



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CAUSE NO. 449 OF 2017

(FORMERLY NAIROBI ELC 190 OF 2011)

DR.NEHEMIAH KIMATHI.....1ST PLAINTIFF/INTENDED APPELLANT

STELLA NKATHA

MWIRARIA.....2ND PLAINTIFF/INTENDED /APPELLANT

VERSUS

GRACE WAMBUI MURIUKI.....1ST DEFENDANT/RESPONDENT

MARY NGENDO TIBA.....2ND DEFENDANT /RESPONDENT

JAQUELINE PAULINE WAIRIMU

THARAO.....3RD DEFENDANT/RESPONDENT

RUTH WANJIRU THARAO.....4TH DEFENDANT/RESPONDENT

MUNGAI MBURU.....5TH DEFENDANT/RESPONDENT

MARGARET NJOKI RUTHA.....6TH DEFENDANT/RESPONDENT

DAVID ODANGA.....7TH DEFENDANT/RESPONDENT

DANIEL KURIA WAWERU.....8TH DEFENDANT/RESPONDENT

OPONDO OTIENO PATRICK.....9TH DEFENDANT/RESPONDENT

GRACE KANGAI GACICI.....10TH DEFENDANT/RESPONDENT

SAMUEL KIARIE MBURU.....11TH DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....12TH DEFENDANT/RESPONDENT

DISTRICT LAND

REGISTRAR THIKA.....13TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **20th September 2019**, by the Plaintiffs/ Applicants seeking for orders that

1. That pending hearing and determination of the Intended Appeal, this Honourable Court do grant a stay of execution of the judgement and resultant order of the Environment & Land Court (Mr. Justice G.M.A Ong'ondo, J) delivered on 14th June 2019.

2. That pending hearing and determination of the intended appeal, an order of injunction do issue restraining the Respondents and each of them, whether by themselves, their agents, employees, servant and/or otherwise howsoever, from selling, disposing of, leasing charging, pledging, alienating or in any other manner whatsoever from dealing with the property known as LR NO. Ruiru/Ruiru East Block 7/53 or the purported subdivisions thereon namely, L.R No. Ruiru/Ruiru East Block 7/298, L.R No. Ruiru/Ruiru East Block 7/299, L.R No. Ruiru/Ruiru East Block 7/300, L.R No. Ruiru/Ruiru East Block 7/301, L.R No. Ruiru/Ruiru East Block 7/302, L.R No. Ruiru/Ruiru East Block 7/303, L.R No. Ruiru/Ruiru East Block 7/304, L.R No. Ruiru/Ruiru East Block 7/304, L.R No. Ruiru/Ruiru East Block 7/305 or any part thereof.

3. That leave be granted to the Applicants to effect service of process herein against the 1st respondent by way of advertisement once in the daily nation newspaper and/or registered post through her known address, P.O Box 3473-00100, Nairobi

4. That costs be in the appeal.

The Application is premised on the grounds that the Applicants were the Plaintiffs in **Thika ELC suit No. 449 of 2017; Dr. Nehemia Kimathi & another...Vs...Grace Wambui Muriuki & 12 other** which suit was heard and determined by **Hon. Justice G.M.A Ong'ondo**. That on **4th June 2019**, the Superior Court delivered its judgement and dismissed the Plaintiffs' case with costs to the Defendants. Being aggrieved by the said Judgement, the Applicants intend to appeal against the said judgement in its entirety. Further that on **4th June 2019**, the Superior Court granted 30 days temporary stay of execution of its judgement which stay lapsed on **14th July 2019**. That the stay of execution of the Superior Court having lapsed, the Respondents are at liberty to deal with the suit property in the manner they wish, including transferring suit properties rendering the intended appeal by the Applicants nugatory as the subject matter of the suit and the appeal will have been disposed of and further complicate the expeditions disposal of the intended appeal as the parties will have to amend pleadings to include third parties.

It was further contended that the stay of execution of the superior court Judgement having lapsed, the Respondents are at liberty to sell, dispose of, lease, charge, pledge, alienate or in any other manner deal with the suit property in the manner that they wish which will render the intended appeal nugatory and leave the applicants without remedy as the suit property is the subject matter of the intended appeal.

In his supporting Affidavit, sworn on **20th September 2019**, **Dr. Nehemiah Kimathi**, reiterated the contents of the grounds in support of the Application and averred that the Applicants have taken steps to have the appeal prosecuted as evidenced by the letter dated **18th June 2019**, requesting for the certified copies of the typed proceedings, judgement and a copy of the decree. It was his contention that the instant Application has been filed without unreasonable delay and that the Respondents herein will not be prejudiced by the grant of the orders sought and therefore, it is in the interest of substantive justice that the Application be allowed.

The Application is opposed and the 3rd & 4th Defendants/Respondent filed grounds of opposition dated **7th October 2019** and averred that no competent Notice Of Appeal was served as required by **rule 77(1)** of the Court of Appeal rules as what was filed on **18th June 2019** having been lodged with the Deputy Registrar Thika on **20th June 2019**, and lodged with the Court of Appeal on **28th June 2019**, should also have been served upon the 2nd and 3rd Defendants/Respondents by the **27th of June 2019** and not on **30th August, 2019** which is **47** days outside the statutory period.

That the order issued on **14th June 2019**, being a negative order is incapable of being stayed. It was contended that staying an order dismissing a suit is tantamount to re-instating a dismissed suit and further issuing an injunction on the very dismissed suit. Further that the plaintiffs have not demonstrated what loss they will suffer on a property that the court has found is no longer theirs nor have they proposed any security for the grant of the orders sought. Further that this court having already dismissed the Plaintiffs/Applicants suit cannot find that the plaintiff has prima facie case with the probability of success, that the Plaintiffs/Applicants will suffer any irreparable loss or result to considering where the balance of convenience lies which is a prerequisite for the issue of injunctions. It was further contended that the Plaintiffs/Applicants have not met the conditions for the grant of the orders sought and that the application is a nonstarter and clear abuse of the court process.

The 2nd Defendant/Respondent **Mary Ngendo Tiba** swore a Replying Affidavit dated **1st November 2019**, and averred that she has been advised by her advocates on record, that the instant application seeking stay of execution pending appeal is defective, incompetent and/or lack merits. It was her contention that the application by the applicants fails on the face of equity as it seeks to deny the Defendants/Respondents the entire fruits of the judgment, yet the award was made by a court of competent jurisdiction. She further averred that that the proposed appeal has no chance of success and that the Applicant has not demonstrated that they would suffer substantial loss if stay is not granted. It was her further contention that the applicants have not furnished sufficient grounds for the exercise of the courts discretion in its favour and the application is merely an attempt to frustrate the Defendants/Respondents and delay justice. She urged the Court to dismiss the Application.

The Application was canvassed by way of written submission which the Court has now carefully read and considered. The Court finds that the issue for determination is **whether the Plaintiffs/ Applicants are entitled to the orders sought**

It is not in doubt that the Plaintiffs/ Applicants are seeking stay of execution of the Judgment and order of **Hon. Justice G.M.A Ogondo**, delivered on **14th June 2019**. It is further not in doubt that the said Judgment merely dismissed the Plaintiffs/ Applicants suit with costs to the Defendants/ Respondents. The guiding provisions of the Law with regards to Stay of Execution are to be found in **Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010** which provides that an applicant must demonstrate the following:-

a. **Substantial loss may result to the applicant unless the order was made;**

b. *The application was made without unreasonable delay; and*

c. *Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.*

From the above provisions of law, it is evident that for the Court to exercise its discretion, the Applicant should meet the conditions as set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010.

It is however not in doubt as already stated by the Court that the order issued by my brother **Hon. G.M.A Ogondo**, was a negative order as the Court only dismissed the said suit and did not order any party to do anything or refrain from doing anything. There are plethora of Court decisions both in the Court of Appeal and from the High Court that have held that when a Court has granted negative orders, there is nothing that can be stayed. See the case of **Western College Farts And Applied Sciences Vs Oranga & Others [1976] KLR 63** where the Court held that:-

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”

Further In the case of **John Mbuu Muthoni & Another v Ruth Muthoni Kariuki (2017) eKLR**, the Court held that;

“33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga’s decision in R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances. 34. I am persuaded that the circumstances here are the same as those in the Wananchi Group Case which I find to be persuasive. It is in accord with the James Hoseah Gitau Mwara Case cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be “executed.” A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed,”

And the Court of Appeal in the case of **The Hon. Peter Anyang’ Nyong’o & 2 Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007**, the Court of Appeal expressed itself as follows:

“It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil proceedings pending appeal is circumscribed by rule 5(2) (b). It is apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. That rule has been construed to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgement for the Court of Appeal in an application for stay, to enforce or to restrain by injunction. A temporary injunction asked for is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and the Court of Appeal has no jurisdiction to entertain it..Where the superior court merely upheld the preliminary objection and as a consequence struck out the application for judicial review with costs, the order striking out the application is not capable of execution against the applicant save for costs.”

The Plaintiffs/ Applicants have submitted that the stay is necessary to prevent the Defendants/ Respondents whether by themselves or their agents from selling, disposing of leasing, charging pleading alienating or dealing with the land in a manner that would prejudice them. It is the Court’s considered view that when the suit was dismissed, the Court did not allow the Defendants/Respondents to do or refrain from doing anything and in granting the stay for the said reason will be akin to granting an injunction which in the Court’s considered view is not merited.

Given that the order of the Court dismissing the suit being a negative order, there was no order to be executed and therefore upon the Court’s perusal of Application, the annexures in support, the Affidavits and the written submissions, the Court finds and holds that it cannot stay the orders that had been issued as negative orders are not capable of being stayed.

Consequently, the Court finds and holds that the Notice of Motion Application dated 20th September 2019 by the Plaintiffs/ Applicants is not merited and the same is dismissed entirely with costs.

It is so ordered.

Dated, signed and Delivered at Thika this 23rd day of July 2020

L. GACHERU

JUDGE

23/7/2020

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. They 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.

With Consent of:

..... for the **1st Plaintiff/Applicant**

No consent for the 2nd Plaintiff/Applicant

No consent for the 1st Defendant/Respondent

No consent for the 2nd Defendant/Respondent

No consent for the 3rd Defendant/Respondent

No consent for the 4th Defendant/Respondent

No consent for the 5th Defendant/Respondent

No consent for the 6th Defendant/Respondent

No consent for the 7th Defendant/Respondent

No consent for the 8th Defendant/Respondent

No consent for the 9th Defendant/Respondent

No consent for the 10th Defendant/Respondent

No consent for the 11th Defendant/Respondent

No consent for the 12th Defendant/Respondent

No consent for the 13th Defendant/Respondent

L. GACHERU

JUDGE

23/7/2020