REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 141 OF 2014

SIMON WARUI MWANGI.....1ST PLAINTIFF

SARAH WANGECHI MWANGI.....2ND PLAINTIFF

VERSUS

GRACE RUGURU MWANGI.....1ST DEFENDANT

NATIONAL IRRIGATION BOARD Through

THE MANAGER, MWEA IRRIGATION SCHEME.....2ND DEFENDANT

RULING

Introduction

By way of a Notice of Motion dated 8th June 2020, the Plaintiff/Applicant sought the following orders:-

(1) Spent.

(2) That this Court do grant the applicants stay of execution of the orders delivered on 29th May 2020 and order that the status quo regarding the suit land rice holding No. 3277 be maintained to the extent that the plaintiffs occupy the rice holding and refrain the defendants from entering, cultivating or in any other way dealing and interfering with the rice holding pending hearing and determination of this application.

(3) That the Court do grant the applicants a stay of execution of the orders delivered on 29th May 2020 and order that the status quo regarding the suit land rice holding No. 3277 be maintained to the that the plaintiffs occupy the rice holding and refrain the defendants from entering, cultivating or in any other way dealing and interfering with the rice holding pending the hearing and determination of the intended appeal.

(4) Costs be provided for.

The application is premised on the following grounds:-

(a) That this Court delivered a judgment on 29th May 2020.

(b) The applicants were dissatisfied with the order and filed a Notice of Appeal and also applied for proceedings.

(c) The applicants have an arguable appeal with probability of success.

(d) That the respondent has started threatening that she will forcefully take over 2 acres in rice holding No. 3277 and the applicants stand to suffer irreparably.

(e) The applicants appeal is likely to be rendered nugatory if proceedings continue.

(f) That it is in the interest of justice that the status quo regarding rice holding No. 3277 be maintained pending hearing and determination of the intended appeal.

(g) That no prejudice will be suffered by the respondents if the applicants' application is allowed.

(h) That it is in the best interest of justice that the applicants be granted an opportunity to exercise their right of Appeal as they strongly believe that they have a good and arguable appeal.

(i) The defendant is a stranger and has never occupied the suit land and she is now threatening to enter the land forcefully and the applicants have already prepared the land for the current crop season that commenced in April 2020 and her interference will cause a breach of peace.

(j) It is in the interest of justice that this Court do exercise its discretion and grant the orders sought for stay of proceedings and maintenance of the status quo concerning the suit land.

Applicants Statement of Facts

The applicants through the affidavit by Simeon Warui Mwangi in support of the application deponed as follows:-

(I) That this Court delivered a judgment on 29th May 2020.

(II) That he was dissatisfied with the order and filed a Notice of Appeal.

(III) That he applied for proceedings.

(IV) That he has an arguable appeal with probability of success.

(V) That the respondent has started threatening that she will forcefully take over 2 acres in the rice holding No. 3277 and he stands to suffer irreparably.

(VI) That her appeal is likely to be rendered nugatory if proceedings continue.

(VII) That it is in the interest of justice that the status quo regarding rice holding No. 3277 be maintained pending hearing and determination of the intended appeal.

(VIII) That no prejudice will be suffered by the respondents if his application is allowed.

(IX) That rice holding 3277 was his property as at 7/2/2007 when the Advisory Committee made Irrigation Scheme distributed it behind his back.

(X) That on 7/2/2007, the Advisory Committee distributed his rice holder to a stranger and the Advisory Committee did not have capacity to deal the 1st plaintiff's holding in view of the fact that the matter had been decided by the Court and the Advisory Committee usurped the powers of the Court.

(XI) That defendant is a stranger and has never occupied the suit land and she is now threatening to enter the land forcefully and he has already prepared the land for the current crop season that commenced in April 2020 and her interference will cause a breach of peace.

(XII) That he will be greatly prejudiced by the respondents actions as their actions will interfere with his activities.

(XIII) That he urges this Court to exercise its discretion and grant the orders sought for stay of proceedings and maintenance of the status quo concerning the land.

Respondents Statement of Facts

The 1st respondent filed a replying affidavit and stated as follows:-

(i) That the application is frivolous, vexatious, bad in law and an abuse of the due process of the Court.

(ii) That the application has been brought under Order 42 Rule 6 CPR.

(iii) That the wording of the said provision of the law is clear that no order of stay should be granted 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.

(iv) That the applicant has terribly failed to satisfy those mandatory twin requirements, hence her application should fail. The nearest that the applicant has gone in fulfilling the conditions is in paragraph 7 of the supporting affidavit where he stated that she has started threatening to forcefully take over the 2 acres of rice holding number 3277 and that the applicant stand to suffer irreparably.

(v) That the taking over of the 2 acres of the rice holding cannot be forceful as there is a valid award from the Advisory Committee of the National Irrigation Board.

(vi) That there is no indication what irreparable loss the applicant will stand to suffer and that the mere mention that the applicant will suffer irreparably is not enough to warrant issuance of the orders for stay of execution.

(vii) That there is nothing to stay as the plaintiffs suit was struck off which is a negative order and therefore incapable of being stayed.

(viii) That the Court did not direct that something be done so that it can be stayed pending appeal.

(ix) That she is not a stranger as the applicant even brought up some of her children after she was chased away by their now late husband, David Mwangi when he befriended the applicant.

(x) That she should enjoy the fruits of the award given in her favour which award was extremely fair in that each wife of the now late David Mwangi should cultivate 2 acres.

(xi) That the applicant cannot be heard to say that she will not suffer any prejudice as she has been suffering all through and the applicant is being selfish as she wants the whole land to cultivate by herself.

(xii) That if the applicant feels that she has a good appeal, that's okay. She is entitled to appeal as of right but she should be allowed to enjoy the award given by cultivating the 2 acres and if the applicant will finally succeed, then she will take back the 2 acres as there is nowhere she can take the land which belongs to National Irrigation Board.

(xiii) That the ends of justice will be best served by dismissing the application with costs for lack of merit and being bad in law.

Legal Analysis

I have considered the Notice of Motion, the supporting affidavit and the submissions by the applicant. I have also considered the replying affidavit by the 1st defendant, the grounds of opposition by the 2nd defendant and submissions by counsels appearing for the parties. The applicant has invoked ***Order 42 Rule 6 CPR*** for the orders sought. ***Order 42 Rule 6 (2)*** provides as follows:-

"No order for stay of execution shall be made under sub-rule (1) unless:-

(a) 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".

In a judgment delivered on 29th May 2020, this Court struck out this suit with costs on grounds that the Court had not been properly invoked. This Court and the superior Courts have rendered themselves that for an order of stay to lie, there must be a positive requirement therein which would or could be affected or tempered with by the stay. The Court of Appeal for Eastern Africa in the case of ***Western College of Arts and Applied Sciences Vs Oranga & Others (1976 – 80) 1 K.L.R*** held as follows:-

"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. Any execution can only be in respect of costs. In Wilson Vs Church, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any 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 and application for stay, it is so ordered".

In the instant application just as the Western College case, there is nothing which this Court ordered to be done or refrained from being done. All it did was the striking out of this suit for being commenced by way of a plaint and not Judicial Review. Again in the more recent case of ***Kenya Commercial Bank Limited Vs Tamarind Meadows Limted & 7 others (2016) e K.L.R,*** the Court of Appeal expounded on stay of execution and stated:-

"16. In Kanwal Sarjit Singh Dhiman Vs Keshavji Juuraj Shah (2008) e K.L.R, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:-

> *"The 2nd prayer in the application is for stay (of execution) of the order of the superior Court made on 18th December 2006. The order of 18th 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) K.L.R 63 at page 66 paragraph C".*

In light of the above authorities which are binding on me, there is nothing to stay in the present application and the same is hereby dismissed with costs.

Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 20th day of November, 2020.

……

E.C. CHERONO

ELC JUDGE

In the presence of:-

1. M/S Githaiga holding brief for Maina Kagio for 1st Defendant/Respondent

2. Mr. Gori holding brief for Ms Ann Thungu for Applicant

3. 2nd Defendant/Advocate – absent

4. Mbogo, Court clerk – present