



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC APPEAL NO 12 OF 2019**

**MISHECK NDEGWA KIRAGU**

**SAMSON KARIUKI KARANJA**

**TOMOTHY BUNDI (Suing as the office bearer of Nanyuki General**

**Engineering Jua Kali Association)**

**STEPHEN KIHARA GITHINJI.....APPELLANT/APPLICANT**

**VERSUS**

**TIRUS KINYUA THUMBI T/A GASTON ENTERPRISES.....RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 17<sup>th</sup> May 2019 brought under Order 42 Rule 6(1), Order 51 Rule 1 of the Civil Procedure Rules, Sections 63(e) and Section 3A of the Civil Procedure Act and all other enabling provisions of the law where the Applicant seeks for the following orders.

**i. Spent.....**

**ii. Spent.....**

iii. That the honourable Court be pleased to issue an order staying execution of the Decree emanating from the judgment delivered in Nanyuki CMCC No 166 of 2010 on 20<sup>th</sup> February 2019 by Hon L K Mutai (CM) pending the hearing and determination of the Appeal lodged against the said judgment in the Nyeri ELCA No. 12 of 2019.

iv. That costs of this application be in the cause.

2. The said application is supported by the grounds set on its face as well as on the sworn affidavit of Samson Kariuki Karanja the Appellant/Applicant.

3. Pursuant to the filing of the said application, the Respondent herein filed their Replying Affidavit dated the 3<sup>rd</sup> July 2019 on an equal date. Leave was granted to the parties to file their supplementary and further affidavits respectively. By consent, parties agreed to dispose of the application by way of written submissions wherein they filed their respective submissions to which I have considered and to which I will summarize as herein under.

**Appellant/Applicant's submissions.**

4. The Honorable Court sitting at Nanyuki delivered its judgment in Nanyuki CMCC No. 166 of 2010 on 20<sup>th</sup> February 2019 in favour of the Respondents herein wherein the Applicants being dissatisfied with the said the judgment instructed their Advocates to lodge an Appeal against the decision of the trial Court which Memorandum of Appeal was filed in Court.

5. That the Applicants did not seek for the 30 days stay of execution of judgment and Decree in the trial Court due to the absence of their

Counsel who had not been notified of the date of delivery of the said judgment and were therefore apprehensive that while the Appeal was pending, the Respondents were likely to execute the Decree against them which would cost them substantial and irreparable loss and damage and the Appeal would be rendered nugatory should the suit property be registered in the name of the Respondents.

6. That it would then be impossible to recover the same from the Respondent who was of unknown means. That it was therefore just that the execution be stayed as the Respondent would be able to make restitution in the event that the Appeal was successfully.

7. The Applicants also submitted that the application had been brought without unreasonable delay and further that they were ready to abide with any condition that the Court may impose of them as security for due performance pending the determination of the appeal .

8. That the Appeal had a high chance of success and would be rendered nugatory should the Respondent proceed with execution of Decree and the Appeal succeeds eventually

9. That unlike the averment of the Respondent in their Replying Affidavit dated 3<sup>rd</sup> July 2019, that the stay of execution had been overtaken by events, after the National Land Commission had acted on the Decree and processed documents pursuant thereto, the said stay of execution had not been overtaken by events because the Respondents had not been issued with a lease certificate.

10. The Applicants framed their issues for determination as follows:

i. The application is brought without undue delay.

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

iii. such security as the Court orders for due performance of such Decree or Order as may ultimately be binding on him has been given by the Applicant

11. On the first issue for determination it was their submission that the application for stay had been made on 28<sup>th</sup> May 2019 which was two months and six days from the date the Memorandum of Appeal had been filed. That they had been prevented from filing the application on time as the file had gone missing for a period of time in the lower Court. The Memorandum of Appeal had however been filed timelessly and within time. That the delay of two months and six days could not be said to be undue delay and was excusable and reasonable in the circumstance.

12. The Applicant also recognized that the grant of stay of execution was the discretion of the Court and urged the Court to consider the fact that they would suffer substantial loss if their land was sold and put beyond their reach by the time the Appeal was determined. They relied on the decided case in **Kalonde Mbusya vs Martin Kimwele Kokoi & 10 Others** (sic)

13. On the second issue for determination, it was their submission that substantial loss occurring to them was the cornerstone of the jurisdiction the High Court (sic) in granting stay of execution. That should the Stay of execution not granted, they were likely to lose the plot known as Nanyuki Municipality Block 7/533 which would be registered in the name of the Respondent in the pendency of hearing of the Appeal to which should the appeal succeed, the Respondent would not be in a position to re-transfer it to the Applicants for he would have subdivided and sold it to 3<sup>rd</sup> parties to the detriment of the Applicants thus rendering the appeal nugatory. That substantial loss was what had to be prevented by preserving the status quo because such loss would render the appeal nugatory. The Applicant relied on the decided case in, **Ann Wanjiru & Another vs Joseph Kiragu Kibarua** (sic)

14. The Applicants also submitted on their third issue for determination that they were ready and willing to furnish any security as the Court directed and to abide by any conditions that the Court would impose on them.

