



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 121 OF 2017**

**EDITH WANGARI WANDUNA.....APPLICANT**

**-VERSUS-**

**JOSEPH KINYUA MUKIRI.....1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER GATHUA MUKIRI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is an Application dated the 20<sup>th</sup> February 2020 brought under Section 28 of the Civil Procedure Act and Order 22 Rule 6 of the Civil Procedure Rules where the Applicant seeks for the Court to issue an order authorizing the Deputy Registrar of the Court to execute the necessary documents to give effect to the Decree and orders issued by this Court on 5<sup>th</sup> October 2016 in favour of the Applicant.

2. The Applicant also seeks that the Court issues an order directing the Land Registrar at Nyeri to cancel the titles to land parcel No. Kirimukuyu/Ngandu/615 and land parcel No. Kirimukuyu/Ngandu/616 registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and to use the documents executed by the Deputy Registrar of the Court to cause the same to be transferred and registered in the name of the Applicant herein

3. Pursuant to the filing of the said Application the Respondents also filed an Application dated 10<sup>th</sup> March 2020 under the provisions of Section 63 of the Civil Procedure Act Order XXI Rules 49, 59, 60, 61 and 65 of the Civil Procedure Rules (sic) seeking for an extension of time to deposit the sum of Ksh. 300,000/= in an interest earning account in the joint names of the Advocates of the parties and in the alternatives the Court to issue a fresh directions on conditions for stay in the face of the refusal of the Applicant to co-operate in the opening of the joint account .

4. By consent the Court directed that both Applications be heard together by way of written submissions.

**Applicant's written submission to the Notice of Motion dated 20<sup>th</sup> February 2020.**

5. The Applicant framed the issues for determination as follows;

i. Whether the Applicant is entitled to be registered as proprietor of the property known as land parcel Kirimukuyu/Ngandu/615 and land parcel No. Kirimukuyu/Ngandu/616 registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

ii. Whether an order should be issued authorizing the Deputy Registrar of the Court to execute the necessary documents to give effect to the Decree and orders issued by this honorable Court on 5<sup>th</sup> October 2016 in favour of the Plaintiff/Applicant.

iii. Whether an order should be issued directing the Land Registrar at Nyeri to cancel the titles to land parcel No. Kirimukuyu/Ngandu/615 and land parcel No. Kirimukuyu/Ngandu/616 registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and to use the documents executed by the Deputy Registrar of the Court to cause the same to be transferred and registered in the name of the Applicant herein

6. On the first issue for determination, it was the Applicant's submission that the order of stay of execution issued by the Court having lapsed, there existed no legal impediment barring the Applicant from executing the judgment and Decree of the Court issued on 5<sup>th</sup> October 2016.

7. That the Respondents had preferred to lodge an Appeal at the Court of Appeal against the entire judgment and orders of the Court wherein vide a Notice of Motion Application dated 11<sup>th</sup> July 2017 they sought a stay of execution of the judgment and Decree pending the hearing and determination of the Appeal. The Application was granted on two conditions that they deposit in an interest earning account to be opened in the name of the Advocates the sum of Ksh 300,000/= within 14 days from the date of ruling and secondly that the Respondents shall within 21 days from the date of ruling file an undertaking to prosecute the Appeal without unreasonable delay.

8. The Respondents failed to comply with the conditions and sought an extension of time to enable them comply via an Application dated 28<sup>th</sup> July 2018 which Application was allowed and time enlarged by a further 14 days which lapsed on the 2<sup>nd</sup> January 2019.

9. Despite a further extension of 14 days, the Respondents did not take any action to comply with the conditions given by the Court but have employed delaying tactics by filing Applications upon Applications to further their agenda to deny the Plaintiff the right to enjoy the fruits of her judgment.

10. That the Respondents have defied the Court's order to have the Appeal heard and determined within one year wherein they had not taken any steps to have the said Appeal set down for hearing.

11. The Applicant relied on the decided case in **Peter Kiplangat Tuwei vs Alfred Cheruiyot Sang [2017] eKLR** to submit that once orders of stay had lapsed, the successful party in the suit is at liberty to execute the judgment and subsequent Decree.

12. On the second issue for determination it was the Applicant's submission that since they had conclusively established that the orders for stay of execution of judgment had lapsed, the next issue to be appraised would be the mode of execution of the Decree. That the Applicant had tried all means possible to effect the transfer of land parcel No. Kirimukuyu/Ngandu/615 and land parcel No. Kirimukuyu/Ngandu/616 from the Respondents to herself in vain since the Respondents have refused to execute the transfer documents to enable the Lands Register transfer the suit property and the only option left was for the documents to be executed on the Plaintiff's behalf by the Deputy Registrar to enable the Land Registrar to effect the transfer. Reliance was placed on Section 98 of the Civil Procedure Act and on the case of **Simon Pkite Chemoltor vs William Loishakou [2017] eKLR** and **Fredrick Nyakagwa Osoro vs Hezron Mogere & Another [2016] eKLR** where it was held that where a judgment debtor failed to execute such documents, the Court may order the Deputy Registrar to do so.

13. That the Respondent's acts and omissions of failure to execute transfer documents even after the same had been delivered to them by the Applicant's Advocate amounted to defiance of Court orders as stated in the judgment issued by the High Court on the 5<sup>th</sup> October 2016 therefore curtailing the Applicant's rights to enjoy the fruits of her successful judgment.

14. On the last issue for determination the Applicant submitted that pursuant to the judgment delivered on 5<sup>th</sup> October 2016 and the subsequent Decree, the Land Registrar had the authority to cancel the title deeds of land parcel No. Kirimukuyu/Ngandu/615 and land parcel No. Kirimukuyu/Ngandu/616 registered in the names of the Respondents and cause the same to be registered in the Applicant's name. Reliance was placed in the case of **William Juma Mbui vs. Public Trustee & Another [2019] eKLR** where it was held that in cases where a party to a suit refused to surrender title documents regarding the transfer of the suit property the Court had the authority to order the Land Registrar to effect transfer and registered the same in the name of the judgment creditor in the absence of the original title deed or any other documents.

15. That the Respondents herein having been adamant and having refused to execute transfer documents so that the suit property is registered in the name of the Applicant was a clear indication that they had no intention of co-operating with the Applicant and therefore a need for the Court to reaffirm the Orders contained in its judgment of 5<sup>th</sup> October 2016. The Applicant sought for the Application dated 20<sup>th</sup> February 2020 to be allowed.

#### **Respondents' submission on the Application dated 28 February 2020 and 10<sup>th</sup> March 2020.**

16. The Respondents' submission was to the effect that the crux of the Application was an allegation that they had failed to comply with the terms of the condition of stay of execution granted by this Court on 5<sup>th</sup> April 2018, an allegation they refuted by submitting that they had filed the Application of undertaking and filed an Appeal being Nyeri Court of Appeal No. 18 of 2018 but had been unable to deposit the sum of Ksh 300,000/= in a joint account due to the refusal by the Applicant to co-operate in the opening of the said joint interest earning account.

17. That as demonstrated by the Replying Affidavit of Duncan Waweru Macharia dated 19<sup>th</sup> March 2020 and the annexures thereto, the Respondents had written to the Applicants former and current Advocates to co-operate with them in the opening of a joint account but they had flatly refused and even refused to respond to their communications. That the order directing the opening of the joint account required to be obeyed by both parties whereby the Applicant refused to obey in hope of trapping the Respondents into non-compliance and thereby being in breach of the orders of this Court to open a joint account.

18. Their submission was that he who comes to equity must come with clean hands and he who seeks equity must do equity. That the Applicant has clearly frustrated their efforts to open a joint account and they have been holding the sum of Ksh 300,000/= with nowhere to deposit it. That the Applicant was not entitled to the orders of execution she sought, that the order of stay of execution granted by the Court on 5<sup>th</sup> April 2018 had never been vacated and the only orders that could lapse for non-compliance were the orders dated 18<sup>th</sup> December 2018 which did not affect the orders of stay of execution of 5<sup>th</sup> April 2018.

19. In regard to the Application dated 10<sup>th</sup> March 2020, the Respondents' submission was that they were seeking for an extension of time to deposit the sum of Ksh 300,000/= and for alteration of the terms as to where the money should be deposited for reasons that the Applicant had refused to co-operate in opening of a joint account despite their numerous letters seeking that the Applicant's past and present Counsel do sign the forwarded enclosed account opening forms.

20. That they were willing and ready to comply with the order to have the said amount deposited in Court as they await for the hearing and determination of the Appeal for whose Court diary they had no control of. That they should not be sent away from the seat of justice over matters as they had no control of.

#### **Determination.**

21. It is not in dispute that judgment in this matter was delivered on 5<sup>th</sup> October 2016 in favour of the Applicant directing that titles to the land parcel No. Kirimukuyu/Ngandu/615 and land parcel No. Kirimukuyu/Ngandu/616 registered in the names of the Respondents be canceled and the same be registered in the name of the Applicant.

22. It is also not in dispute that pursuant to the delivery of the said judgment the Respondents herein sought for and were granted a conditional stay of execution pending the hearing and determination of their intended Appeal.

23. In the ruling dated 5<sup>th</sup> April 2018, the Court ordered the Respondents to deposit the sum of Ksh 300,000/= in an interest earning account in the joint names of the Advocates of the parties within 40 days from the date of delivery of the ruling. That further the Respondents to, within 21 days of the ruling to file an undertaking to prosecute the Appeal without unreasonable delay.

24. Being unable to comply with this order the Respondents filed a Notice of Motion dated 28<sup>th</sup> July 2018 seeking for enlargement of time to comply with the Court's order. The said Application was allowed and the Order was extended for a further 14 days via a ruling dated 18<sup>th</sup> December 2018 where the Court also give a condition for the Appeal to be heard and determined within (1) one year failing to which the stay of execution would stand automatically dismissed.

25. According to the Applicant, the Respondents have not taken any steps to comply with the conditions given by the Court but have employed delaying tactics by filing Applications upon Applications to further their agenda to deny the Plaintiff the rights to enjoy the fruits of her judgment. That further the Respondents have defied the Court's order to have the Appeal heard and determined within (1) one year and have not taken any steps to have the said Appeal set down for hearing.

26. The Respondents' response on the other hand is that although they had filed an Appeal to the Court of Appeal being Nyeri Court of Appeal No. 18 of 2018, they had no control of the Court's diary as to when to set the matter down for hearing and that further they had been unable to deposit the sum of Ksh 300,000/= in a joint account by virtue of the refusal by the Applicant to co-operate with them in the opening of a joint interest earning account. They therefore sought for a further enlargement of time to comply or in the alternative for the Court to issue fresh directions on conditions for stay in the face of the refusal of the Applicant to cooperate in the opening of the joint account, as parties await for the hearing and determination of their Appeal.

27. Order 50 Rule 6 of the Civil Procedure Rules provides as follows:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, **the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require**, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

28. I have considered the submissions for and against both the Applications herein. It is plain that the Memorandum of Appeal dated 18<sup>th</sup> October 2018 was filed on 23<sup>rd</sup> October 2018 and therefore the Court, in exercising its discretion on whether or not to grant the prayers sought in either of the Applications should therefore guard itself from limiting a party's right to appeal to the Court of Appeal which would fetter the right of access to justice under Article 48 and fair hearing under Article 50(1) of the Constitution. The Court should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the Court ...The Court in considering whether to grant or refuse an Application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an Appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the Applicant /defendant...For the Applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the Court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the Application for stay of execution pending Appeal the Court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the Court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the Court . Justice requires the Court to give an order of stay with certain

conditions.”

29. In the case in **Banco Arabe vs. Bank of Uganda [1999] 1 EA 22**, it was held that:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the Appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

30. Further in **New Wide Garments EPZ (K) Ltd v Ruth Kanini Kioko [2019] eKLR** the Court held that:

The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions. According to Section 1A(2) of the **Civil Procedure Act** “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under Section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court ; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court , at a cost affordable by the respective parties.

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in Section 1A as read with Section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.

31. In the light of the above decisions and arguments, I dismiss the Application dated the 20<sup>th</sup> February 2020 and allow the Application dated the 10<sup>th</sup> March 2020 to the extent that the Respondents are granted an extension of time to deposit the sum of Ksh 300,000/= which sum of money shall be within 7 days from the date of this ruling be deposited in Court. The Respondents shall further expedite the hearing of the Appeal.

32. Costs to abide by the outcome of the Appeal.

**Dated and delivered at Nakuru this 17<sup>th</sup> day of December 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**