



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. 35 OF 2018**

**FRANCIS MUIRURI KAMUNYU.....APPELLANT/ APPLICANT**

**VERSUS**

**KENNEDY ORUMO ONG'ERA.....RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated **25<sup>th</sup> June 2019**, brought by the Appellant/ Applicant seeking for orders that;

**1. That this Honourable Court be pleased to order stay of execution of the Judgment/ decree of Honourable C.A Otieno Omondi Principal Magistrate Thika issued on 31<sup>st</sup> October 2018.**

**2. That pending the hearing and determination of this Application, a temporary injunction be issued by this Honourable Court restraining the Respondents, his agents and/or servants from trespassing, encroaching, and/or entering into the Appellant's plot no. Ruiru/Kiu Block 6/773, and constructing a permanent house.**

The Application is premised on the grounds that the Appellant/Applicant is the registered owner of the suit property. That the Appellant sold a plot to the Respondent measuring **50 by 100 ft in L.R 551/8867**, but the Respondent trespassed and commenced construction of a permanent house in the suit property. That the Respondent is now constructing on the suit property which belongs to the Appellant/Applicant instead of building in **L.R 551/8867**.

In his Supporting Affidavit **Francis Muiruri Kamunyu**, the Appellant/Applicant herein averred that he is the registered owner of the suit property. That vide an agreement dated **28<sup>th</sup> May 2008**, he sold to the Respondent a plot measuring **50 by 1000 ft** which was excised from **L.R 551/8867**, for a consideration of **Kshs. 270,000/=**. Further that the Respondent paid the full purchase price and the Appellant/Applicant showed him the beacons of his plot upon which he took vacant possession. However, instead of constructing on his portion of land, No. **551/8867**, the Respondent started digging trenches and constructing a permanent house on Applicant's plot which is the suit property **Ruiru/Kiu/Block 6/773**. He further averred that he reported the matter to the area chief, but that the Respondent refused to stop the construction which necessitated the filing of **ELC No. 16 of 2013**, which trial was dismissed by the trial Court. Further that the Appellant/Applicant has tried to stop the Respondent from constructing and or interfering with his parcel of land to no avail.

It was his contention that the Respondent does not have any proprietary right over the parcel of land and that the orders that the Appellant be restrained by Court and execution of the Judgment/ Decree of the Honourable **C.A Otieno Omondi** Principal Magistrate Thika on **31<sup>st</sup> October, 2018**, be stayed. He further averred that he had already filed an Appeal against the Judgment of the lower Court and that he fears if the Judgment is not stayed, the Appeal will be rendered nugatory and a mere academic exercise. He also averred that he stands to, suffer irreparable harm loss and damages.

The Application is opposed and the Respondent **Kennedy Orumo Ong'era**, sworn a Replying Affidavit on **5<sup>th</sup> November 2019**, and averred that the Applicant's application is **frivolous**, a misdirection and anchored on a false assertion or claim of encroachment onto the suit property. That the Appellant/Applicant, sold to him a property measuring **50 by 1000, ½ acre** registered as **Githurai Ting'ang'a** vide certificate **No. 551/L.R No. 887** for a consideration of **Kshs. 270,000/=**. It was his contention that the certificate of lease in favour of the Appellant/Applicant for the suit property is at variance and does not relate to the parcel of land constituting the sale agreement dated **28<sup>th</sup> May 2008**.

He further contended that the Property the Appellant/Applicant sold to him was registered as **Githurai Ting'anga** vide certificate **No. 551/L.R No.8867** and a certificate of ownership issued in his name vide certificate **No. 13260** to which he took possession and effected construction of permanent buildings in the year **2010** and the Appellant/ Applicant did not raise any objections. That prior to the signing of the sale agreement and payment of the purchase price, the Applicant pointed out the beacons / boundaries in respect to the land he purchased and a surveyor from **Githurai Ting'ang'a Company Limited** confirmed the beacons, area and actual location of the property pointed to him by the Appellant/ Applicant.

He further averred that the Applicant claim that the suit property and plot certificate **No. 551/LR No. 8867**, share a common boundary was not established as no map/ deed plan was presented by the Appellant/Applicant to evidence in encroachment. Further that upon the visit to the site by the trial Court, the property that he allegedly trespassed was non-existent and thus the Appellant/Applicant could not establish his claim. He further averred that the Applicant admitted at the hearing before the trial Court that **Plot No. 551**, was sold to him and the other half belonged to the Appellant's brother, who sold it and vested possession to a purchaser. It was his contention that the Applicant/Appellant will not suffer any harm, loss and or damages as the claim does not exist, is misconceived, lacks substratum and or legal prerequisites in support of the Applicant's claim.

The Application was canvassed by way of written submissions and the Court finds the issues for determinations are:-

**1. Whether the Appellant/Applicant is entitled to stay of Execution**

**2. Whether the Appellant/ Applicant is entitled to injunctive orders sought**

**1. Whether the Appellant/Applicant is entitled to stay of Execution**

The Applicant has sought for stay of execution of the Judgment delivered by **Hon. C.A Otieno Omondi** on **31<sup>st</sup> October 2018**. It is not in doubt that the said Judgment merely dismissed the Appellant/ Applicant's suit with costs to the Defendant/Respondent.

The guiding provisions of the Law with regards to Stay of Execution are to be found in **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** which provides that an applicant must demonstrate the following:-

a. *Substantial loss may result to the applicant unless the order was made;*

b. *The application was made without unreasonable delay; and*

c. *Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.*

From the above provision of law, it is evident that for the Court to exercise its discretion, the Applicant/Applicant should meet the conditions as set out in the said **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. However, it is not in doubt as already pointed out by this Court that the order issued by the trial Court, was a negative order as the Court only dismissed the said suit and did not order any party to do anything or refrain from doing anything.

Courts have on various occasions held that when a Court has granted negative orders, there is nothing that can be stayed. See the case of **Western College Farts And Applied Sciences ...Vs... Oranga & Others [1976] KLR 63** where the Court held that:-

*"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. An execution can only be in respect of costs....."*

*The High Court has not ordered any of the 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 an application for stay to enforce or restrain by injunction."*

Further In the case of **John Mbuu Muthoni & Another...Vs...Ruth Muthoni Kariuki (2017) eKLR**, the Court held that;

*"33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga's decision in R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances. 34. I am persuaded that the circumstances here are the same as those in the Wananchi Group Case which I find to be persuasive. It is in accord with the James Hoseah Gitau Mwara Case cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be "executed." A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed."*

Given that the order of the Court dismissing the suit was a negative order, then there is no order to be executed and therefore it is the Court's considered view that it cannot stay the orders that had been issued as negative orders are not capable of being stayed.

**2. Whether the Appellant/ Applicant is entitled to injunctive orders sought**

The threshold for the grant of Injunctive orders was set out in the case of **Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358**, where the court held:-

*"The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless*

*the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.*

Has the Applicant established a prima facie case ? A prima-facie case was described in the case of Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR, to mean:-

***“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

Is there a right that apparently has been infringed? The Appellant/ Applicant has averred that the Respondent encroached upon the suit property which he alleges that is his property and is not the one he had sold to the Respondent. However, it is not in doubt that the Judgment Appealed against by the Appellant/Applicant has disapproved this notion and the Appellant/Applicant’s claim to the said property has been dismissed.

Therefore, the Court finds and holds that given that there is a valid order and further given that the Court has declined to allow stay of execution orders, then the Appellant/ Applicant herein has no claim to the land and has therefore not established a prima facie case with probability of success.

The principles set out for granting injunctive orders are sequential in order so that if one of them fails, then it follows that the others automatically fails. See the case of Kenya Commercial Finance & Co. Ltd...Vs... Afraha Education Society (2001) 1EA 86, where the Court held that:-

***“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed. (emphasis mine).”***

The Court having found that the Applicant has not met the threshold for grant of injunctive orders, then the Court further finds that he is not entitled to the orders sought.

The Upshot of the foregoing is that the **Notice of Motion Application** dated 25<sup>th</sup> June 2019, is **not merited** and the same is dismissed entirely with costs to the Respondent.

It is so ordered.

**Dated, signed and Delivered at Thika this 12<sup>th</sup> day of November 2020**

**L. GACHERU**

**JUDGE**

**12/11/2020**

**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 **15<sup>th</sup> 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**

**Mr. Kiarie holding brief for Ndungu Mwaura for the Appellant/ Applicant**

**No appearance for the Respondent**

**L. GACHERU**

**JUDGE**

**12/11/2020**