



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. CASE NO. 28 OF 2017**

1. ALEXANDER NYAGA MWAKE
2. CHARLES MUNYI NJIRU
3. JOHN NGARI KAUMBUTHU
4. BARNABAS NYAGA KAUMBUTHU
5. MBAKA ATHAT RUMBIA
6. ANTONY MWANGI NJIRU
7. CECILIA NJURA ETHAN
8. JOHN MWANIKI MWAKE
9. NJERU ETHA
10. SIMBA ATHA
11. PETERSON NJERU MERU
12. BENEDICT NGARI NYAGA.....APPLICANTS

**VERSUS**

- JOHN MWANIKI MAKENGE.....1<sup>ST</sup> RESPONDENT
- ESPON N.T. MAKENGE.....2<sup>ND</sup> RESPONDENT
- ALFRED NGIRI MARANGI.....3<sup>RD</sup> RESPONDENT

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 5<sup>th</sup> June 2020 brought under the provisions of **Order 42 Rule 6 (1) (2) & (3)**, and **Order 50 Rule 1** of the **Civil Procedure Rules (the Rules)** the Respondents sought the following orders:

*a. Spent*

*b. Spent*

*c. There be a stay of execution of the decree issued on the 14<sup>th</sup> May 2020 pending the hearing and determination of an intended appeal.*

*d. That this honourable court do give any other or further orders as it deems fit in the circumstances in the interest of justice.*

e. That costs of this application be provided for.

## **B. THE RESPONDENTS' 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 1<sup>st</sup> Respondent on 5<sup>th</sup> June 2020. The Respondents contended that they were dissatisfied with the judgement and decree of the court dated 14<sup>th</sup> May 2020. They further stated that they had already filed a notice of appeal and that their intended appeal had overwhelming chances of success.

3. The Respondents contended that the Applicants had already extracted the relevant decree and if executed their intended appeal, if successful, would be rendered nugatory. It was further contended that the Applicants would not suffer any loss which could not be compensated by an award of damages should a stay be granted. They, therefore, urged the court to grant the application.

## **3. THE APPLICANTS' RESPONSE**

4. The Applicants filed a replying affidavit sworn by the 1<sup>st</sup> Applicant on 10<sup>th</sup> June 2020 in opposition to the said application. The Applicants contended that upon delivery of judgement they had the resultant decree extracted and registered against the suit properties and that they believed that the order of stay sought had already been overtaken by events.

5. The Applicants further contended that there was undue delay in the filing of the application for stay in that it was filed long after the filing of the notice of appeal. It was also contended that the Respondents had not demonstrated that the intended appeal had any chances of success. The Applicants, therefore, urged the court to dismiss the said application and allow them to enjoy the fruits of their judgement.

## **4. THE RESPONDENTS' REJOINDER**

6. The Respondents filed a supplementary affidavit sworn by the 1<sup>st</sup> Respondent on 22<sup>nd</sup> June 2020 in response to the Applicants' replying affidavit of 10<sup>th</sup> June 2020. The Respondents disputed that the decree had been executed and asserted that as at 19<sup>th</sup> June 2020 the registration status of the suit properties had not been altered. The Respondents further stated that they could not file their application earlier on account of a circular issued on 15<sup>th</sup> March 2020 by the Hon. Chief Justice staying execution of all decrees during the period of the Covid-19 pandemic.

## **5. DIRECTIONS ON SUBMISSIONS**

7. When the application was listed for directions on 11<sup>th</sup> June 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 21 days to file and exchange their respective written submissions. The record shows that the Respondents filed their submissions on 25<sup>th</sup> June 2020 whereas the Applicants filed theirs on 16<sup>th</sup> July 2020.

## **F. THE ISSUES FOR DETERMINATION**

8. The court has considered the Respondents' notice of motion dated 5<sup>th</sup> June 2020, the Applicants' replying affidavit sworn on 10<sup>th</sup> June 2020, the Respondents' supplementary affidavit sworn on 22<sup>nd</sup> June 2020, and the material on record. The court is of the opinion that the following issues arise for determination:

- a. *Whether the Respondents have made out a case for the grant of an order for stay of execution.*
- b. *Whether the application has been overtaken by events.*
- c. *Who shall bear costs of the application.*

## **G. ANALYSIS AND DETERMINATIONS**

### **a. Whether the Respondents have demonstrated a case for stay of execution pending appeal**

9. The application is grounded upon the provisions of **Order 42 Rule 6** of the **Rules**. The relevant parts stipulate 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)

10. The Respondents contended that the outcome of the intended appeal might be rendered nugatory if the suit properties were transferred to third parties before the hearing and conclusion of the same. The court is inclined to accept that such an eventuality may constitute substantial loss within the meaning of **Order 42 Rule 6 (2)** of the **Rules**. The court is aware that the decree being challenged directed that the suit properties should ultimately be distributed to members of Keere clan who are entitled to a share thereof. The court is thus of the opinion that it may be difficult or impossible for the Respondents to recover the suit properties in the event of their appeal being successful.

11. In the case of **Butt Vs Rent Restriction Tribunal [1979] eKLR**, the Court of Appeal while considering an application for stay held, *inter alia*, that;

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory. per Brett LJ in Wilson Vs Church (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”**

12. The court is satisfied from the material on record that the Respondents have demonstrated that substantial loss may result unless a stay is granted. The court is further satisfied that the instant application was filed without unreasonable delay. The record shows that the judgement was delivered on 14<sup>th</sup> May 2020 whereas the application for stay was filed on 5<sup>th</sup> June 2020. The court does not consider the lapse of a period of 21 days or so to constitute unreasonable delay.

**b. Whether the application for stay has been overtaken by events**

13. The Applicants contended that the application for stay had been overtaken by events on the basis that the decree had already been extracted and executed. On the other hand, the Respondents contended that as at 19<sup>th</sup> June 2020 the registration status of the suit properties had not changed hence there was no execution. The court has noted that the Applicants did not place any tangible evidence of execution on record. On the other hand, the Respondents indicated in their supplementary affidavit that copies of the relevant land registers were attached thereto as exhibits but there were no such attachments. The court is thus of the opinion that there is no evidence on record to demonstrate that the decree has been executed or fully executed. Accordingly, it could not be said that the application for stay has been overtaken by events.

**c. Who shall bear costs of the application**

14. 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)**. However, since the instant application is for stay pending appeal the court is of the opinion that costs should abide the outcome of the intended appeal.

**H. CONCLUSION AND DISPOSAL ORDER**

15. The upshot of the foregoing is that the court finds merit in the Respondents’ notice of motion dated 5<sup>th</sup> June 2020. Accordingly, the same is hereby allowed in the following terms:

- a. There shall be a stay of execution of the judgement and decree dated 14<sup>th</sup> May 2020 for a period of 2 years from the date hereof or upon conclusion of the intended appeal whichever comes first.
- b. The Respondents shall collect copies of proceedings and other documents for purposes of the intended appeal from court within 14 days.
- c. An order of inhibition shall be registered against the suit properties, that is *Title Nos. Nthawa/Riandu/1568, 1569, 1570, 1571, 1793, 1794, 1796, 1797, 1798, 281, 287, 5916 and 5917* for a period of two (2) years from the date hereof or until conclusion of the appeal, whichever comes first.
- d. Costs of the application shall abide the outcome of the intended appeal.

16. Orders accordingly.

**RULING DATED** and **SIGNED** in Chambers at **EMBU** this **27<sup>TH</sup> DAY** of **JULY 2020** and delivered via Microsoft Teams platform on 27<sup>th</sup> July 2020 in the presence of Ms. Rose Njeru for the Applicants and in the absence of the Respondents.

**Y.M. ANGIMA**

**JUDGE**

27.07.2020