



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 490 OF 2017

LUCY WATIRI MUBURI (legal

representative and administrator of the estate of Mathews Muburi

Muya deceased).....**PLAINTIFF**

VERSUS

NJOROGE F.A WACHIRA.....**1ST DEFENDANT**

ALOIS WATIRI MUBURI.....**2ND DEFENDANT**

RULING

Defendant's Motion dated the 15/6/2020

1. The Defendants (Applicants) filed a motion under Section 1A & 1B of the Civil Procedure Act, Order 51 Rules 1, 2, 3 & 4 and Order 42 Rule 6 of the Civil Procedure Rules interalia.
 - a. Spent
 - b. Spent
 - c. There be a stay of execution of the ruling and order of this Honourable Court delivered on the 12/5/2020 pending the hearing and determination of the Appeal.
 - d. That the honourable Court be pleased to issue directions in the form of a notice to show cause pertaining to the fate of the Applicant's permanent houses, food crops and cash crops to wit thousands of tea bushes prior to any execution of the decree herein.
 - e. That there be a stay of execution of the judgement and decree of this Honourable Court delivered on the 27/9/18 and all subsequent rulings and orders pending the hearing and determination of the Appeal.
 - f. Costs of the application be provided for.
2. The application is supported by the affidavit of Njoroge F A. Wachira and the grounds annexed to the said application. The Applicants aver that they are aggrieved with the ruling delivered on the 12/5/2020 and have consequently lodged an Appeal, which Appeal stands a high chance of success. That if the orders of stay of execution are not granted, they stand to lose the suit property and their Appeal shall be rendered nugatory.
3. In his supporting affidavit, Njoroge F. A. Wachira, the deponent herein delved at length at what appears to be evidence in the suit, which suit was heard and determined.
4. He has annexed a Notice of Appeal against the ruling and orders of this Court delivered on the 12/5/2020.
5. The application is opposed by the Respondent/Plaintiff who contended that the application is incompetent and unmeritorious only intended to delay the execution of valid Court orders in the suit.
6. In addition, she avers that there is inordinate delay in filing the application for stay since the judgement being sought to be stayed was

delivered on the 27/9/18, a period of 18 months; That the application has been overtaken by events because the title is now registered in the Plaintiff's name; no new evidence is admissible at this stage given the suit was heard and determined; the Memorandum of Appeal is full of falsehoods and fallacies, for example where the Applicant claims that the costs were awarded to the Plaintiff while the fact is the Court ordered each party to bear their costs; no negotiations have taken place contrary to what is stated in the memorandum of Appeal; no Appeal capable of being negated if the orders are denied; no prejudice will be suffered by the Applicants save for what can be compensated through costs.

The Plaintiffs Motion dated the 16/5/2020

7. The Plaintiff/Applicant filed a motion on the 16/5/2020 seeking orders that the Court order the substitution of the auctioneer Joseph Kiarie Watenga T/A Front Bench Auctioneers with Bernard M Gaturuku T/A Bensure Auctioneers.

8. The Plaintiffs argue that the former auctioneers developed cold feet and failed to carry out the eviction orders as instructed on the 11/6/2020 partly due to movement restrictions during the COVID -19 Pandemic period. That the substitution shall not prejudice the Respondents in any way.

9. In her supporting affidavit the Plaintiff reiterated the grounds of the application set out in the preceding para and added that the auctioneer be substituted so that the orders of this Court may be executed.

10. The application is opposed by the Defendants/Respondents who contend that being aggrieved with the judgement delivered on the 27/9/2018 they instructed their then lawyers to apply for stay of execution which application they later learned was withdrawn without their consent. That mistake of Counsel should not be visited on them. That the said Advocate also failed to file an Appeal.

11. In addition, they stated that they have filed an application before the Court of Appeal seeking inter alia stay of execution of the orders of the Court delivered on the 27/9/18, leave to file Appeal out of time and expressed optimism that they will be granted the orders in the Court of Appeal. That status quo should be maintained.

12. Further the deponent stated that unless stay of execution is granted they shall be evicted from the land that is their only abode and source of livelihood. That they have lived on the land for over 50 years occupying a portion of 10 acres while the Plaintiff occupies two acres.

13. Further that the Defendants have invested in the tea bushes and permanent houses which investments have not been quantified. That their rights over their parent's tombs have neither been determined and will not be at peace unless the same is determined in accordance with Kikuyu customs in the unlikely event that the Appeal succeeds. That their rights under Art 28 and 43 (1) of the Constitution are at the risk of being violated if the anticipated eviction is carried out before their Appeal is heard and determined.

14. The parties filed written submissions and addressed me in open Court which submissions I have read and considered.

15. The Defendants submitted that there is no Appeal pending before the Court of Appeal; that they filed an application seeking leave to file the Appeal out of time, which application has not been heard; The subject matter be preserved so that their Appeal if granted shall not be rendered nugatory; That the title has already been transferred to the Plaintiff; That all the parties reside on the suit land.

16. With respect to delay in filing the application for stay, the Defendants argued that it arose as a result of the mistake of their previous Advocate who withdrew their application for stay of execution and failed to file the Appeal. Upon being served with notice to vacate, it dawned on them that no Appeal had been filed. They then instructed the current Advocate on record. That the mistake of the advocate should not be visited on the Defendants.

17. With regard to substantial loss the Defendants argued that unless stay is granted they stand to lose their permanent house and tea bushes. That they will suffer emotional anguish on account of their parent's graves on the suit land.

18. With regard to security that there is no necessity of giving any security for the performance of the decree because the subject matter is land. That Art 50 gives them the right to be heard including on Appeal.

19. The Plaintiff submitted that the application dated the 15/6/2020 was filed inordinately. The judgement was delivered on the 27/9/2018, a period of 18 months. Further that the Applicants have not shown any substantial loss. No security has been offered by the Applicants. That no prejudice shall be suffered by the Defendants as the house can be compensated in monetary terms.

20. The background of this case is that the Court rendered judgement on the 27/9/18 in favour of the Plaintiff and ordered the Defendants to vacate the land within 90 days in default execution by way of eviction to ensue. On the 26/11/18 the Defendants filed a Notice of Motion seeking orders for stay of execution of the said judgment. The motion was withdrawn on the 21/3/19 before it was heard and determined. The Plaintiff caused the registration of the suit land in her name on the 20/8/19 in execution of the said judgement. The Plaintiff vide the letter dated 11/9/19 gave notice to the Defendants to vacate the suit land.

21. On the 2/10/19 the Defendants filed a motion vide CA 157 of 2019 in the Court of Appeal seeking orders inter alia that leave be granted to file the notice of Appeal and Record of Appeal out of time.

22. On the 22/11/19 the Plaintiffs sought orders through a motion of eviction of the Defendants, the auctioneer to undertake the eviction and the Officer Commanding Station of the area to give security for the said undertaking. Equally on the 13/12/19 the Defendants through a motion moved the Court for orders inter alia that a new Counsel be brought on record, execution of the decree be stayed pending the hearing and determination of the application, status quo be maintained pending the hearing and determination of the motion dated the 22/11/19. The

Court heard the two motions and on 12/5/2020 dismissed the Defendant's motion and granted the one for the Plaintiff paving way for the execution of the judgement of this Court delivered on the 27/9/18.

23. The Defendants filed another motion in the Court of Appeal on the 4/6/2020 vide CA 46 of 2020 and sought orders of stay of execution of the judgement delivered on the 27/9/2020. On the 6/7/2020 they filed a Notice of Appeal in respect to the said judgment.

24. On the 15/6/2020, the Defendants filed a motion seeking stay of execution in respect to the ruling of 22/5/2020 and the judgement of the 27/9/18. Similarly, the Plaintiff on the 16/5/2020 sought orders to substitute the Auctioneer as the previous one failed to carry out the eviction as ordered by the Court. These two motions are the subject of this Ruling.

