42 Rule 6 (1) of the Civil Procedure Rules.

6. That pursuant to Rule 2 of Order 42 of the Civil Procedure Rules, the conditions provided that one needed to discharge before an Order of the stay of execution was issued were as follows;

- i. That unless stay of execution was allowed, she or he would suffer substantial loss.
- ii. The application for stay was filed without unreasonable delay.
- iii. Willingness to offer security.

7. The Applicants submitted on the 2nd condition to the effect that the judgment of the Court was issued on the 10th December 2019, where the Court provided for a stay of 14 days and further directed that the Defendants/Applicants vacate the suit property within 60 days from the time of the judgment. The present application was then filed barely 14 days upon the pronouncement of the Judgment which was within reasonable time.

8. On the first condition, the Applicants submitted that the Respondents had moved to Court seeking amongst other orders the delivery of vacant possession of the parcel of land known as Nyandarua/Olkalou South/1698 in default they were to be forcefully evicted at the Applicants' costs. In their defence the Applicants had deponed that they had been on the suit land from 1966 and that the plaint by the plaintiffs/Respondents was time barred. It was therefore evident that they were in possession of the land upon which at the Respondents at paragraph 24 of their Replying Affidavit sought to be allowed to use half of the said parcel of land.

9. That it was evident that the eviction of the Applicants from the suit land would render the Appeal nugatory, secondly that it would render them a homeless and displaced family considering that they were in possession therein which in turn would occasion them substantial loss.

10. They relied on the decided cases in Trustees **Chrisco Church Nakuru vs Samwel Kobowen Towett & 4 Others [2017] eKLR** and **Waweru Mwaura vs Mary Wanjiru Njenga [2016] eKLR** to urge the Court to allow their application.

11. On the third condition, the Applicants' submission was that they had demonstrated the desire and willingness to offer security in the sum of Ksh 550,000/- to which the Court should consider that they had come to Court with clean hands. They sought that the costs of the application awaits the outcome of the Appeal.

Respondents' submission.

12. The application was opposed by the Respondent whose submission was to the effect that the Applicants application was only meant to prevent them from enjoying the fruits of the judgment rendered by the Court on 10th December 2020 (sic) which game the Applicants had been playing since 1999 when the first judgment was delivered against them in Nairobi Civil Case No.1994 of 1979 where the Court had held the Respondents to be the legal owners of the disputed land. That going by the history of the suit, the Defendant/Respondents (sic) had demonstrated clear concerted efforts and design to ensure that the Plaintiff/Respondents did not enjoy the fruits of their judgment and especially considering that this dispute had stretched since the year 1969 when the first suit was filed.

13. That in the judgment of 10th December 2019, the Court had awarded them Mesne Profits of a sum of Kshs. 1,000,000/= and Kshs 100,000/= as compensation for the infringement of their right to use and enjoyment of their suit properties occasioned by the Defendant's trespass. That therefore if the Court was inclined to grant the Applicants the stay of execution, which was highly discouraged, that the Applicants be Ordered to deposit a sum of Kshs. 1,000,000/= as mesne Profits and Kshs 100,000/= being damages for the infringement of their right and cost of the suit.

14. That in the alternative since the land in dispute measured 30 acres that the Court orders the Applicants, as a condition for stay of Appeal, to allow the Respondents access and use half of the said parcel being 15 acres which space they had occupied before the malicious demolitions and eviction by the Applicants.

15. The Respondents acknowledged that the issuance of stay Orders were discretionary and were to be issued by the Court depending on the circumstance of each case. They therefore urged the Court, being the Court that had presided over the hearing of matter, to exercise its legally granted discretion to dismiss the application for reasons that the same was calculated to cause further delay and to prevent them from enjoying the fruits of their judgment. In so submitting, the Respondents relied on the decided cases in **Butt vs Rent Restriction Tribunal [1982] KLR 417** and **M/s Port Reitz Maternity vs James Karanga Kabia Civil Appeal No 63 of 1997** to buttress their submission and to pray that the Applicants application herein be dismissed.

