



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 58 OF 2019

ESTHER WANDII MAINGI.....1ST APPELLANT/APPLICANT

PETER MUTUA KIKOLE.....2ND APPELLANT/APPLICANT

VERSUS

MACHARIA CHEGE.....RESPONDENT

RULING

1. The Appellants/Applicants approached the court with the instant Application vide a Certificate of Urgency and Notice of Motion dated 11th December, 2019 that was brought under Sections 1A, 1B and 63(c) and (e) of the Civil Procedure Act, Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law. The following orders have been sought:

a) Spent.

b) Spent.

c) That there be a temporary stay of execution of the Judgment, Decree herein in Kithimani M.E.L.C Case NO. 27 of 2018 pending the hearing and final determination of the Appeal.

d) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of Esther Wandii Maingi, the 1st Appellant who deponed that in December, 2018, the Respondent sued them over Ndalani/Ndalani Block 1/389; that they were duped by a person masquerading as an advocate whom they gave the summons and court documents and that the masquerader was unable to attend trial and represent them.

3. According to the 1st Appellant, it was not until she was served with a Decree of the lower court that she realized about the fake advocate and that the Decree prompted her to instruct the current advocate who filed an Application to set aside the Judgment, which Application was dismissed vide a Ruling delivered on 30th October, 2019.

4. It was deponed that being dissatisfied with the Ruling, she filed the instant Appeal; that the Respondent has threatened to execute the Judgment and that if the Application is not allowed, then the Appeal will be rendered nugatory.

5. In response, the Respondent deponed that both Appellants were served with summons to enter appearance in February, 2019; that the 1st Appellant entered appearance but opted not to file a Defence within the stipulated time and that the 1st Appellant cannot claim not to have participated in trial yet she filed her Memorandum of Appearance.

6. The Respondent deponed that there were no justifiable reasons why the Appellants did not file a Defence within the stipulated time; that the Appellants were served with the notice of entry of Judgment on 16th July, 2019 and that the Appellants should be ordered to deposit the decretal amount in a joint interest earning account.

7. The Application was canvassed vide written submissions. It is only the Respondent's submissions that are on record. The Respondent submitted that one of the conditions in granting stay of execution is furnishing the court with security as provided for under Order 42 (6) of the Civil Procedure Rules 2010. It was counsel's argument that the Appellants should be ordered to deposit the decretal amount in a joint interest earning account.

8. Counsel cited the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules 2010 that state as follows:

“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 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.”

9. Reliance was placed on the case of *Superior Homes (Kenya) Ltd vs. Musango Kithome (2019)*, eKLR where the court directed that the entire decretal sum be deposited in a joint interest earning account in the names of the advocates for the parties, pending the hearing and determination of the Appeal.

10. The only issue for determination is whether the Applicants are entitled to an order for stay of execution pending the hearing and determination of the Appeal.

11. Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution pending Appeal. The conditions to be met by an Applicant 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 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.”

12. In considering if the Appellants 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.”

13. In his Judgment dated 19th June, 2019, the learned Magistrate allowed the Respondent’s Complaint, and directed the Land Registrar, Machakos, to rectify the register by deleting the name of the 2nd Appellant as proprietor of land known as Ndalani/Ndalani Block 1/ 2077. The Magistrate further directed the Land Registrar to register the Respondent as the owner of the said land.

14. The registration of the suit land in the name of the Respondent will remove the land from the Appellants’ reach, especially if the land is sold by the Respondent to a third party. Such an occurrence is likely to occasion the Appellants substantial loss before the Appeal is heard and determined.

15. Although the Respondent had prayed for an award of special damages in the alternative, it would appear the alternative prayer was not awarded by the trial court. That being the case, and considering that the suit property will be intact as at the time of hearing and determining the Appeal, I will not order for security.

16. In the circumstances, I allow the Application dated 2nd December, 2019 as follows:

a) There be a temporary stay of execution of the Judgment and Decree herein, in Kithimani M.E.L.C Case No. 27 of 2018 pending the hearing and final determination of the Appeal.

b) Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE