REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE 146 OF 2011

JOSEPH MBAABU MARETE …….....…….1ST APPELLANT

PAUL KITHINJI MARETE …….....……2ND APPELLANT

MARGARET NYOROKA MARETE.....……3RD APPELLANT

ZIPPORAH MARETE …….....……4TH APPELLANT

VERSUS

JOSPHINE KINANU…….....……1ST RESPONDENT

GODFREY KIOGORA…….....……2ND RESPONDENT

R U L I N G

The appellants/applicants through an application dated 4th May, 2012 brought under Order 42 Civil Procedure Rule 6 of the Civil Procedure Rules seeks the following orders:

1.That pending the inter-parties hearing of this application, an order for stay be issued staying the execution of the Decree/judgment herein. Alternatively a conservatory order do issue maintaining status quo in respect of L.R.NO.ABOTHUGUCHI/KATHERI/3072 as at the date of judgment of the lower court on the 18/11/2011.

2.That pending the hearing and the determination of this appeal an order of stay of execution of the decree/judgment of the lower court, be issued.

3.That pending the hearing and the determination of this appeal, a conservatory order maintaining the status quo in respect of L.R.NO.ABOTHUGUCHI/KATHERI/3072 as aZAAAAASSSDDDt 18/11/2011 be issued by this court.

The application is based on the following grounds:-

a. Substantial loss will result to the applicants if the order or stay is not granted.

b. The appeal pending before this court will be rendered nugatory.

The application is supported by affidavit of Joseph Mbaabu Marete in which it is stated as follows: That judgment in CMCC 552 of 2000 was delivered on 18th November, 2011. That the appellants being

aggrieved by the trial court's judgment they filed this appeal on 16th December, 2011 which appeal is still pending. That the applicants applied for proceedings on 28th November, 2011 but the same are yet to be supplied. That while this appeal was pending the respondents invaded the suit land and violently attacked the applicant's brother one Justus Gituma on 4/12/2012 as per attached copy of P3 marked "JMMI". That the respondents have threatened to use force to chase the applicants from the land notwithstanding the pending appeal. That the applicants deponed that they have been in possession of 2 acres out of L.R. NO.ABOTHUGUCHI/KATHERI/3072 since 1963 when the applicants' father bought the land. That for the last 40years the applicants aver that they have extensively developed the land and 2 acres are steaming with tea bushes. That the respondents did not plant even a single tea plant on the 2 acres at all and have always had their tea on the balance of the land. That the applicants use the proceeds from the tea to feed their families and have done so for the last 40years. That applicants deponed that if an order of stay is not granted, the respondent will use force to evict the appellants/applicants from the two acres, take over the applicants' tea and the applicants stand to suffer substantial loss and further to the above, their appeal would be rendered nugatory if the eviction is carried out.

The respondent on the other hand, filed a replying affidavit dated 22nd May, 2012. The 1st respondent deponed that she is legal representative of one Julius Muthuri who at all material times from inception was registered owner of L.R. NO.ABOTHUGUCHI/KATHERI/3072. That the application for stay of execution has been brought 7months after delivery of judgment and is inordinately delayed and an afterthought. That the application is based on an appeal which has no arguable basis and is otherwise only meant to support an illegal invasion and occupation of the respondents' family land to their detriment and prejudice. The respondents contended that there is no justification for delay as they applied for the proceedings and judgment and were supplied with the proceedings and judgment on 30/11/2011. That the applicants are not willing to take steps to prosecute their appeal and this is evident by non-payment for the proceedings to facilitate the preparation of record of appeal for hearing. That the applicants have been indolent and the court should not exercise its discretion in their favour. That the respondent's son, the 2nd respondent was indeed attacked and injured by 2nd applicant and his brother as he tried to pluck tea leaves on 4/12/2012. He was treated and issued with a P3 form as per annextures "JKI" and "JK2". That applicants are said to have vowed not to obey court's order in spite of having their own parcel of land neighbouring the suit land and others which include L. R. ABOTHUGUCHI/KATHERI/3071. That the respondents deponed that the court found the appellants have no cause of action over ABOTHUGUCHI/KATHERI/3071. That the refusal to grant stay it is deponed by the respondent's won't render the appeal nugatory nor are the applicants likely to suffer any substantial loss at all as the land in issue and tea bushes thereof are respondents' which the applicants have illegally and unlawfully been enjoying all those years with impunity. That the applicants continued occupation and/or use of respondent's land is causing the respondents hardship and suffering in spite of there being judgment in their favour. That the appellants/applicants it is deponed have not offered any security in the event their appeal fail for using the respondents' land and tea bushes during the period, pending hearing of the appeal. The respondents urged that the applicants ought to be ordered to deposit Kshs.1,000,000/- to cover the loss the respondents are likely to suffer during the period of the hearing of the appeal. The respondents further submitted that refusal to grant stay of execution would be proper as subject matter is land which cannot change and in any case the applicants do not have any dwelling houses within the suit land and the respondents should be left to enjoy the fruits of the judgment which they have fought for many years. That the primary suit among others it was deponed has taken over 20years and all the time the cases were delivered in the favour of the respondents.

