



**REPUBLIC OF KENYA**

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

**ELCA NO. 3 OF 2020**

**JOEL NDIRITU NDIANG'UI.....APPLICANT/APPELLANT**

**VERSUS**

**ANN KABURA CHOMBA.....RESPONDENT**

**RULING**

1. Before me for determination is an Application via a the Notice of Motion dated 8<sup>th</sup> May 2020 brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law where the Applicant seeks for orders of stay of execution of the decree in Nyahururu CMC ELC No. 56 of 2018 pending the hearing and determination of his Appeal.
2. The Application is supported by the grounds set on the face of the said Application as well as on the sworn affidavit of Joel Ndiritu Ndiang'ui the Applicant herein, dated the 8<sup>th</sup> May 2020.
3. The said Application was opposed vide the Respondent's Replying Affidavit dated the 23<sup>rd</sup> June 2020 in which the Respondent sought for its dismissal with costs for being fatally defective, inept and an abuse of the Court process. That the Applicant had neither met the requisite conditions for stay of the decree pending the hearing and determination of an Appeal nor had he demonstrated that his Appeal had a high chance of success.
4. The Application was disposed of by way of written submission wherein the Applicant's submission was to the effect that sometime in 1976 he had been allotted land parcel No. LR Marmanet/North Rimuruti Block 2/4623 by Laikipia West Farmers Company Limited wherein he had taken physical and actual possession of by letting his brother reside on the same, which was the status of affairs to date.
5. That since the year 1976 having settled his brother one Robert Mwaniki and his family on the suit land, a fact which was not denied by the Respondent at paragraph 4 of his plaint, the Decree issued by the trial court to the effect that the Respondent was the legal owner of the parcel of land to which a permanent injunction had been issued against him, if executed, would lead to his eviction from the said suit land hence dispossessing him off the land to which he had made vast developments. That this would in turn expose the said development to damage which would in turn occasion the applicant irreparable loss and damage. Reliance was placed on the decided case in **Mukuma vs Abuoga [1988] KLR**.
6. The Applicant submitted that the Respondent had admitted to not being in occupation of the suit land and therefore would not suffer any prejudice, loss or damage if the Applicant continued to possess the suit land or if the orders sought were granted.
7. That the Applicant had a high chance of success on his Appeal the land Registrar having testified that he was the owner of the suit land, evidence which was not specifically challenged by the Respondent.
8. That it was in the best interest of justice and since the Applicant was in possession of the suit land, for the substratum of the Appeal which was the suit land, be preserved pending the determination of the Appeal as was held in the cases in **James Thomas Andafu vs Joseph Makokha Akhulunya [2018]eKLR**, **Mugah vs Kunga [1988] KLR** and **Hamisi Salim Mwaluimo vs Julius Wambugu Mombasa HC Civil Appeal No. 9 of 2003**.
9. The Applicant also submitted that the Application herein had been brought without unreasonable delay having been filed during the Covid-19 pandemic and sought that because he had met the conditions for granting of the prayers sought, that his Application be allowed.

**Respondent's Submission.**

10. In response to the Applicant's submission and in opposition of the

Application dated the 8<sup>th</sup> May 2020, the Respondent submitted that the provisions that concerned the stay of execution under Order 42 Rule

6 of the Civil Procedure Rules were to the effect that an Applicant had to satisfy 3 conditions to which that;

- i. Applicant will suffer substantial loss unless stay of execution is ordered.
- ii. The application is brought without undue delay.
- iii. Whether the Applicant has offered any such security binding on him in light of the decree or order granted.

11. The Respondent submitted that he had acquired the suit land in the year 1984 from Laikipia West Farmers Company Limited and holds the title as proof. That Section 26(1) of the Land Registration Act was explicit as to the implication of a holder of title to land to the effect that title was prima facie evidence that the person named therein was the absolute and indefeasible owner of land.

12. That the Applicant had not brought forth any evidence to show that he was the owner of the land but had admitted to having settled in Ngong with his family thereby settling his brother, who was not party to the suit, on the suit land.