Determination.

16. I have considered the submissions by Counsel to the respective parties in respect to the application by way of a Notice of Motion dated 23rd December 2019 wherein the Applicants sought for Orders of stay of execution of the Judgment delivered on the 10th December 2019 pending the hearing and determination of their intended Appeal. I have also considered, the supporting affidavit and the replying affidavit as well as authorities herein cited by Counsel to the parties

17. The law applicable in an application seeking Orders of stay of execution pending the hearing and determination of an Appeal is found under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or Order Appealed from except 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 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.

18. There are three conditions for granting of stay Order pending an Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which :

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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.

19. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”** which connotes that all three (3) conditions must be met simultaneously.

20. On the first condition of proving that substantial loss may result unless stay Order is made, it was incumbent upon the Applicant to demonstrate the kind of substantial loss they would suffer if the stay order was not made in their favour.

21. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

22. The Applicants contends that they would suffer irreparable loss for reason that they had been on the suit land from 1966 and their eviction thereof would render the Appeal nugatory and render them a homeless and displaced family, thereby occasioning them substantial loss. On this point alone, I am in agreement that they have discharged the first condition as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules.

23. On the second condition, I find that the impugned judgment was delivered on the 10th December 2019 wherein the Applicants thereafter filed the preset Application on the 23rd December 2019 which was 13 days later which in my opinion was not unreasonable delay.

24. On the last condition as to provision of security, the Applicants in their Application, have indicated that they will suffer substantial loss unless the Order of stay is given. They have also given an undertaking to provide security of Ksh 550,000/- or meet any condition(s) as the Court may impose as a pre-requisite for the grant of stay pending Appeal.

25. It is the Court which exercises discretion as to what kind of security a party should provide based on the circumstances of the case. Security will be ordered where a Court grants the prayer for stay of execution.

26. After going through submissions, pleadings and the record before the Court I find the following issues arising;

i. Whether the Application before the Court is competent and meritorious?

ii. If answer in affirmative, what conditions should be imposed in grant of Orders sought?

iii. What is the Order as to costs?

27. In the case of **Mohammed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat (2013) eKLR**, The Court upheld the decision of **M/s Portreitz Maternity (Supra)** and stated that:

“That right of Appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right

28. I have gone through the Application, supporting affidavits and the grounds of objection thereto. The Court is empowered to ask the Applicants to deposit security. Such security as stated in Order 42 Rule 6 (2) (b) is for the due performance of such Decree or Order as may ultimately be binding on them. I had the opportunity of hearing the matter and therefore know that the subject suit measures approximately 30 acres although I am not in a position to know the value of the same.

29. Secondly it is trite law that he who seeks equity must come with clean hands, I note that the Applicants have submitted that if the application is not granted, they would be evicted and rendered homeless, however I have not lost the sight to the fact that they themselves did evict the Respondents from the suit land. Although it is not the duty of the Court to deny successful litigants the fruits of their Judgment, yet the Court finds that since the Applicants face the eminent danger of eviction, the orders sought shall be granted pursuant to the following conditions;

i. That there shall be stay of execution of decree in ELC No 245 of 2017 pending the hearing and determination of the Appeal herein on condition that the Applicants shall within 30 days from the date of this ruling deposit Kshs.1,500,000/=(One million, Five Hundred Thousand shillings) in a joint earning interest account.

ii. That the Applicant/Appellants shall lodge an Appeal against the Court’s judgment within 14 days of this date.

iii. That the Applicant/Appellants shall further, within 30 days from this date compile, file and serve upon the Respondents a complete record of Appeal.

iv. In default, of any of the clauses (i) (ii) and (iii) above the stay herein granted shall automatically lapse.

v. Costs to abide as per the outcome of the Appeal.

It is so ordered.

Dated and delivered at Nyahururu this 23rd day of June 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE