



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL SUIT NO. 605 OF 2010**

**CONSOLIDATED WITH ELC CASE NO. 758 OF 2016**

**DOUGLAS MUHINDI KANGETHE.....1ST PLAINTIFF**

**JAMES KAMAU KANGETHE.....2ND PLAINTIFF**

**HANNA WAIRIGU GAGTHURI.....3RD PLAINTIFF**

**JOHN KAGAI NGURE.....4TH PLAINTIFF**

**=VERSUS=**

**MICHAEL KARUKU GATURA.....DEFENDANT**

**RULING**

1. Nairobi ELC Case Number 605 of 2010 was consolidated with Nairobi ELC Case Number 758 of 2016 and the two consolidated causes were heard by Lady Justice J M Onyango. Her duly signed judgment dated 5/5/2020 was subsequently read on her behalf by Eboso J on 18/5/2020. The court (Onyango J) entered judgment in favour of the plaintiffs in the following terms: -

***(a) The sub-division of Land Parcel No Dagoretti/Mutuini/1139 being Land Parcel No Dagoretti/Mutuini 1329, Land Parcel No Dagoretti/Mutuini 1330, Land Parcel No Dagoretti/Mutuini 1331, Land Parcel No Dagoretti/Mutuini 1332, Land Parcel No. Dagoretti/Mutuini 1333, Land Parcel No Dagoretti/Mutuini 1334 and Land Parcel No Dagoretti/Mutuini 1335 done at the instance of the defendant are hereby declared null and void and the same are hereby cancelled.***

***(b) Michael Karuku Gatura is ordered to transfer***

***(i) One acre from his Land Parcel No Dagoretti/Mutuini/1139 to the 1st and 2nd plaintiffs who shall hold the land in trust for the Estate of Hanna Kabura Kangethe;***

***(ii) 0.75 of an acre from his land Parcel No Dagoretti/Mutuini/1139 to the 3rd plaintiff who shall hold it in trust for the Estate of Gathuri Kabera; and***

***(iii) 0.25 of an acre from his Land Parcel No. Dagoretti/Mutuini/1139 to the 4th plaintiff who shall hold it in trust for the Estate of Daniel Ngure Kuria.***

***(c) The Deputy Registrar is hereby authorized to sign the relevant transfer documents, mutation forms, application for transfer of land and consent forms should the defendant fail to do so in terms of order (b) above.***

***(d) ELC Case No 758 of 2016 is found to be without merit and is dismissed.***

***(e) The cost of this suit shall be borne by the defendant.***

2. Subsequently, on 16/6/2020, Michael Karuku Gatura, the defendant in ELC Case No. 605 of 2010 (the applicant), brought a notice of motion dated 8/6/2020 in which he sought an order of stay of execution for 90 days in the following terms:-

**1. Spent**

## 2. Spent

**3. That this honourable court be pleased to grant 90 days stay of execution of the judgment and orders issued by this honourable court on 18/5/2020 pending the hearing and determination of the appeal filed at the Court of Appeal.**

**4. That costs of this application be provided for.**

3. The said application is the subject of this ruling. It was supported by the defendant's affidavit sworn on 8th June 2020. It was canvassed through brief written submissions dated 13/7/2020. The defendant contended that there was a likelihood that the decree holder(s) will evict him from the suit property and dispose it altogether. Relying on the decision of **Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR**, counsel for the applicant urged the court to grant the orders.

4. The 1st and 2nd plaintiffs opposed the application through a Preliminary Objection dated 17/7/2020, replying affidavit sworn on 17/7/2020 by Douglas Muhindi Kangethe, and written submissions dated 17/7/2020. They contended that there was no substantive appeal filed against the judgment rendered in this matter. They argued that the court had no basis to entertain the application for stay. Secondly, they contended that they had been in possession of the suit property all along, hence the contention that the defendant stood the risk of eviction was a lie. Relying on the decision in **Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] KAR 1018**, among others, counsel for the 1st and 2nd plaintiffs argued that the defendant had failed to satisfy the requirement for demonstration of substantial loss.

5. The 3rd plaintiff opposed the application through grounds of opposition dated 1/7/2020 and written submissions dated 11/7/2020. The 3rd plaintiff contended that the applicant was not in occupation and/or occupation of the suit property hence the issue of eviction did not arise. The 3rd plaintiff added that the decree in this suit had not been extracted and there was therefore no basis for the orders sought by the defendant.

6. I have considered the application, the responses thereto, the relevant legal framework, and the applicable jurisprudence. The single issue falling for determination in this application is whether the defendant has satisfied the criteria upon which the trial court exercises jurisdiction to grant an order of stay pending appeal.

7. The trial court's jurisdiction to grant an order of stay of execution pending appeal is governed by the legal framework in **Order 42 rule 6(2)** of the Civil Procedure Rules which provides as follows:-

**42 rule 6(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.**

8. Secondly, the jurisdiction to grant an order of stay pending appeal is a discretionary one and must be exercised judiciously. The principles upon which the discretion is exercised were summarized by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1979] eKLR**.

***“If there is no other overwhelming hindrances, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. 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 its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory.....”***

9. I have reflected on the tenor and import of the disposal orders in the judgment giving rise to the present application. I have also reflected on the circumstances of this application. It was contended without any controverting evidence that, although the existing sub-divisions are registered in the name of the defendant, the plaintiffs have all along been and are in actual possession of their respective portions. The disposal orders issued by Onyango J cancelled the sub-divisions carried out by the defendant and ordered transfer of portions of the original parcel to the Estates of Hanna Kaburu Kangethe, Gathuri Kabera and Daniel Ngure Kuria respectively.

10. The defendant has not demonstrated what substantial loss he stands to suffer if the said disposal orders are implemented. The legitimate expectation of a successful litigant in a land dispute is to realise the fruits of the judgment of the court. Unless the defendant is able to demonstrate the likelihood of substantial loss that may ensue from enforcement of the judgment, the court should be reluctant to issue a blanket order of stay.

Taking the circumstances of this case into account, and further taking into account the fact that the stay sought is expressly limited to 90 days, I will allow the successful plaintiffs to realise the fruits of the judgment but at the same time preserve the suit properties for the said period of 90 days so that the defendant's intended appeal is not rendered nugatory. I accordingly dispose the notice of motion dated 8/6/2020 by Michael Karuku Gatura in the following terms:-

**(a) The plaintiffs are at liberty to enforce the judgment in this suit in terms of the disposal orders in the said judgment.**

*(b) Once the parcels are registered in the names of the plaintiffs as ordered by the court, the plaintiffs shall not dispose the parcels or register any dealings on the titles for a period of 90 days from today.*

*(c) Parties shall bear their respective costs of this application.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF JULY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Onsembe for the Applicant.

Ms June Nafula - Court Clerk