



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**MISC APPEAL NO. 6 OF 2020**

**LEONARD MUNGAI NJOROGE.....APPLICANT**

**VERSUS**

**NANCY MUGURE NJUGUNA.....RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated **5<sup>th</sup> February 2020**, by the Applicant seeking for orders that;

- 1. That there be an order of stay of execution of the Judgment entered on 25<sup>th</sup> April 2019, pending the filing, hearing and determination of the Applicant's appeal against the said Judgment.**
- 2. That in the interest of justice this Honourable Court directs the Environment and Land Court at Limuru to fast track the issuance of the typed Court proceedings in the matter.**
- 3. That the costs be in the cause.**

The Application is premised on the grounds that the Decree holder has proactively attacked, attached and /or taken possession of the Judgment debtor's property known as **Tigoni/Tigoni Block 1/2899**. That the Applicant has filed an Appeal and that the Appeal is in the process of being lodged. Further that the Applicant is waiting for the certified Court proceedings to proceed to file his Appeal in the Environment and Land Court at Thika. That the Judgment issued by the Honourable Court highly prejudices the Applicant's title /proprietary interests in the suit parcel of land and the Appeal has high chances of success and unless the orders are granted, the Applicant stands to suffer prejudice.

In his Supporting Affidavit, **Leonard Njoroge Mungai** averred that on **7<sup>th</sup> March 2007**, the Plaintiff/Respondent herein filed a suit where she sought for a permanent Injunction restraining him and his agents from interfering with the ownership and possession of the suit property whose title is registered in his name. That the Judgment was delivered in favour of the Respondent/Plaintiff on **25<sup>th</sup> April 2019**, and being aggrieved with the said decision, his Advocates filed a Notice of Appeal intending to Appeal against the said Judgment .

That the Respondent has attacked and taken ownership over his property and there is a reasonable belief that the register shall be changed to remove and replace his proprietary interests. He averred that the Respondent has embarked on the destruction of his property and crops without giving him time to harvest the crops and safely keep his property. That even though he filed a Notice of Appeal, an Appeal is yet to be lodged as there is a delay by the Court Registry at Limuru to have the Court proceedings typed and ready for pick up.

That efforts to file the Appeal have been hampered by the delay of the lower Court to provide the typed proceedings in the matter and the registry has failed to issue him or his Advocate with a certified Decree of the Judgment, despite making requests. Further that no execution process or documents were served upon his Advocates on record as required by law. He contended that unless the Court stays the Execution, he risks losing his title /proprietary interest to his parcel of land which is legally registered in his name. Further that the Appeal shall be rendered nugatory if stay is not granted and the land Register is tampered with and the title forcefully changed from his name to the Respondent's name.

The Application is opposed and the Respondent filed a Replying Affidavit sworn by **Nancy Mugure Njuguna** on **8<sup>th</sup> July 2020**, who averred that she has always been in possession of the suit property. That by virtue of the Judgment in **ELC Case No. 24 of 2018** issued on **25<sup>th</sup> April 2019**, in which the Court held that she was the rightful owner, the Applicant has been in blatant disregard of the Decree of the Court by interfering with the suit property and gaining forceful entry. Further that the Applicant through his Advocates have placed a restriction on the suit property on **24<sup>th</sup> May 2019**, without obtaining an order from the trial Court. That the Applicant's Application for stay of execution in the lower Court was dismissed for lack of merit. She also averred that she had been advised by her Advocate which advice

she believed to be true, that the Applicant has refused to comply with the Decree issued by the trial Court. That the Applicant stands to suffer **no** substantial loss as alleged as there exists a restriction on the suit property. Further that the Applicant has not demonstrated that he is willing to furnish the Court with security for the due performance of the Judgment and Decree issued by the trial Court.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court finds and holds that the issue for determination is ***whether the Applicant is entitled to the orders sought.***

The Applicant has sought for stay of execution orders pending the hearing and determination of the Appeal against the Judgment delivered on **25<sup>th</sup> April 2019** by the **Hon. E.Olwande**, Senior Principal Magistrate .

The guiding provisions of law with regards to Stay of Execution is **Order 42 Rule 6 of the Civil Procedure Rules**, which states as follows:

**“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) 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.**

**(3) ...**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) ...**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.**

The purpose of a stay of Execution pending Appeal was explained by the Court in **RWW ...Vs... EKW [2019] eKLR**, and held that;

**“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory (Emphasis mine). However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.**

**9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”**

The Court having gone through the Application and the Judgment delivered, it notes that the trial Court ordered for the rectification of the register as to the trial’s Court found and held that the title between the parties had been interchanged and therefore directed for cancellation of the Applicant’s title. It is not in doubt that if the Judgment is executed, and the title transferred to the Respondent , she will be at liberty to deal with the land as she deems fit.

Therefore, it is the Court’s considered view that the same will have caused the Applicant substantial loss.

However, as rightly submitted by the Applicant, the importance of **Stay of Execution** is apart from preserving the subject matter is to safeguards the Appellant if he is successful in his Appeal. Therefore, it follows that there ought to be an Appeal in existence that would be rendered nugatory.

The Applicant has acknowledged that he is yet to lodge an Appeal. That his Advocates filed a Notice of Appeal, but no **Appeal** has been lodged as the proceedings are yet to be typed and issued to them. The Court notes that for a party to lodge an Appeal, the Appeal is lodged through a Memorandum of Appeal and subsequent a Record of Appeal is filed. It is the record of Appeal that requires the proceedings, but a Memorandum of Appeal can be filed without the proceedings. The Court is not satisfied with the explanation advanced by the Applicant for failing to file his Appeal.

Judgment was delivered on 25<sup>th</sup> April 2019, the instant Application was filed on 7<sup>th</sup> February 2020. The time within which the Applicant is allowed to file an Appeal had since lapsed by the time this Application was filed. There is no Application by the Applicant seeking to extend time. Since there is no guarantee as whether the Applicant's Application will be allowed and given that no Appeal has been filed against the Judgment, the Court is not satisfied that there is anything that would be rendered nugatory, and would warrant staying execution of the Judgment.

The Court is required to look at the rights of both parties in exercising its discretion. It would be an injustice for the Court to grant **Stay of Execution** pending an Appeal that does not exist. The fact that there is no Appeal filed, then it follows that the Application has no legal basis. See the case of **James Mbatia Thuo & Ephantus Mwangi ...Vs... Kenya Railways Corporation & Attorney General of Kenya [2018] eKLR** where the Supreme Court held that

**“The decision of the Registrar dated 19<sup>th</sup> May 2017, was made pursuant to and in exercise of the powers conferred by Section 4A of the Supreme Court Rules, 2012. The decision was premised on two (2) grounds;**

**(i) That the applicants had not made an application for certification of the appeal as one involving a matter of general public importance under Article 163 (4) (b) and Article 163 (5), of the Constitution; and**

**(ii) That the time for filing the appeal under Article 163 (4) (a) as a matter of right had lapsed as provided under Rule 33 (1) of the Supreme Court Rules, 2012.**

**[17] It is not in doubt, that by the time the applicants lodged their application for a stay of execution in the registry, there was no appeal before this Court, the same having not been filed for the reasons advanced by the applicants.**

**[18] The applicants made no attempt to file an application for extension of time to enable them file their appeal out of time as provided for under Rule 53 of the Supreme Court Rules, 2012. The Rule allows the Court on an application by a party and at its own discretion, to extend the time limited by the Rules. The circumstances pursuant to which an extension of time within which to file an appeal may be granted, were explained at length by this Court in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 6 Others* [2013] eKLR.**

**[19] Extension of time is an indulgence requested from the Court by a party in default. The applicants cannot reasonably expect this discretion to be exercised in their favour, unless they apply for an extension, and provide a satisfactory explanation for the default. The applicants herein, failed to formally move the Court in this regard. At the time the application dated 17<sup>th</sup> May, 2017 was presented to the Honourable Registrar of this Court for admittance, the time within which a party is allowed to file its appeal had lapsed.**

**[20] The Notice of Appeal was filed on 23<sup>rd</sup> December 2015, while the application for stay was lodged at the Supreme Court Registry on 15<sup>th</sup> May 2017; more than a year after the expiry of the statutory time provided for filing appeals. The applicants have not provided any reason for their failure to apply for an extension of time, which application, had it been granted, would have enabled them to file their appeal and thereby provided legal grounding for the rejected application for stay.**

**[21] In the absence of an appeal, or an application for extension of time, accompanied by a memorandum of appeal, the rejected application had no legal basis. We therefore see no reason to interfere with, or upset the decision by the Honourable Registrar rejecting the application.”**

Having considered the instant Notice of Motion Application, the annexures thereto, the Written Submissions, together with the cited authorities and the relevant provisions of law, the Court finds the said Application not merited. Consequently, the **Notice of Motion Application** dated 5<sup>th</sup> February 2020, is hereby dismissed entirely with costs to the Respondent.

It is so ordered.

**Dated, signed and Delivered at Thika this 17<sup>th</sup> day of December 2020**

**L. GACHERU**

**17/12/2020**

**JUDGE**

**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**

**No Appearance for the Applicant**

**Mr. Kimathi for the Respondent**

**L. GACHERU**

**17/12/2020**

**JUDGE**