15. That they had met all the requirements for grant of stay of execution pending hearing of their appeal and the orders sought were not prejudicial to the Respondent. That stay of execution was governed by Order 42 Rule 6 of the Civil Procedure Rules and such power was discretionary on sufficient cause being shown. That to grant or refuse an application for stay of execution was discretionary wherein the Court in granting stay had to balance the interest of the Applicants with those of the Respondents. That they had satisfied the Court that they stood to suffer substantial loss in the event that the orders sought were not granted and prayed that these orders be granted.

### **The Respondent's Submission**

16. The Respondent in response to the Applicants' application and submission and in opposition thereto submitted that the Applicants' claim for ownership the suit property was premised on a letter of allotment which letter of allotment, in law, was not a document of title and could not be a basis for a claim of ownership to land. That at the best the Applicants' Appeal was a non- starter and there was no credible Appeal before the Court. They relied on the decided case in **Wreck Motor Enterprises vs. Commissioner of Lands & 3 Others [1977]eKLR**.

17. That Pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, an Applicant for an order of stay of execution was enjoined to demonstrate that (s)he was likely to suffer substantial loss if the stay order was not granted .That it was not in dispute that the Applicant was neither the owner or in possession of the suit property and therefore they did not stand to suffer any substantial loss if the order of execution was not granted.

18. That the Applicant had deliberately failed to annex the copy of the subordinate Court's judgment to their Supporting Affidavit where the orders made therein did not in any way expose the Applicants to any substantial loss which loss was defined in the case of **Sammy Some Kosgei vs Grace Jelel Boit [2013] eKLR**.

19. Their submission was that the Applicant's application lacked merit and the same ought to be dismissed with costs.

**Determination.**

20. I have considered the application, the affidavit on record, and submissions by counsel as well as the law concerning stay of execution pending Appeal 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.

21. There are three conditions for granting of stay order pending 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.

22. I find two issues for determination arising therein namely:

i. Whether the Applicants had satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this Court should make

23. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2)

The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.

24. While under section 1B some of the aims of the said objective are;

The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

25. It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

26. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the Applicants to demonstrate what kind of substantial loss they will suffer if the stay order was not made in their favour.

27. 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.”**

29. The Applicants seems to contend that they would suffer irreparable loss if they were not granted stay of execution as the the suit property would be registered in the name of the Respondent who would then sub divide it and dispose it hence putting it out of their reach. That further, should their Appeal succeed, it would be difficult to recover the same from the Respondent who is of unknown means.

29. What amounts to reasonable grounds for believing that the Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the Respondent was a person of lesser means, that would not necessarily justify a stay of execution, as poverty is not a ground for denial of a person's right to enjoy the fruits of its success.

30. In the case of **Justus Kyalo Musyoka v John Kivungo [2019] eKLR** the Court had held that:

Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgment. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court

31. Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.

32. I also find that the Applicants had not discharged her burden of proving that that the Respondent would not be able to refund the detrital sum if paid to it in satisfaction of the decree see **Caneland Ltd & 2 Others vs Delphis Bank Ltd Nai Civil Application No. 344 of 1999**.

33. The Respondents in their submission, which was not controverted, held that the Applicant was neither the owner nor in possession of the suit land.

34. It therefore follows even without going to the merit of the Appeal, that even if orders sought herein are not granted, there is no evidence that the Applicant will suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of his/her Judgment.

35. On the second condition, this Court finds that the Applicant filed the present application for stay of execution on the 20<sup>th</sup> May 2019 which was approximately 3 months after delivery of the impugned Judgment which had been delivered on the 20<sup>th</sup> February 2019. I find that the said Application is brought without undue delay.

36. On the last condition as to provision of security, the Applicant in the present Application has indicated their willingness to furnish security for a grant of the order for stay of execution.

37. I find that since there would be no prejudice occasioned to the Respondent if the grant of stay of execution is granted, the Court is herein inclined to grant and hereby grants stay of execution wherein the Respondent will have an opportunity to challenge or oppose the Appeal.

38. In the circumstance, I make the following orders:

- i. That there shall be stay of execution of decree emanating from the judgment delivered in Nanyuki CMCC No 166 of 2010 on 20<sup>th</sup> February 2019 pending the hearing and determination of the Appeal.
- ii. The Applicants shall within 30 days from the date of this ruling deposit Kshs.500,000/=(Five Hundred Thousand) in a joint earning interest account. In default, the stay shall automatically lapse.
- iii. That the Applicant/Appellants shall within 60 days from the date of this ruling, compile, file and serve upon the Respondent a complete record of Appeal.
- iv. The Deputy Registrar is directed to call for the proceedings of the lower Court record for admission of this Appeal to hearing expeditiously.
- v. Costs to abide as per the outcome of the Appeal.

It is so ordered.

**Dated and delivered at Nyahururu this 12<sup>th</sup> day of June 2020**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**