When the application came up for hearing the learned Advocate for the applicants Mr. Murango Mwenda submitted that the trial court entered judgment in favour of the respondents. That the trial court issued permanent order of injunction restraining the applicants from entering, and working on land parcel No.ABOTHUGUCHI/KATHERI/3072. That the effect of that order is that the applicants would be evicted from the land which they have been in occupation since 1963. He argued that if the decree is executed the appellants would suffer substantial loss and loose use of tea bushes which they have been nurturing and using since 1963. He submitted the eviction and loss of use of tea bushes would result to substantial loss to the applicants. He stated a refusal to grant stay of execution would render the appeal nugatory if applicants succeed on appeal as the subject once it changes hands by way of sale and transfer it would be difficult or complicated to recover it from third parties. He further argued that there is no

doubt the applicants are in occupation and have been in occupation and it would be unjust to dispossess them of the land when they have a pending appeal. He submitted that the appellants/applicants are anxious to have the appeal heard as they have applied for lower court proceedings which are not ready and have no intention of delaying the appeal.

That both parties agree there have been violent incidents between the parties as the respondents attempted to enforce the decree. That there are P3 forms from both sides and the matter is being handled by police. That an order of stay would amount to preservation of status quo pending hearing of the appeal and would avoid the violence being witnessed at the moment. He argued the appeal is not frivolous as the respondents cause of action had long extinguished by dint of the Limitation of Actions Act. The Counsel submitted that they are not asking court to make a decision at this stage but are showing that the appeal is not frivolous. He further submitted the appellants have not been indolent or unwilling to set the appeal down for hearing nor have they vowed not to obey court's order. He argued the appeal was filed in time and so was the present application.

On the other hand, the learned Counsel for the respondents Mr. Gikunda Anampiu in his oral submission opposed the application. He stated that he was relying on the Replying Affidavit and the annexures thereto. He submitted the land in dispute has always been registered in the name of the respondent and the registration has not been challenged. That the allegation that the respondents' title had been extinguished was rejected by the trial court and that the appellants' claim has no chances of success. That the subject-matter is 7.36 acres and the applicants are only in occupation of only 2acres. That there is therefore no clear boundary nor is there a separate title. He argued by granting stay of execution it would mean that the respondents are likely to be pushed out of the land in which they have their own properties including tea bushes as well. He argued that it would be difficult to supervise the stay orders. Mr. G. Anampiu Advocate further argued by refusing to grant stay, the applicants are not likely to suffer substantial loss because the subject matter is land which is immovable property, hence the applicants ought to have sought orders of inhibition but not stay of execution. That as the respondents were successful at the lower court they should not be denied fruits of their judgment. He also argued that there is nothing to show that if stay of execution is not granted the appeal would be rendered nugatory. He submitted judgment was delivered on 18th November, 2011 and application for stay was filed on 7/5/2012, a span of about 7 months, which is an ordinate delay and which should not be forgiven. Mr. G. Anampiu, Advocate further submitted there had been incidents of violence and there is pending case at Nkubu Law Courts as parties seek to enforce decree whereas the other parties opposes the same. He argued that the present application was filed following an application for execution of the decree. He argued the applicants have been indolent and the application is intended to have applicants continue using the respondents' land to their detriment. He argued the proceedings and judgment were ready by 25th November, 2011 and decree was signed on 19th December, 2011 and that the applicants wrote a letter to court but failed to follow up the proceedings and also failed to pay for the same.

Mr. G.Anampiu finally submitted that if court is inclined to grant the orders sought they are seeking for security of Kshs.1,000,000/- which applicants should deposit with the court otherwise the appellants would go to sleep once application is granted. Mr. G.Anampiu further submitted the applicants have their land ABOTHUGUCHI/KATHERI/3071 and it is therefore not true if stay orders are refused they would be rendered landless. He concluded by asking court to give limited period within which this appeal should be heard and determined.

