

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT & LAND COURT

CIVIL CASE NO.217 OF 2012

CHARLES NGATIA NGUYO.....PLAINTIFF

VERSUS

EKIRA GATHONI KARIITHI & ANOTHER.....DEFENDANT

RULING

The application before me is dated 11/10/2013 whereby the applicants Ekira Gathoni Kariithi and Teresia Mumbi Kariithi pray for orders that there be stay of execution of the judgment of this court dated 1st October 2013 and the decree of this court dated 8th October 2013, pending hearing and determination of the defendants intended appeal. They have also prayed that costs of the application be provided for.

The application is based on grounds that the plaintiff has already extracted the decree of this court and may have lodged the same for registration at the Nyeri District lands office. The applicants intend to appeal against the whole of the judgment and orders of this court made on 1st October 2013 and on this end the applicants have lodged a Notice of Appeal against the said judgment and orders. The applicants believe that they will suffer extreme prejudice if the orders sought herein are not granted. They contend that the intended appeal raises weighty grounds with high probability of success and it is in the interest of justice that the execution of the said judgment and decree be stayed pending the hearing and determination of the intended appeal.

The application is supported by the affidavit of Ekira Gathoni Kariithi who states that she is dissatisfied with the said judgment and the orders made and that she intends to appeal before the Court of appeal against he said judgment and that she lodged her Notice of Appeal on 8th October 2013. That she applied for a certified copy of the court's proceedings to enable her file the intended appeal at the Court of Appeal registry and has already prepared a draft memorandum of appeal. According to the applicant the intended appeal raises weighty issues of law and it is in the interest of justice that the execution of the judgment of the court be stayed pending hearing and determination of the intended appeal. They argue that the orders of the Court made on 1st October 2013 entail cancellation of titles to parcels of land registered in the names of persons who were not parties to the instant suit and who would be occasioned extreme prejudice as they have in effect been condemned without the benefit of being heard by the court. Surprisingly, this people have not appealed. The applicants have also argued that the respondent has already extracted the decree of this court and may already have lodged the same for registration at the Nyeri District Lands Office. That in the circumstances, it is mete and just that there be ordered a stay of execution of the judgment of this court pending hearing and determination of the intended appeal.

The application is opposed by the decree holder Charles Ngatia Nguyo who states in his replying affidavit sworn on 18/10/2013 that the said application is misconceived, frivolous and an abuse of the court process. The application does meet the thresh hold set under order 42 rule 6 of the Civil Procedure Rules. He argues that the applicants have not demonstrated how they stand to suffer substantial loss if the orders are not granted rather they aver about other parties. He states that such other parties are the ones who should be coming to court. He further contends that the applicants have also not offered any security as required by the law. Finally he argues that the intended appeal has no chances of success as there is no injustice occasioned to the applicant. The application falls too far short of meeting any of the principles that warrant the granting of such an order and the application should be dismissed with costs.

When matter came for hearing on the 3/12/2013 Mr. Muthigani submitted that there was a Notice of Appeal filed on 7/10/2013 seven days after delivery of judgment. He submitted further that the draft memorandum of appeal raises substantial issues and therefore the appeal is not frivolous. The decree is partially executed as the resultant parcels of land have been canceled and that the land is presently in the name of Kariithi Weru. He argues that if the plaintiff is registered as an owner of 2.62 acres there will be no restriction to bar him from dealing with the resultant parcels of land and if the defendant were to succeed on appeal, they will not have any land.

Mr. Nguyo on his part argues that he is suffering where he lives at Kitunduti Secondary School with the whole family of Wairimu as a notice has been given to the family to vacate the compound of the said school.

I have considered the application supporting affidavit, replying affidavit and submissions of Mr. Muthigani for the applicants and Mr. Nguyo for the respondent and do find that Order **42 rule 6 (2) of the Civil Procedure Rules** provides for stay in case of appeal and not stay pending appeal as provided for by Rule 5(2) b of the Court of Appeal. The Court appealed from has the power to grant a stay in case of appeal on condition that the court should be satisfied that **substantial loss may result** to the applicant unless the order is made and that the application has been made **without unreasonable delay**.

Under rule **5 (2)b of the Court of Appeal rules** the principles for granting a stay pending appeal are that the appellant must demonstrate that there is an **arguable appeal** and that if a stay is not granted the appeal if successful will be **rendered nugatory**. From the foregoing this court has no duty going into the merits of the appeal as doing will usurping the powers of the Court of Appeal.

The application herein was made on the 11/10/2011, whilst the judgment was delivered on 1/10/2011, a deference of 10 days between the two dates. I do find that the application was made timeously as a delay of 10 days cannot amount to unreasonable delay.

This court also finds that the applicant has demonstrated that she is likely to suffer substantial loss if a stay is not granted. She states that once registered as proprietor of 2.62 acres of the land, the decree holder might deal with the same in a manner prejudicial to her so that if she succeeds on appeal, she will not be able to recover the land.

The second issue to be considered is security for the due performance of the decree. I do find that the issue of security in this matter is not relevant as the parcel of land in dispute is protected by the decree of the court and that a stay of execution will not reverse the decree.

Ultimately, this court finds the application merited and the said is allowed in terms of prayer 3 of the Notice of Motion save that the same will last for only three months from today.

Dated, signed and delivered on 11th day of July 2014.

A. OMBWAYO

JUDGE