



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 37 OF 2018**

**DOMINIC KATUA NZIOKA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ANASTASIO NJUE NJIRU.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**SOLOMON KIMANI KAIRU (*Suing on their behalf and as their officials of***

**NGELANI PIONEER SOCIETY).....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ZIBA TRUSTEES LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NATION MEDIA GROUP STAFF RETIREMENT**

**BENEFIT SCHEME.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**RULING**

1. In the Notice of Motion dated 8<sup>th</sup> August, 2019, the Plaintiffs are seeking for the following orders:

***a) That there be a stay of execution of Judgment delivered on 12<sup>th</sup> July 2019 pending the hearing and determination of the Appeal herein.***

***b) That costs be provided for.***

2. The Application is supported by the Affidavit of Dominic Katua Nzioki, who has sworn it on his own behalf and with the authority of his Co-Applicants, where he has deponed that the Applicants have been on the suit property for thirteen (13) years without the consent and or authority of the Defendants; that the Applicants have individually and collectively carried out extensive and intensive developments on the suit property and that the Applicants have no other home.

3. The 1<sup>st</sup> Applicant deponed that that this court delivered a Ruling in which it discharged an existing injunction and that the Applicants are exposed to a risk of eviction from the suit premises which will defeat their claim for adverse possession. The 1<sup>st</sup> Applicant deponed that there will be no prejudice occasioned to the Respondents if the Application is allowed.

4. The Application was opposed. The 2<sup>nd</sup> Respondent filed Grounds of Opposition dated 16<sup>th</sup> September, 2019 in which it averred that the Application is bad in law and misconceived. The 1<sup>st</sup> Respondent averred that the Application does not meet the threshold for the grant of the orders sought as set out in the cases of *Samvir Trustee Limited vs. Guardian Bank Limited [2007] eKLR*, *Kenya Shell Limited vs. Benjamin Karuga Kibiru & Another [1986] eKLR* and *Middle Town Forex Bureau Ltd vs. Central Bank of Kenya [2016] eKLR*.

5. The 1<sup>st</sup> Respondent averred that no evidence has been adduced by the Applicants to enable the court exercise its discretion and that the Applicants have not demonstrated the prejudice they will suffer if the orders sought are not granted or the substantial loss that would result if the orders sought are not granted.

6. The 1<sup>st</sup> Respondent lastly deponed that the Application has been made with the sole aim of denying the 2<sup>nd</sup> Respondent the fruits of the Ruling and orders issued on 12<sup>th</sup> July, 2019. There is no indication of any reply by the 1<sup>st</sup> Respondent.

7. The Application was canvassed by way of written submissions. Learned counsel for the Applicant submitted that on 12<sup>th</sup> July, 2019, the

court dismissed the Application for injunction pending the hearing and determination of the suit; that the Applicants have lodged an Appeal against the said Ruling and that the Applicants will suffer substantial loss unless the orders of stay are granted.

8. The Applicants' counsel submitted that the Applicants have resided on the suit property for more than twelve (12) years; that the Applicants have homes on the suit property and that the Applicants will suffer substantial loss unless a stay of execution is granted.

9. The Respondents' counsel submitted that the threshold for a stay of execution has not been made by the Applicants; that the Applicants have not shown how they will suffer substantial loss and that because the financial status of the Applicants is unknown, they should be ordered to provide security for the due performance of the decree. Counsel relied on numerous authorities which I have considered.

10. Order 42 Rule 6 of the Civil Procedure Rules is the legal framework for a stay of execution pending Appeal. The conditions to be met by an Applicant in order to be entitled to an order for stay are laid out in that Rule in the following terms:

***“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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—***

***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***

***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.”***

11. I have perused the impugned Ruling of this court dated 12<sup>th</sup> July, 2019. The said Ruling was in respect of the Applicants' Application dated 1<sup>st</sup> March, 2018 seeking for an order of injunction in respect to land title number 81100/3 (*the suit property*) pending the hearing of the suit. In its Ruling, the court dismissed the Application with costs.

12. The Ruling of this court did not grant any positive order capable of execution. Indeed, this court has no jurisdiction to make an order of stay of execution unless there is a positive order authorizing something to be done or enforced.

13. In *Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another [2005] 1 EA 53 (CA)*, it was held by the Court of Appeal that a stay of execution envisaged under Rule 5 (2) (b) of the Court of Appeal Rules of Kenya is the execution of a decree capable of execution in any of the methods stipulated under Section 38 of the Civil Procedure Act.

14. This position was followed in the case of *Catherine Njeri Maranga vs. Serah Chege & Another [2017] eKLR*. In the case of *Cooperative Bank of Kenya Ltd vs. Banking Insurance & Finance Union (Kenya) (2015) eKLR*, the Court of Appeal held as followed:

***“An order of stay of execution pending Appeal is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in the decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with ...an order of stay of execution must be intended to serve a purpose.”***

11. In *Kenya Commercial Bank Limited vs. Tamarind Meadows Limited & 7 others (2016) eKLR*, the Court of Appeal quoted with approval the case of *Kanwal Sarji Singh Dhiman vs. Keshavji Juvraj Shah (2008) eKLR* where the Court of Appeal held as follows:

***“The order of 18<sup>th</sup> December, 2006 merely dismissed the Application for setting aside the Judgment with costs...it was thus a negative order which is incapable of execution save for costs (Western College of Arts & Applied Sciences vs. Oranga & others (1976) KLR 63 at page 66 paragraph C).”***

12. To the extent that the Ruling of 12<sup>th</sup> July, 2019 dismissed the Applicants' Application for injunction with costs, there is no positive order to stay save for costs. In the circumstances, the Application dated 8<sup>th</sup> August, 2019 lacks merit and the same is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF JULY, 2020.**

**O. A. ANGOTE**

**JUDGE**