



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 318 OF 2009 (OS)**

**SAMUEL KIMINTAE MPARO.....1<sup>ST</sup> PLAINTIFF**

**WANGUI KIMINDAI JOSEPH.....2<sup>ND</sup> PLAINTIFF**

**ANNA MBENEK.....3<sup>RD</sup> PLAINTIFF**

**ALBERT LEMPARO.....4<sup>TH</sup> PLAINTIFF**

**RICHARD TURERE MPARO.....5<sup>TH</sup> PLAINTIFF**

**ANDREW SAIBULU KIMINTAE.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MATHARE INVESTMENTS & PROPERTIES LTD.....DEFENDANT**

**RULING**

1. The Plaintiffs approached this court vide a Notice of Motion dated 29<sup>th</sup> May, 2019 seeking for the following orders:

**a. Spent.**

**b. Spent.**

**c. There be a stay of execution of the Judgment entered on the 15<sup>th</sup> May, 2020 pending the hearing and determination of the Plaintiffs' intended Appeal.**

**d. The Court be pleased to grant the orders sought herein subject to any conditions as the court may deem fit.**

**e. That the costs of this Application be provided for.**

2. The Application is supported by the Affidavit of the 6<sup>th</sup> Plaintiff who deponed that Judgment was delivered in this matter by the court on 15<sup>th</sup> May, 2020 in favour of the Defendant dismissing the Plaintiffs' Originating Summons and that the court found that the Plaintiffs' claim for adverse possession in respect of all that parcel of land known as Title Number Kajiado/Kaputiei-South/45 (*hereinafter referred to as "the suit property"*) was not proved to the required standards.

3. The 6<sup>th</sup> Plaintiff deponed that the Plaintiffs are dissatisfied with the said Judgment and have in line with Rule 75 of the Court of Appeal Rules filed and served a Notice of Appeal and requested for certified copies of the court proceedings.

4. It was deponed by the 6<sup>th</sup> Plaintiff that upon advice from his counsel on record, the Plaintiffs have an arguable Appeal with high probability of success and that the Plaintiffs will suffer irreparable loss and damage in the event that the Judgment of this court is executed by the Defendant who may proceed to evict the Plaintiffs and their families from the suit property thus rendering them homeless and destitute. It was further deponed that if execution proceeds, then the intended Appeal shall be rendered nugatory.

5. The deponent averred that the Plaintiffs are willing to comply with such conditions/terms as to the provision of security as may be

determined by the court. The 6<sup>th</sup> Plaintiff urged the court to grant the orders sought in the Application.

6. The Application was opposed by one of the Directors of the Defendant who deponed that the Judgment of the court dismissed the Plaintiffs' claim; that the Judgment did not lead to an executable decree in as far as the occupation and use of the suit land is concerned; that the Judgment of the court did not order parties to do or refrain from doing anything and that there is no positive and enforceable order.

7. The Application was canvassed vide written submissions. According to counsel for the Plaintiffs, the Plaintiffs have satisfied the grounds to warrant the issuance of the orders sought as envisaged under Order 42 Rule 6 of the Civil Procedure Rules, 2010.

8. Counsel submitted that the Plaintiffs have demonstrated that substantial loss will be occasioned to the Plaintiffs unless the order is made; that the Application has been made without unreasonable delay and that the Plaintiffs are ready and willing to provide such security as the court orders for the due performance of the Judgment of the court.

9. The Defendant's counsel relied on the case of *Esther Wanjiku Mwangi & others vs. Wambui Ngarachu (sued as the legal representative of the Estate of Ngarachu Chege - Deceased) (2019) eKLR* where the court observed that **there was no positive order issued by the court to be stayed.**

10. Counsel also cited the case of *Western College of Arts & Applied Sciences vs. Oranga & Others (1976) KLR 63* which was referred to in *Charles Munyendo Olingo vs. Salim Chetechi Makokha & Another (2019) eKLR* where it was stated that where a Judgment merely dismissed a suit with costs, there is nothing to be stayed in an Application for stay of enforcement.

11. It was counsel's submissions that the Judgment of the court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. Therefore, it was submitted, there is nothing for the Defendant to enforce.

12. The issue for determination is whether the Application has merit. The Application is hinged *inter alia* on Order 42 Rule 6 of the Civil Procedure Rules that provides for stay of execution pending Appeal. The conditions to be met by the Plaintiffs in order to be entitled to an order for stay are laid out in that Rule in the following terms:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 Applicants 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 Applicants.”

13. In considering if the Plaintiffs will suffer substantial loss unless an order of stay of execution is granted, I am guided by the decision of the Court of Appeal in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in which the court stated as follows:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. 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 cornerstone of both jurisdictions for granting stay.”

14. The substantial loss contemplated under Order 42 Rule 6 (2) of the Civil Procedure Rules should result on the existence of a positive order of the court, which if executed will result in a loss to the Defendant

15. Indeed, this court cannot stay an action unless there is a positive order of the court for something to be done or enforced. The court cannot stay a negative order of dismissal. This is the position that the Court of Appeal took in the case of *Oliver Collins Wanyama vs. Engineers Board of Kenya [2019] eKLR* where it held as follows:

“An order of stay is not available to the applicant his application for judicial review having been dismissed, giving rise to a negative order that is incapable of being stayed.”

16. In *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR (Kantai J.A)* held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this

general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated:

‘ . . . . an order for stay of execution must be intended to serve a purpose...’”

17. In *Kenya Commercial Bank Limited vs. Tamarind Meadows Limited & 7 Ors* [2016] eKLR, the Court of Appeal stated as follows:

“16. In *Kanwal Sarjit Singh Dhiman vs. Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

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

19. In the case of *Western College of Arts and Applied Sciences vs. Oranga & Others* [1976] KLR 63 the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order stated:

“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. An execution can only be in respect of costs. The High Court has not ordered any of the parties to do anything or to 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 restrain by injunction.”

20. In its Judgment of 15<sup>th</sup> May, 2020, this court merely dismissed the Plaintiffs’ Originating Summons with costs. The court did not issue any positive order capable of being stayed pending the hearing and determination of the Appeal.

21. In the circumstances, I find the Plaintiffs’ Application dated 29<sup>th</sup> May, 2020 to be unmeritorious. The Application is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF OCTOBER, 2020.**

**O. A. ANGOTE**

**JUDGE**