25. I will determine the motions in the order of filing. The issues for determination are;

- a. Whether the execution of the judgement delivered on the 27/9/18 and all subsequent rulings and orders should be stayed pending the hearing and determination of the Appeal.
- b. Whether the execution of the ruling and orders delivered on the 12/5/2020 should be stayed pending the hearing and determination of the Appeal.
- c. Whether the Court should issue directions in the form of a notice to show cause pertaining to the fate of the Applicant's permanent houses, food crops and cash crops to wit thousands of tea bushes prior to any execution of the decree herein.
- d. Whether the Court should order the substitution of the auctioneer.

26. The principles guiding the grant of a stay of execution pending Appeal are well settled. These principles are provided under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

“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.”

27. In the case of Vishram **Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending Appeal is unfettered, the High Court's jurisdiction to do so under Order 41 Rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

28. In respect to the 1st issue, it is noted that the judgement was delivered on the 27/9/18. Under the rules of procedure any party desirous of filing an Appeal against a decision of the Court must file a notice of Appeal within 14 days from the date of the decision. Order 42 Rule 6(4) of Civil Procedure Rules provides that an Appeal to the Court of Appeal shall be deemed to have been filed when Notice of Appeal shall have been given under the Rules of the Court of Appeal. It is admitted by the Defendants that they failed to file the Appeal within the stipulated time. It is on record that there are two applications vide CA 157 of 2019 and CA 46 of 2020 pending in the Court of Appeal at Nyeri seeking to file an Appeal out of time and stay of execution of the judgement of 27/9/2018. That said, I have seen the Notice of Appeal filed on the 4/6/2020 on record. Even if this was to be taken as correct, the same is filed out of time and without leave of the Court which application is pending in the appellate Court. In the end there is no competent Appeal pending before the Court of Appeal to anchor the application of the Defendants. It is standing on quick sand.

29. For the above reason this prayer is not sustainable and is hereby dismissed. That settles issue no a).

30. In respect issue No b), the ruling was delivered on 22/5/2020 and the application for stay was filed on the 15/6/2020, therefore without any delay.

31. In a case of stay of execution pending Appeal, the Court has to balance two rights that the parties have. Firstly, is the right of the successful party in the suit to enjoy the fruits of his judgment. The second right is the right of an Applicant to Appeal which includes the prospects that the Appeal is not rendered nugatory. In the case of **Mohamed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat (2013) eKLR**, where the Court upheld the decision of **M/S Portreitz Maternity –vs- James Karanja Kabia Civil Appeal No. 3 of 1997** and stated that:-

“That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.....”

32. In the case of **Macharia t/a Macharia & Co. Advocates –vs- East African Standard** (Supra) the Honourable Court observed that:

“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 judgement 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.”

33. Have the Defendants/Applicants proved substantial loss? The Court in the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi HCMCA No. 1561 of 2007** defined substantial loss as;

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that..... 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 judgement.”

34. The Applicant must demonstrate the actual loss that he stands to suffer if the stay is not granted. In the case of **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, the Court held that if there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented.

35. In the case of **Antoine Ndiaye v African Virtual University [2015] eKLR, supra**, the learned judge Gikonyo J. cited the holding in the case of **Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005** where it was held that;

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible Appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.

36. As regards determination of what amounts to substantial loss, Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held that:

“...substantial loss’ is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and that Applicant is therefore forced to pay the decretal sum.”

37. In the case of **Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001, (unreported)** the Court stated as follows;

“Coming to the substantial loss likely to be suffered by the Applicant if the stay order is not granted, she was bound to place before the Court such material and information that should lead this Court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay”.

38. In the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63**, it was held as follows;

“In this kind of applications for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay...”

