



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC PETITION NO. 2 OF 2017

(FORMERLY NAKURU NO 26 OF 2013)

PETER MUCHERU NJUGUNA

SAMUEL WAINAINA NJUGUNA

MARY MWIHAKI NYORO

PAUL NJUGUNA WAITHERA

BEATRICE MUKUHE NJUGUNA

MARY WANJIKU KABUGI

HANNAH KAHAKI MUCHERU

DAVID KARIUKI.....PETITIONERS/APPLICANTS

VERSUS

THE ATTORNEY GENERAL.....1st RESPONDENT

CHAIRMAN LAND CONTROL BOARD,

OL KALOU NYANDARUA COUNTY.....2nd RESPONDENT

DISTRICT LAND REGISTRAR,

NYANDARUA COUNTY.....3rd RESPONDENT

EUNICE MUTHONI NJUGUNA.....4th RESPONDENT

DANIEL MWANGI MARIGI5th RESPONDENT

RULING

1. Before me for determination is an Application via a Notice of Motion dated the 10th March 2020 brought under the provisions of Order 42 Rule 6(1), Order 51 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act where the Applicant seeks for orders of stay of execution of the Judgement and the consequent decree passed on the 23rd October 2018 pending the hearing and determination of his Appeal.

2. The Applicants have also sought for conservatory orders restraining the Respondents by themselves, their agents and/or servants from dealing with the suit land herein being No. Nyandarua/Passenga/ 226 and 227.

3. The Application is supported by the grounds set on the face of the said Application as well as on the sworn affidavit of Peter Mucheru Njuguna the 1st Applicant herein on behalf of all the Applicants, dated the 10th March 2020.

4. The Respondents did not file their Response to the said Application, however after direction had been issued for parties to dispose of the Application by way of written submission, the Applicants, the 4th and 5th Respondents complied.
5. The Applicants' submission was to the effect that they had established all the requirements as provided for under the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, to be granted the orders sought. That on the 1st condition of establishing sufficient cause, their submission was that they had lodged their individual Notices and Records of Appeal after having been dissatisfied with the judgment of the Court. That their Appeals were arguable and had great chances of success and given their industrious pursuit of the Appeal, that sufficient cause had been established.
6. Their submission on the second condition as to whether there would be substantial loss occasioned if the Application was not granted, the Applicants submitted that the 4th and 5th Respondents had already started interfering with the suit land being Nyandarua/Passenga/226 and 227 in preparation to dispose it off through a sale agreement to one Meshack Kingori Githaiga. That this being family land, it was imperative to preserve the subject matter in dispute and to let them exercise their right of Appeal otherwise the Appeal would be rendered nugatory and they would suffer irreparable and substantial loss. Reliance was placed on the decided case in **NM vs EMN [2019] eKLR**
7. On the 3rd condition of unreasonable delay, the Applicants' submission was that pursuant to the dismissal of their Petition on the 23 October 2018 they had filed their individual Notices of Appeal and records of Appeal on the 2nd November 2018 and 30th August 2019 respectively. That although they had inadvertently overlooked the filing of the present application, the delay was not inordinate. That they had filed the present application on the first sign of interference with the subject suit by the Respondents and that it was in the best interest of justice that the said suit lands be preserved until the determination of their Appeals. They relied on the determined case in **Butt vs Rent Restriction Tribunal [1982] KLR**
8. The Applicants further submitted that they were willing and ready to furnish security upon such terms as the Court will pronounce and that no prejudice would be occasioned to the Respondents. That further that since the subject matter was land, then there might be no need for security to be provided as was held in the case of **David Oyiare Ntungani vs Matuiya ole Naisuaku Orket [2017] eKLR**.
9. The 4th and 5th Respondents submission in response was to the effect that the present application had been served upon them when Counsel had closed their offices due to the present pandemic. That further they could not obtain the Respondents' affidavit at the time as she had been incapacitated and admitted in hospital leading to a delay in the response of the Applicants' application (which the Court is not in receipt of)
10. While in opposition of the Applicants application on the other hand, the 4th and 5th Respondents' submission was that the orders that the Applicants sought to vary were discretionary orders and the jurisdiction to grant the same was provided for under Order 42 Rule 6(1) of the Civil Procedure Rules. That Rule 2 of Order 42 further provided the conditions one ought to meet before the order of stay of execution could be issued.
11. That Section 2 of the Civil Procedure Act gave a definition of a Decree holder and that for a decree to be a subject of stay of execution, it must be one that was capable of being executed. To this effect, the Judgment that had been delivered on the 23rd October 2018 was one that had dismissed the Applicant's Petition with costs to the 4th and 5th Respondents. That the order that had been made by the Court was a negative order in law and which was incapable of being stayed. They relied on the decided case in **Sonalux Limited & Another vs. Barclays Bank of Kenya Limited [2008] eKLR** among others to buttress their submission.
12. The Respondents thus sought, based on the numerous authorities and on the kind of order being sought to be stayed, to humbly decline to submit on the remaining pillars related to the granting of orders for stay and asked the Court to dismiss the application with costs.
13. That with respect with the Applicants application seeking for an order to restrain them from dealing in any way with the subject parcels of the land, it was the 4th and 5th Respondents' submission that the same lacked merit and ought to be dismissed.
14. That they had moved the Court after occupation of the suit land and no evidence had been produced in the form of an agreement to support the allegation that they (Respondents) were bent on disposing off the suit land.
15. That the Applicants had no legal or proprietary interest in the suit properties capable of protection or enforcement of the law and therefore had no basis to seek the said orders. Reliance was placed on the decided case in **Daniel Lomagul Kande & 2 Others vs Kamanga Holding Limited & 40 Others [2017] eKLR** to submit that they had been issued titles to the suit land long before the suit was filed and no orders had been issued restraining them from continued enjoyment of their peaceful and quiet possession
16. That the fact that an Appeal had been filed was not grounds enough to grant the orders sought. That the right of Appeal must be balanced against an equally weighty right of the Respondents.
17. That there having been negative orders in the judgment delivered by the Court, the Court could therefore not issue orders of injunction. Reliance was placed on the decided case in **Western college of Arts and Applied Sciences vs. Oronga (1976) KLR 63 and Republic vs Kenya wildlife Service & 2 Others [2007] eKLR**. The 4th and 5th Respondents submitted that there was nothing before Court to warrant the granting of the orders sought and prayed that the Application be dismissed with costs.

Determination.

18. I have considered, the Applicants' Application, the supporting affidavit as well as the written submissions of both the Applicants and the 4th and 5th Respondents. 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.

19. Having said so, I have considered the judgment and decree sought to be stayed herein. Vide a Judgment delivered by this Court on the 23rd October 2018, the Court had held as follows:

‘The Petitioners herein do not have any legal or proprietary interest in the suit properties capable of protection or enforcement under the provisions of Article 40 of the Constitution. In essence therefore these resultant parcels of land did not form part of the deceased’s estate therefore the Petitioners’ right to inherit them as their father’s property does not arise and no constitutional rights were infringed in any way.

In the end, the Petition herein is dismissed with costs to the 4th and 5th Respondents’.

20. These orders were, in my humble opinion and in agreement with the 4th and 5th Respondent’s submissions, negative orders.

21. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR** the Court had held that an order for stay cannot be granted where a negative order had been issued.

22. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

‘any person in whose favour a decree has been passed or an order capable of execution has been made...’

23. In the present judgment, the Court did not order the Applicants to do anything or to abstain from doing anything or to pay any sum of money.

24. In the case of **Western College of Arts and Applied Sciences (supra)** the Court of Appeal 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. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or 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 to restrain by injunction.”

25. In the decided case of **Sonalux Limited & Another (supra)** the Court of Appeal held:

‘As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.’

26. For the foregoing reasons, the upshot of this Court’s Ruling to the Applicant’s Application for orders of stay of execution of the judgement and decree pending the hearing and determination of an Appeal is that the same is not merited and therefore is dismissed.

27. On the second issue where the Applicants seek conservatory orders restraining the Respondents by themselves, their agents and/or servants from dealing with the suit land herein being No. Nyandarua/Passenga/ 226 and 227, I have considered the orders issued in the impugned judgment herein above captioned and find that the Court neither ordered any of the parties to do anything or refrain from doing anything. There was therefore, no positive and enforceable order made by the Court which could be the subject matter of the application for injunction and /or conservatory orders. The application for injunction or stay is apparently extraneous to the orders made by the Court as was held in **Western College of Arts & Applied Sciences (Supra)**

28. I find that the application lacks merit and is dismissed with costs to the 4th and 5th Respondents.

It is ordered.

Dated and delivered at Nakuru this 6th day of August 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE