



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

KAJIADO ELC CASE NO. 636 OF 2017

(Formerly Machakos ELC 189 of 2015)

RACHAEL MUTABARI

(Suing for and on behalf of Humility Ministries).....1ST PLAINTIFF

BERNARD NJOGU NJOROGE.....2ND PLAINTIFF

MARY WANJIKI NJUNGE.....3RD PLAINTIFF

PETER M. KARIUKI.....4TH PLAINTIFF

MARTHA WANJIKU.....5TH PLAINTIFF

GIVERN WANJALA.....6TH PLAINTIFF

BILLY JOSEPH LENANA NGAAGI.....7TH PLAINTIFF

LUCY KANYI NJOMO.....8TH PLAINTIFF

DENNIS NJOROGE.....9TH PLAINTIFF

VERSUS

KASAINO OLE KORUTA.....DEFENDANT

Consolidated with Machakos ELC Case No. 207 of 2015

KASAINO OLE KORUTA..... PLAINTIFF

VERSUS

LUCY KANYI NJOMO ALIAS LUCY MUNGASIO.....1ST DEFENDANT

MARY WANJIKI NJUNGE ALIAS MARY NJUNE.....2ND DEFENDANT

GIVERN WANJALA ALIAS LEVI WANJALA.....3RD DEFENDANT

MARTHA WANJIKU DEMENGE.....4TH DEFENDANT

JAMES NGATIA.....5TH DEFENDANT

SOMPET KEEJA KANCHORI.....6TH DEFENDANT

RACHEL MATABARI.....	7 TH DEFENDANT
JOSEPH NGAAKI LENANA.....	8 TH DEFENDANT
DENNIS NJOROGE.....	9 TH DEFENDANT
BERNARD NJOGU NJOROGE.....	10 TH DEFENDANT
PETER MUTHEE.....	11 TH DEFENDANT
HUMILITY MINISTRY.....	12 TH DEFENDANT
ROBERT MUNGAI.....	13 TH DEFENDANT

RULING

What is before Court for determination is the Plaintiffs’ Notice of Motion application dated 29th April, 2020 brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution. The Applicants seek the following orders:

1. The Honourable Court be pleased to grant leave for the firm of Wakiaga Semekia & Company Advocates to come on record following the judgment delivered on 3rd February, 2020.
2. That pending hearing and determination of this application for stay the Honourable Court be pleased to issue restrain order of any execution proceedings against the Applicants.
3. The Honourable Court be pleased to grant stay of any execution proceedings against the judgment delivered by Hon. Justice Christine Ochieng given at Kajiado Law Courts on 3rd February, 2020 pending hearing and determination of Appeal by the Plaintiffs before Court of Appeal Nairobi.
4. Cost of this application be on due course.

The application is premised on the grounds on the face of it and the supporting affidavit of WAKIAGA PETER SEMEKIA who is the Advocate in conduct of the matter on behalf of the Plaintiffs. He deposes that the current COVID 19 related problem led to the delay in filing the instant application. He contends that there is need to stay execution pending appeal. Further, that the Plaintiffs have filed a Notice of Appeal and requested for typed proceedings. He has reiterated the Plaintiffs’ claim over ownership of the disputed plots and contend that they obtained transfer and continued paying rates to the Kajiado County. He insists that the Defendant did not acquire his title legally but through fraud. He insists the draft Memorandum of Appeal raises triable issues.

The Defendant opposed the application and filed a replying affidavit where he deposes that it does not meet the threshold of Order 42 Rule 6 of the Civil Procedure Rules as there was unreasonable delay in filing it and the Plaintiffs have failed to demonstrate sufficient cause to justify the stay of execution pending appeal. He contends that the Applicants cannot claim being purchasers for value and yet he is the registered proprietor of the suit property as evidenced by his Certificate of Lease. He avers that the Applicants have not demonstrated the substantial loss they will suffer. He insists that the filing of the Notice of Appeal including application for typed proceedings and attached draft Memorandum of Appeal is not a demonstration that the Appeal has high chances of success since the trial Court exhaustively dealt with the issues raised in the application for stay. He reiterates that the Applicants have not offered to provide any security as a condition for the grant of stay pending appeal.

The Plaintiffs and Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion application dated 29th April, 2020 including the rivalling affidavits and submissions, the following are the issues for consideration:

- Whether the firm of messrs Wakiaga Semekia & Company Advocates should be allowed to come on record for the Plaintiffs.
- Whether there should be a stay of execution pending appeal from the Judgement delivered on 3rd February, 2020.

As to whether the firm of messrs Wakiaga Semekia & Company Advocates should be allowed to come on record for the Plaintiffs. Order 9 Rule 9 of the Civil Procedure Rules provides that: ‘ **When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.'

Since the Defendant has not opposed the advocates application to come on record for the Plaintiffs and in relying on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, I will proceed to allow the firm of messrs Wakiaga Semekia & Company Advocates, to come on record for them.

As to whether there should be a stay of execution pending Appeal from the Judgement delivered on 3rd February, 2020. The Plaintiffs have sought for a stay of execution of the Judgment pending appeal, which application is opposed by the Defendant. The Plaintiffs in their submissions reiterated their claim and stated that they have an arguable case with high probability of success and if the stay is not allowed then the Appeal will be rendered nugatory. They have relied on the decisions of **Amal Hauliers Limited V Abdulnasir Abukar Hassan (2017) eKLR; Butt V Rent Restriction Tribunal (1982) KLR 417; Pauline Yebei & Another V Estate of Kiprotich Arap Letting represented by Andrew Kiprotich Kiprono (2017) eKLR** to buttress their arguments. The Respondent in his submissions insisted the Plaintiffs had not met the threshold set in Order 42 Rule 6 of the Civil Procedure Rules as they have not shown sufficient cause to warrant the orders sought. Further, that the Applicants have been rustled into action after realizing the three (3) months from the date of judgment being delivered was about to expire and eviction was imminent. He further submits that being the legitimate owner, he ought to enjoy peaceful and quiet possession of the suit land. He relied on the decisions of **Kiraita Abuta V Richard Nyandika Nyangoya (2019) eKLR; Yakobet Nechesa Wabuko V Humphrey Olwisi Muranda & Another (2019) eKLR and Kenya Industrial Estates V Anne Chepsiror & 5 Others (2018) eKLR** to buttress his averments.

Order 42 Rule 6(2) provides that: ' **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.'**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution pending appeal and stated thus:'

- "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.'**

Further, in the case of **Mohammed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, the Court state that: - 'the right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.....'

In the current scenario, the Plaintiffs filed the application after almost three months after delivery of the judgement. The Plaintiffs have not provided security for costs and only filed their Notice of Appeal in February, 2020 which is almost four months ago. The Plaintiffs seem to argue their case afresh in the supporting affidavit insisting that the Defendant obtained his Certificate of Lease fraudulently. The Plaintiffs claim there are special circumstances as they have premises on the suit land but have not filed their Record of Appeal nor confirmed if the process of execution has been put in motion. Further, they have not demonstrated if the Appeal is arguable. I opine that since the Defendant was the successful party, he is indeed entitled to the fruits of his judgment. Based on the standards set in the aforementioned decision and in applying them to the circumstances at hand, I find that the Plaintiffs have not met the threshold for stay of execution and decline to grant the said orders.

It is against the foregoing that I allow only prayer No. 1 of the Notice of Motion dated 29th April, 2020 but disallow prayers No. 2, 3 and 4. I award the costs of the application to the Defendant.

Dated Signed and Delivered via email this 16th Day of June, 2020.