



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYAHURURU

ELC APPEAL NO 16 OF 2019

JANE WANGUI MACHARIA.....1ST APPELLANT

ALICE WAMBUI MUIGA.....2ND APPELLANT

MARY WANGUI MACHARIAIA.....3RD APPELLANT

VERSUS

RUTH MOHAGI MACHARIA.....1ST RESPONDENT

CATHERINE WANGECHI MUGO.....2ND RESPONDENT

RULING

1. Before me for determination is an Application via a the Notice of Motion dated 13th January 2020 brought under the provisions of Order 50 Rule 6, Order 42 Rule 6 of the Civil Procedure Rules Section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law where the Applicant s seeks for orders of stay of execution of the judgement delivered on the 9th October 2019 in Nyahururu CMC ELC No. 248 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 Jane Wangui Macharia the 1st Applicant herein and on behalf of the other Applicants, dated the 13th January 2020.

3. The said Application was opposed vide the 2nd Respondent's Replying Affidavit dated the 24th January 2020 in which the Respondent sought for its dismissal with costs for having been brought by bad faith the subordinate Court's decree having been fully executed. That the Applicant had neither met the requisite conditions for stay of the decree pending the hearing and determination of an Appeal nor had they demonstrated that their Appeal had a high chance of success.

4. Pursuant to the Covid-19 Pandemic, the Court, on the 3rd June 2020 directed that that the application be dispensed of by way of written submissions whereby save for the 1st Respondent, parties filed their respective submissions.

Applicant s' submission.

5. The Applicants' submission was that on the 9th October 2019, the subordinate Court delivered its judgment dismissing their case wherein being dissatisfied with the said decision they had filed an appeal against the same vide their memorandum of appeal annexed as JKM2 which Appeal was arguable and had a good chance of success.

6. That the stay of execution would not prejudice the Respondent herein but that they stood to suffer substantial loss if execution of the decree in the said Nyahururu CMC ELC No. 248 of 2018 was not stayed and which in turn would render their Appeal, which was arguable and had high chance of success, nugatory. Reference was made to the case in **MM vs PM [2018] eKLR**

2nd Respondent's submission.

7. The 2nd Respondent's response and in opposing the Applicants application for stay of execution was that pursuant to the delivery of judgment in Nyahururu CMC ELC No. 248 of 2018, its decree had been executed fully leaving nothing to stay. That in as far as Account No. [...] was concerned, the same had been unfrozen wherein the 1st Respondent had accessed and utilized funds therein, funds which had been

proceeds of the sale of the portion of land the 2nd Respondent had purchased.

8. That secondly she was now in possession of her portion of land which she had purchased from the 1st Respondent and even tilled the land in readiness for the planting season.

9. That the Court's discretion to order for stay of execution of the judgment and Decree is fettered by several conditions including;

i. The Applicant must establish a sufficient cause

ii. The Court must establish or be satisfied that substantial loss would ensue from the refusal to grant stay

iii. The Applicant must furnish security.

10. That the Applicants' affidavit in support of their application was woefully deficient, bare and lacking in substance where the Applicants had approached the Court with an erroneous view that the orders they sought would be granted as a matter of course.

11. That the Applicants' Appeal was not arguable and had no chances of success whatsoever. That the Applicants had not placed anything before the Court to demonstrate that they would suffer any substantial loss and the nature of the loss.

12. That the subject of Appeal being land, the same would be available at the time the Appeal will be heard and determined and the Applicants had not demonstrated how the Appeal would therefore be rendered nugatory and neither had they furnished or bound themselves to furnish any security.

13. The 2nd Respondent further submitted that pursuant to the judgment delivered on 9th October 2019, she was entitled to enjoy the fruits of her success immediately and any further delay was prejudicial to her. That in case the intended Appeal would eventually not succeed, which was highly possible, then the orders would then have to be executed by which time she would have suffered irreparable loss which the Applicants had no ability whatsoever to make good.

14. That the judgment having been delivered on 9th October 2019, the application had been filed on the 20th January 2020 over 3 months later which was after inordinate delay, and the delay had not been explained. That the Applicants were therefore guilty of laches.

15. The 2nd Respondent's submission was that the only issue that arose herein for determination was whether the Applicants had made out a case for the grant of the orders so sought to which the answer was in the negative as the Applicants had not discharged the conditions placed on them by virtue of the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Reference was placed on the decided case in **Charles Munga Bichage vs Richard Nyagaka Tongi & 2 Others [2013] eKLR**.

16. As to whether the Appeal had a high chance of success, the 2nd Respondent submitted that the Applicants herein were biological daughters to the 1st Respondent who had inherited the subject suit from her husband, their late father. That the evidence adduced in the trial Court had been to the effect that the Applicants had tried to inherit the 1st Respondent while she was still alive, a right they did not have in law. Reliance was placed on the High Court case in **John Ndungu vs Gideon Karegwa Ndungu & 5 Others [2006] eKLR**.

17. That secondly, no law obliged a registered proprietor of the land to seek consent from his/her children before dealing with his/her land. Reference was placed on the case in **Jemutai Tanui vs Juliana & 5 Others [2013] eKLR**. That pursuant to the holdings in the above captioned authorities, the Applicants neither had any interest, legal or otherwise in the suit land and neither did the 1st Respondent hold the suit land in trust for them. That the Applicants therefore had no cause of action against both the Respondents. In the circumstance, the Applicants' Application was unmeritorious and the same ought to be dismissed.

Determination.

18. I have considered the Applicants Application for stay of execution of the decree in Nyahururu CMC ELC No. 248 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.

19. 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 .

20. 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 Applicants 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

21. I find issues for determination arising therein namely:

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

22. The purpose of stay of execution is to preserve the substratum of the case. In the case of **Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that:-

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

23. What is the status quo on the suit land? The Applicants contend that they would suffer irreparable loss if stay is not granted, I have considered the submission of both the Applicants and the 2nd Respondent and find that indeed there is no contestation that pursuant to the delivery of the impugned Judgment, its decree was fully executed to wit the 1st Respondent accessed and utilized funds which were the proceeds of the sale of the suit land deposited in her Account which had been frozen, the 2nd Respondent is now in possession of the disputed suit land wherein she has now tilled the same in preparation for the planting season. With due respect, this Court fails to understand how the Applicants would suffer any loss if the orders sought are not granted since the application has been overtaken by events and there is nothing left to stay.

24. Secondly, it was incumbent upon the Applicants to demonstrate the kind of substantial loss they would suffer if the stay order was not made in their favour. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs 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.”

25. The 2nd Respondent is in occupation of the suit land and there is no evidence adduced that she is desirous of disposing off the same whilst the 1st Respondent has already utilized the proceeds of the purchase price. The Applicants herein have not demonstrated how the said execution of the decree had occasioned substantial loss to them *or whether or how the said state of affairs had created a state of affairs that will irreparably affect or negate the very essential core of their success in the Appeal*. I find that the Applicants herein have failed to convince the Court to grant them the Order for stay of execution pending Appeal based on a threat of substantial loss if the order is not granted.

26. On the second issue as to whether the Application was brought without unreasonable delay, again the Applicants did not submit on this issue however the Court finds that pursuant to the delivery of the impugned judgment on the 9th October 2019, this application was filed on the 20th January 2020 which was over period of 3 months. No reason had been given for the delay in filing of the application and the Court thus finds that this ground must also fail as the Applicants are guilty of laches.

27. The Provisions of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules also stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Again the Applicants have not furnished any security nor pledged to furnish any such security for due performance. In the case of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] eKLR** the Court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant . It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicant s become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicant s. I presume the security must be one which can serve that purpose.”

28. On this ground, the Application must fail.

29. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.

30. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how discretion should be exercised as follows:

1. "The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an Appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an Appeal may not be rendered nugatory should that Appeal Court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of Appeal.
5. The Court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

31. In the present case, I find that the 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/Applicants, and therefore the Court is not inclined to grant the order of stay of execution so sought.

32. In the circumstance, the Appellants/Applicants Notice of Motion dated 13th January 2020 is hereby denied and dismissed with costs to the 2nd Respondent.

- i. The Applicants shall prepare, file and serve their record of Appeal within 45 days.

Dated and delivered at Nyahururu this 29th day of September 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE