



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

MISC. APPLICATION NO. 11 OF 2020

JAMES MUTHEE.....1ST APPLICANT

JOHN MARAKA.....2ND APPLICANT

PETER KARIUKI.....3RD APPLICANT

VERSUS

JOSEPH MBURU KIMANI.....1ST RESPONDENT

EUNICE WAWIRA MBURU.....2ND RESPONDENT

BANCY WAWIRA MBURU.....3RD RESPONDENT

JOHN KIMANI MBURU.....4TH RESPONDENT

JAMES KARIUKI GICHARU.....5TH RESPONDENT

JANET WAMBUI GICHARU.....6TH RESPONDENT

RULING

Introduction

On 17th September 2020, two applications dated 17th June 2020 and 21st July 2020 were consolidated together by consent of the parties who are acting in person. The first application was brought under *Section 78 G and 95 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules* where they are seeking leave to file an appeal out of time. The second application dated 21st July 2020 is seeking to stay the

judgment of Honourable A.K. Ithuku delivered on 30th April 2020 in Chief Magistrate's Court CM ELC No. 23 of 2018 pending the hearing and determination of this application.

The first application dated 17th June 2020 was opposed with a replying affidavit by Joseph Mburu Kimani sworn on 8th July 2020. The second application dated 21st July 2020 was equally opposed with a replying affidavit sworn by Joseph Mburu Kimani.

Applicants Statement of Facts

The applicants in the two applications are seeking leave to appeal out of time and stay of proceedings and/or execution pending an intended appeal. According to the applicants, the impugned judgment was delivered on 30th April 2020 in favour of the respondents and that they were not notified of the judgment date until they perused the lower Court file on 10th June 2020. They contend that upon realizing that the judgment had been delivered in favour of the respondents, the mandatory period for filing appeal had already lapsed. They stated that they were dissatisfied with the decision by the trial magistrate and that they would like to prefer an appeal to this Honourable Court. The applicants further contend that their appeal has high chances of success and that the respondents have issued them with a notice of eviction dated 26th June 2020, a copy of which they annexed to the supporting affidavit. They stated that unless the Court intervenes and issue the orders sought, they will be evicted and the appeal will be rendered nugatory.

Respondents Statement of Facts

The respondents stated that the applicants failed to institute their preferred appeal within the 30 days period despite the fact that they knew about the decision early in May. They stated that the application is in bad faith as the applicants came to Court to delay the execution of the decree after they received his notice to vacate the suit land. They further stated that the applicants intended appeal has chances of success but a delaying tactic to keep them away from enjoying the fruits of the judgment.

Analysis and Decision

I have considered the two applications and the supporting affidavits. I have also considered the replying affidavits in opposition to the application. The two applications are seeking leave to appeal out of time and stay of proceedings and execution of decree pending an intended appeal. I have perused a copy of the judgment delivered on 30th April 2020 in the absence of the parties. The trial magistrate indicated that Notice had been given in accordance with the directions by the Hon. the Chief Justice on Covid 19 Rules. There is no affidavit of service showing that the plaintiff/applicants were indeed served and/or notified of the said judgment. In the absence of an affidavit of service showing such service, I have no reason to doubt the averments by the applicants that they were not notified of the said judgment on 30th April 2020. As regards the second prayer for stay pending appeal, the applicants have stated that the respondents have issued them with an eviction notice. A copy of the said notice dated 26th June 2020 is annexed to the supporting affidavit. From the contents of the said notice, the applicants were given sixty (60) days to vacate the suit premises failing which they were to be evicted forcibly. Upon perusal of the statement of facts contained in the judgment in the lower Court, I have noticed that the applicants/plaintiffs were seeking an order that the 1st respondent was registered as proprietor of the suit land parcel No. GICHUGU/SETTLEMENT/SCHEME/835 to hold in trust for himself and the plaintiffs/applicants. The applicants therefore sought a trust be declared and that the suit land be sub-divided into equal portions between the 1st defendant and the applicants.

It is trite that an application for stay pending appeal under **Order 42 Rule 6(2) Civil Procedure Rules** should demonstrate the following three principles:-

- (1) The applicant must demonstrate that he shall suffer substantial loss unless the order is granted.*
- (2) The application has been brought without unreasonable delay and*
- (3) Security for the due performance of the decree has been given by the applicant.*

Flowing from these principles of law, I am satisfied that the applicants claim for customary trust before the lower Court is an overriding interest which if the stay orders are not granted and the intended appeal succeeds, the applicants will suffer substantial loss in the event the respondents dispose of or alienate the same to third parties. The applicants have been in possession and occupation of the suit property and will not be prejudiced if the orders sought are granted. In the final analysis, I find the two applications dated 17th June and 21st July 2020 merited and the same are allowed in the following terms:-

- (1) The applicants are granted leave to file an appeal out of time.***
- (2) The appeal referred to under paragraph (1) above to be filed within 7 days from today.***
- (3) There shall be stay of execution of the decree in CMCC No. 23/2018 (Kerugoya) pending hearing and determination of the intended appeal.***
- (4) Mention on 5th November 2020 for further directions.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 16th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. 1st Plaintiff – present
2. 2nd Plaintiff – present
3. 3rd Plaintiff – absent
4. 1st Defendant – present

5. 2nd Defendant – absent
6. 3rd Defendant – absent
7. 4th Defendant – absent
8. 5th Defendant – present
9. 6th Defendant – absent
10. Mbogo, Court clerk – present