39. In this case the Defendants have variously stated in their affidavits that they and their siblings have lived on 10 acres of the suit land for several years, planted tea, constructed permanent houses thereon. That if evicted they will lose their ancestral land, a place of abode and livelihood. They aver that all these have not been quantified as yet. The burden of proving substantial loss is on the Applicants and it behoved them to give the quantified loss that they would suffer. They have also averred that they stand to suffer emotional anguish on account that their parents graves are situate on the land whose fate has not been determined in accordance with the Kikuyu traditions.

40. In opposing the application, the Plaintiff stated that it is only the two Defendants who are still residing on the suit land at a corner of the suit land. Be that as it may, it is common ground that the Defendants are still living on the suit land.

41. In reiterating the point that substantial loss must be proved, the Court in **Peter Rugu Gikanga & another v Weston Gitonga & 10 others [2014] eKLR, H.C at Nakuru Civil Case No. 148 of 2010** had this to say;

“It is clear from the Replying Affidavit of the Peter Rugu Gikanga, that some of the Defendants/Applicants have moved out of the suit land in obedience to the order of Court. The majority do not live on the land, but are said to have structures thereon. Only the 3rd and 10th Defendants/Applicants persist on living on the land, allegedly because they have no alternative land. This, with respect, is no ground for granting a stay of execution.

42. In the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi (Court of Appeal Civil Application No. NAI 302 of 2007 UR 205/2007)**, 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.”

43. The Applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party in the Appeal. In this case the Defendants have averred that the process of eviction is underway and if stay is not granted they will be removed from the land. In my view the process of execution is a lawful process and the same does not take the place of substantial loss. It is being carried out pursuant to a Court order. In the case of **James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR** stated.

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process”.

44. In conclusion I hold that the Defendants have not proved substantial loss that they aver they will suffer. This limb fails.

45. The third requirement that an Applicant must surmount is that of security for the due performance of the decree. In the case of **Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates** Justice Gikonyo the Court stated 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 Applicants 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 Applicants. I presume the security must be one which can serve that purpose.”

46. Similarly, in the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**, it was stated that: _

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgment. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

47. In this case the Defendants have averred that security is not necessary because the subject matter is land. I disagree with the Defendants on this. The correct position in law is that an Applicant must show readiness and willingness to provide security. There will be costs to be met in the suit in the appellate Court.

48. This limb fails on account of failure to provide security for the due performance of the decree.

49. It is on record that no draft memorandum of Appeal has been attached and as a measure of the Applicant’s commitment to filing the Appeal. It is not for this Court to determine the issue of Appeal but the Applicant has urged this Court to grant stay on the grounds that it has a high chance of success pm Appeal. One would have expected the Applicant to persuade the Court by at least annexing the proposed memorandum of Appeal. None was annexed.

50. In the end the application for stay fails. It is dismissed.

51. In respect to issue number c). the Court notes that this prayer is not supported. I will deem that the Applicants abandoned it midway.

52. In respect to the prayer for substitution of the Auctioneer, the Court notes that a party retains the right to elect which auctioneer to undertake a Court process. In this case the Plaintiff obtained orders directing Joseph Kiarie Watenga t/a Front Bench Auctioneers to carry out the eviction of the Defendants. The complaint by the Plaintiff is that the named auctioneer developed cold feet and failed to carry out the process on the 11/6/2020. It is on record that the said Auctioneer proceeded to write to the OCS Kanyenyaini on the 4/6/2020. The letter was duly received and acknowledged by the said police station on the 11/6/2020. It is therefore true that the said Auctioneer acted on the orders. It is also correct that this was the period when movement in and out of Nairobi was restricted. The averment of the Plaintiff is therefore not based on personal misconduct of the auctioneer and no evidence that the said auctioneer wilfully refused to enforce the Court order. I say so because the Auctioneer is an officer of the Court.

53. For that reason, I decline to grant the orders of substitution.

54. Both applications are dismissed. Each to bear their own costs.

55. **It is ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 17TH DAY OF SEPTEMBER 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kinuthia for the Plaintiff/Applicant

Kiongera for the Defendant/Respondent

Mwangi and Njeri, Court Assistants