



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL CASE NO. 21 OF 2020

CHARLES NGIGI NDUNGU.....APPELLANT/APPLICANT

VERSUS

JOSEPH KIMANI GATHECA.....1ST RESPONDENT

MARGARET NJERI KAMAU

(representing the Estate of JAMES KAMAU NJOROGE).....2ND RESPONDENT

FRANCIS MAINA NJONJO.....3RD RESPONDENT

(Being an Appeal from the Judgment of Honourable C. A Otieno Omondi SPM

dated 29th April 2020, in Ruiru SPMCC MCLE No. 118 of 2019)

BETWEEN

JOSEPH KIMANI GATHECA.....PLAINTIFF

VERSUS

CHARLES NGIGI NDUNGU..... 1ST DEFENDANT

MARGARET NJERI KAMAU

(representing the Estate of JAMES KAMAU NJOROGE).....2ND DEFENDANT

FRANCIS MAINA NJONJO.....3RD DEFENDANT

RULING

The matter for determination is the **Notice of Motion Application** dated 21st May 2020, by the Appellant/ Applicant seeking for orders that;

1. That this Honourable Court be pleased to order stay of Execution of the Judgment and orders issued by the subordinate Court on 29th April 2020, in Ruiru SPMCC MCLE No. 118 of 2019 (Joseph Kimani Gatheca...Vs... Charles Ngige Ndungu & 2 others), pending the hearing and determination of the Appeal herein.

2. That such further orders as the ends of justice may require be made.

The Application is premised on the grounds that Judgment was delivered on 29th April 2020, against the Appellant/Applicant at the Senior Principal Magistrates Court at Ruiru in MCLE No. 118 of 2019, and orders issued that the Appellant's/Applicant's title deed in respect of L.R Ruiru/Kiu Block 2/4970, be cancelled and that the 1st Respondent be registered as the owner. That an order was also issued in the Judgment directing the Appellant/ Applicant to give vacant possession of the aforesaid property to the 1st Respondent within

30 days from **29th April 2020**.

That the Appellant/ Applicant is aggrieved by the Orders issued in the said Judgment, hence the institution of an Appeal and filing of this Application without delay. That unless the Orders of **stay** are granted, the Appellant/ Applicant will suffer **substantial loss** and **great injustice** as the title deed that he legally acquired will be **cancelled** and his property registered in the name of the 1st Respondent thereby rendering the Appeal nugatory. That an Application was made orally by Counsel for the Appellant/Applicant before the subordinate Court for stay of execution after the delivery of Judgment, but the same was not granted. That granting the orders will not occasion any prejudice to the Respondents.

In his supporting Affidavit, **Charles Ngige Ndungu**, the Appellant herein, reiterated the contents of the ground in support of the Application and further averred that the **Senior Principal Magistrate 's Court**, at Ruiru lacked jurisdiction to hear and determine the matter as the value of the suit property is **Kshs. 26 million**, which amount he averred as advised by his Advocate is beyond the pecuniary jurisdiction of the **Senior Principal Magistrates Court** which is limited to **kshs. 15 million**. Further that he has been advised by his Advocates, which advice he believes to be true that the issue of jurisdiction can be raised at any time, even at the appellate stage. It was his contention that he has an arguable appeal and he urged the Court to grant the orders sought as he stands to suffer substantial loss since the orders issued in the Judgment directed that he gives vacant possession, and that would render the appeal nugatory.

The Application is opposed and the Respondent **Joseph Kimani Gatheca**, swore a Replying Affidavit on **2nd June 2020**, and averred that the Court should allow him to rip the fruits of the judgment unencumbered. Further, that when he filed his suit in the trial Court, the Defendant admitted jurisdiction and that it was never an issue at the trial Court. It was his contention that the issue of jurisdiction having not been raised in the trial Court cannot be raised on appeal. Again, that the copy of the Valuation report annexed by the Applicant is an introduction of new evidence that was not placed before the trial Court, and in any case, the issue of value of property is a contested issue, and the new evidence should thus be struck out as the Court was well within its jurisdiction.

He further averred that the 2nd Respondent is the one who has been in possession of the suit property and not the Appellant/Applicant. Further that the appellant has not offered any security for costs which is a condition precedent for stay pending appeal. That the Appellant/Applicant was granted **stay** of **30 days** and it is not true that he was not granted stay. It was his contention that the Appellant/Applicant has failed to attach a copy of the Court Decree which disqualifies the Application, and the filing of the instant Application is an attempt by the Applicant/Appellant to argue his case afresh. He contended that there are no compelling grounds warranting giving of the Appellant/Applicant stay pending appeal.

The 2nd Respondent **Francis Maina Njonjo**, also swore a Replying Affidavit on **29th June 2020**, and averred that the Appellant has no right to introduce new evidence without leave of Court, which was not conversed before the trial Court. It was his contention that if the Applicant was to be allowed to tender new evidence, that would amount to reopening the matter and accord the Appellant/Applicant an unfair advantage and a second bite of his cherry. That at the trial Court, the issue of pecuniary jurisdiction was never raised and though the issue of jurisdiction may be raised at any time, the said issue must not open up the case for retrial. It was his further contention that the issue of jurisdiction should be raised on very plain issue of law and not facts that would necessitate calling of additional evidence that was not tendered at the trial.

He also averred that he owns various parcels of land around the area and that he could confirm that the value of the suit property is not more than **Kshs. 15 million**. Further that he had sighted a Valuation report from his co Respondent signed on **30th June 2020**, showing that the value of the land is **Kshs. 14,900,000/=**. That in as much as he understands as an Advocate, that on Appeal, the Court should not be burdened with new evidence, the Appellant/ Applicant has introduced new evidence which is factual and can only be countered by provision of another Valuation report so that the Court can adjudicate on the matter of jurisdiction.

The 1st Respondent also filed a Notice of Preliminary Objection dated **2nd June 2020** on the grounds that;

- 1. That the Valuation Report annexed and marked as CNN 2 is an introduction of new evidence not tendered at the trial Court and as such should be struck out.***
- 2. That the Application for stay pending appeal should first have been filed in the Court that heard the suit first.***

The Application was canvassed by way of written submissions which the Court has carefully read and considered. In his written submissions dated **1st July 2020**, the 1st Respondent submitted that he had prematurely raised the Preliminary Objection and the said objections were not material to the Application and therefore the said Preliminary Objection was abandoned. Since the said abandonment has not been objected to, the Court will allow the abandonment and not deal with the said Preliminary Objection at this stage.

The issues for determination are:-

- 1. Whether the Court should deal with the issue of Jurisdiction at this stage.***
- 2. Whether the Appellant/Applicant is entitled to the orders Sought***

1. Whether the Court should deal with the issue of Jurisdiction at this stage

The Appellant/Applicant has averred that the lower Court did not have jurisdiction to hear and determine the suit as the value of the suit property exceeded the pecuniary jurisdiction of the trial Court, which is a Senior Principal Magistrate's Court. The Court recognizes that jurisdiction is everything and without the said jurisdiction the Court must down its tool. See the case of ***Owners of Motor Vessel "Lillian" ...Vs...Caltex Oil Kenya Ltd 1989 KLR*** where the Court held that:-

“.....Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

While the Applicant has produced a Valuation report alleging that the suit property was valued at **Kshs. 26,000,000/=**, it is the Respondents' contention that the said valuation is not proper. Further the Respondents have alleged that this is a new evidence of facts that needs **not** be introduced at the appeal stage.

The Court finds and holds that since the valuation of the property is not something that was raised in the lower Court, and the fact that the same is disputed, then the instant Application being an Application that seeks to decide whether or not the Appellant/ Applicant's prayers of stay of execution are merited or not, it would be proper to first deal with the issue of stay of Execution before delving to the issue of jurisdiction. Indeed, it is not the Jurisdiction of this Court that is in question but that of the trial Court.

Therefore, the Court finds and holds that as the issue requires the probing of evidence and whether or not the said evidence should be admitted and which issue does not affect the prayers that have been raised herein then it would be proper not to deal with it at this stage.

2. Whether the Appellant/ Applicant is entitled to the orders Sought

The Appellant/ Applicant has sought for stay of Execution pending the hearing and determination of the Appeal. The Court has considered the provisions of **Order 42 Rule 6(2)** which set out the principles that the court should consider while deciding whether to grant **Stay of Execution Pending Appeal**. These are:-

“No order for stay of execution shall be made under subrule (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.”

The issue of grant of Stay of Execution has been decided by various Court and in **Civil Appeal No.107 of 2015, Masisi Mwita..Vs... Damaris Wanjiku Njeri (2016) eKLR**, the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

This Court will then proceed to determine whether the Appellant/ Applicant herein satisfied the required standard for grant of stay orders pending Appeal. First, the Applicant must show that he will suffer substantial loss. It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of **Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised.”

Further in the case of **Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, the Court held that:-

“For the court to order a stay of execution there must be:-

i. Sufficient cause

ii. Substantial loss

iii. *No unreasonable delay*

iv. *Security and the grant of stay is discretionary*”.

As the Court also embarks in determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. Further the Court will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”

Has the Appellant/ Applicant then satisfied the Court that he will **suffer substantial loss**, unless the orders sought are issued?

From the Judgment of the subordinate Court, it is clear that the 1st Respondent sought for a declaration that the suit property belongs to him and for the cancellation of title deed issued to the Appellant/ Applicant. It is not in doubt that the trial Court ordered the Appellant/Applicant and the 2nd Respondent to give vacant possession of the suit property. While the Appellant/ Applicant has stated that he will suffer substantial loss, it is the 1st Respondent has contended that Appellant/applicant has not shown what substantial loss he would suffer. The 1st Respondent has further submitted that the Appellant/ Applicant is not in possession of the suit property, and that though the order of vacant possession was directed to him, it did not affect him.

The Court had considered the Judgment delivered by trial Court and notes that the Court did acknowledge that the order of trespass was against the 2nd Respondent who was the 3rd Defendant in the Subordinate Court. The 1st Respondent had submitted that the Appellant/Applicant herein had not developed the suit property. However, the Appellant/Applicant was in possession of a title deed which the Court ordered should be cancelled and he was further ordered to give vacant possession to the 1st Respondent. If the said title deed in favour of the Appellant/Applicant is cancelled before the appeal is heard and determined, and the same is registered in favour of the 1st Respondent, then the 1st Respondent would be at liberty to deal with the said suit property as he wishes such as disposing off the same, charging it, subdividing it and developing the same. In the event that the Appellant would be successful in his Appeal, then the said Appeal would have been rendered **nugatory** and the Appellant/Applicant would indeed have suffered substantial loss.

Indeed, if the title deed is cancelled herein then the appellant will have nothing to hang on and his Appeal will be rendered nugatory and just an academic exercise as the 1st Respondent would be at liberty to dispose off the suit property. The essence of stay of execution is to preserve the subject matter. It would not be asking for too much to Respondents herein to wait for the outcome of the Appeal and who knows, the Respondents might turn out to be successful litigants and they may certainly thereafter enjoy the fruits of the judgment.

This is a land matter which land matters are very emotive in this entire area and a litigant should be allowed to exhaust all the Judicial processes. The Appellant/Applicant herein can be assured of exhaustion of such Judicial processes if stay of execution is allowed and cancellation of his title deed halted in the meantime.

The Applicant/Appellant must also satisfy the Court that the application was made without unreasonable delay. The instant application was filed on **22nd May 2020** and the Judgement had been delivered on **29th April 2020**. Indeed, there was no inordinate delay in filing of this application.

Having now carefully considered the instant **Notice of Motion Application** dated **21st May 2020** the Court finds it **merited** and the same is allowed entirely in terms of prayer **no. 3** with costs to the Applicant.

Further the Court directs the Appellant to prepare the **Records of Appeal** within the next **45 days** from the date hereof. Failure to do so, the stay orders will lapse automatically unless otherwise extended by the order of this Court.

It is so ordered.

Dated, signed and Delivered at Thika this 12th day of November 2020

L. GACHERU

JUDGE

12/11/20

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have

waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Charles Ndungu the Appellant/Applicant in person

Mr. Njonjo holding brief for Mr. Matiri for the 1st Respondent

Mr. Muturi holding brief for Mr. Macharia for the 2nd Respondent

L. GACHERU

JUDGE

12/11/20