13. The Respondent submitted that the acts of trespass occurred in the year 2012 and therefore it could not be true that the applicant's brother had been in occupation of the suit land for 35 years. Further no proof of such occupation in terms of photographs and developments had been adduced at trial in the Magistrate's Court. The Respondents relied in the decided case in **Daniel Mungai Mbori vs Julius Omiti Okatch & Another [2016] eKLR** to buttress their submission and to submit that the Applicant would not suffer any loss as he had not proved occupation and/or possession. That what substantial loss entailed was a state of affairs that would irreparably affect or negate the very essential core of the Applicant as the successful party of an Appeal.

14. On the issue of unreasonable delay, the Respondent submitted that the judgment in the lower court had been delivered on 16<sup>th</sup> January 2020 in the presence of both parties and Counsel wherein the Decree was issued on 31<sup>st</sup> January 2020. The Applicant did not seek for stay of execution at the time. That the Covid-19 pandemic only hit the country in the month of March 2020 whereby courts became inoperative on the 9<sup>th</sup> March 2020. That the instant application was filed on the 8<sup>th</sup> May 2020 which was about 50 days from the date of delivery of judgment. That the delay was inordinate and no reason had been given to mitigate the same. That equity aided the vigilant and not the indolent. The Respondents relied on the decided case in **Jaber Mohsen Ali & Another vs Priscillah Boit & Another [2014] eKLR**

15. On the final limb, the Respondent submitted that the Applicant had not offered to furnish any security as a condition for the stay and that it would have been prudent for him to at least offer the cost awarded in the lower court which had been assessed at Ksh 91,895/=, as security.

16. That the Applicant not having meet the threshold for grant of the orders so sought, his application lacked merit and the same ought to be dismissed with costs to the Respondent.

#### **Determination.**

17. I have considered the Applicant's Application for stay of execution of the decree in Nyahururu CMC ELC No. 56 of 2018 pending the hearing and determination of his intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.

18. The law concerning stay of execution pending Appeal is found in 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 1st 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 1st Applicant.*

19. 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 1<sup>st</sup> 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 Applicants.

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

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

21. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicant to demonstrate the kind of substantial loss he would suffer if the stay order was not made in his favour.

22. 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.”*

23. The Applicant contends that he would suffer irreparable loss if stay is not granted, I have considered the submission of both the Applicant and the Respondent and find that indeed there is no contestation that the Applicant is not in occupation and possession of the suit land but that he had allowed his brother, who is not a party to the suit, to reside thereon. With due respect, this court fails to understand how the Applicant would suffer any loss if the orders sought are not granted since he is not in occupation of the suit land herein and there is no evidence adduced that the Respondent is desirous of disposing off the subject suit.

24. In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

*“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”*

25. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of her Judgment. **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410**;

26. It was stated by Kuloba, J in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63**:

*“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.*

27. In an application of this nature, the Applicant should show the damages he would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see **Kenya Shell Ltd (Supra)**

28. On the second condition, although the Applicant did not deem it prudent to annex a copy of the impugned judgment and decree, yet it was not in dispute that the judgment and decree were delivered on the 16<sup>th</sup> January 2020 and 31<sup>st</sup> January 2020 respectively, wherein the Applicant had applied for stay of execution on the 8<sup>th</sup> May 2020 which was after a period of about 4 months. In the present times of the Covid -19 Pandemic, I find that the said application is brought without undue delay.

29. On the last condition as to provision of security, I find that the Respondent has rightly submitted that the Applicant in the present application has not furnished and/or offered any security for a grant of the order for stay. This is a mandatory legal requirement under the provisions of Order 42 Rule 6(2) (b) of the Civil

30. Section 3A. provides as follows:

*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

31. Having found that two conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Appellant/Applicant, this court is not inclined to grant the order of stay of execution so sought.

32. In the circumstance, the Appellant/Applicant's Notice of Motion dated 8<sup>th</sup> May 2020 is hereby denied and dismissed with costs to the Respondent.

i. *The Applicant shall prepare, file and serve his record of Appeal within 45 days.*

**Dated and delivered at Nyahururu this 14<sup>th</sup> day of July 2020**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**