Mr. Murango Mwenda, learned Counsel for the applicants, in reply stated that on issue of applicants being indolent he referred to annexture "JMMI" a letter dated 25th November, 2011 asking for proceedings and judgment seven(7) days from the delivery of the judgment. That applicants obtained copy of judgment which was signed on 30/11/2012. He therefore submitted applicants were not indolent and it is not true judgment was signed on 25th November, 2011.

On issue of the security Mr. M. Mwenda Advocate submitted that security do not arise in the circumstances of this case as there has been admission by the respondents' Counsel the applicants have tea bushes growing on 2 acres of the suit land. He paused a question, "why then if tea bushes belong to

the applicants, should they be asked to provide security to the property that belong to them and which they have been enjoying since 1963? He argued allowing the provision of security would amount to enriching of the respondents from the land they had not been occupying because the applicants interest have been confined to 2 acres where they have their tea bushes. He argued that the court can array the respondent's fears by limiting the order of stay to 2 acres occupied by the applicants.

On the delay he submitted it was not inordinate as at most there has been only delay for 5 months. He urged the court to find the delay not to have been inordinate

Having gone through the application, affidavit in support and replying affidavit as well as submissions by both the Counsel for the applicants/and Counsel for the respondents the issue for consideration is whether the application meets the conditions set out for granting an order of stay of execution.

For stay of execution of the decree to be granted, certain conditions has got to be met. The conditions for granting stay of execution are set out under Order 42 Rule 6(2) of the Civil Procedure Rules.

Orders 42 Rule 6(2) of Civil Procedure Rules provides:-

"(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."

Besides the above, in the case of **HALAI & ANOTHER –V-THORNTON & TURPIN(1963)LTD(1990) KLR 365** Court of Appeal held:-

"1. The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."

The court before granting a stay of execution must be satisfied with the following conditions:-

1. That the court must be satisfied that substantial loss may result to the applicant unless the order is made.

2. That the application has been made without delay.

3. That security as court orders for the due performance of such decree or orders as may ultimately be binding on the applicant has been given by the respondent.

In the instant application, the applicants have demonstrated that since 1963 their works has been confined to part of ABOTHUGUCHI/KATHERI/3071, which the applicants have stated comprises of two(2) acres on which they have tea bushes. The respondents' Counsel in his submission submitted that the applicants have been in occupation of 2acres out of the whole land. The applicants have been nurturing the tea bushes and plucking tea leaves from which they have been making their living. That if the application is refused the applicants would loose the use and enjoyment of the tea which they have been enjoying since 1963. The refusal to grant stay of execution would amount to allowing eviction of the applicants, from the suit land and I find refusing to stay the execution would result to substantial loss to the applicants as such.

On the issue, as to whether the application for stay of execution was brought without unreasonable delay,

this court has considered that the judgment was delivered on 18th November, 2011. The applicant applied for proceedings and judgment on 25th November, 2011 and the same was not signed till 30th November, 2011. The appeal was filed on 16/12/2011 and the present application was filed on 7/5/2012. The application as per respondents counsel was filed following an application for execution. It is the respondent's action that prompted the applicant's to file this application, otherwise before then there was no threat or danger which would have made the applicants to file this application. There was no execution which would have made the applicants seek a stay. The period of delay according to the respondents is 7months whereas according to the applicants it is 5months. The period that can be said to be unreasonable delay is not defined in our Civil Procedure. The period of 5 to 7 months with all respect cannot be said to be unreasonable delay taking into account the delay in obtaining proceedings in our courts. In the instant application, the lower court proceedings are yet to be typed. The lower court file is yet to be forwarded to the High Court for admission and preparation of record of appeal to enable High Court to hear and determine the appeal

On issue of security it has been demonstrated that the applicants have been in occupation of 2acres since 1963. That it is the applicants who have been in occupation and use of the 2 acres in dispute and that all works and tea bushes have been planted and have been cared and plucked by the applicants. The respondents have been in occupation of the remainder of the land.

In view of the above-mentioned finding it would be against the interest of justice at this stage to rule that the applicants do grant security.

In the circumstances of this case the application for stay of execution is granted and the applicants ordered meanwhile to confine their works and activities to 2 acres where they have tea bushes.

Costs in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF JULY, 2012.

J. A. MAKAU
JUDGE

Delivered in Open Court in presence of parties

1. Mr. Murango Mwenda for applicant(absent)

2. Mr. G. Anampiu for the respondent(absent)

J. A. MAKAU
JUDGE

-