



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 22 OF 2020

MARGARET WAGITHI NJUKI.....APPLICANT/APPELLANT

-VERSUS-

BERNARD WAWERU KIBURI.....1ST RESPONDENT

BENSON KARIUKI KIBURI.....2ND RESPONDENT

JACKSON MWANGI KIBURI.....3RD RESPONDENT

RULING

1. The application dated the 4th August, 2020 is brought via a Notice of Motion under the provisions of Section 3, 3A and 78, 79 G of the Civil Procedure Act, Order 42, and 51(1) of the Civil Procedure Rules where the Applicant seeks for orders of stay of execution of the judgement delivered on 30th June 2020 in Mukuru-ini PM ELC No. 28 of 2018, pending the hearing and determination of this Appeal.
2. The Applicant also seeks interim orders of injunction directed that the Respondents and their agents and or servants or any person acting under the authority from selling, alienating and/or disposing of land parcels No. Gikondi/Gikondi/2094-2096 pending the hearing and determination of the Appeal.
3. The Application is supported by the grounds set on its face as well as on the supporting affidavit of Margaret Waithi Njuki the Applicant herein dated the 4th August 2020.
4. The Respondents having been duly served and they having not filed their response, it is herein deemed that the application is not opposed.
5. The Applicant's written submissions dated the 28th September 2020 are to the effect that pursuant to a sale agreement with the Respondents, she had immediately taken occupation of her portion of the suit land while awaiting the subdivision and final transfer of her respective parcel of land. That she has developed her portion of land and has put up a house where her mother resides currently.
6. That it would be in the best interest of justice to preserve the suit property if the Respondents were deterred from the alienating or wasting the same in a manner that would render the Appeal nugatory.
7. That the Respondents did not stand to suffer any prejudice should the orders sought be granted. On the other hand the Applicant stood to suffer irreparable damages that could not be compensated by way of damages should she be evicted from her parcel of land where she had set up her matrimonial home.
8. That the Respondents had been served with the copies of the Application where they had accepted service but had declined to sign the same as evidence of the return of service or file their response.
9. The applicant prayed for her Application to be allowed.

Determination

10. I have considered the Applicant's Application for stay of execution of the decree in Mukuru-ini PM ELC No. 28 of 2018 pending the hearing and determination of his intended Appeal.

11. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except 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 sub rule (1) unless—

(a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant .

12. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which;

i. The Court is satisfied that substantial loss may result to the Applicants unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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 Applicants

13. I find issues for determination arising therein namely:

i. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this Court should make.

14. I have considered the Applicant's application in view of the aforementioned conditions and the fact that the said application was not contested.

15. The purpose of stay of execution is to preserve the substratum of the case. In the case of **Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, 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”.

16. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2)

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.

17. 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.

18. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

19. On the first condition of proving that substantial loss may result unless stay order is made, Applicant has submitted that pursuant to the impugned judgment there was grave to danger of being evicted from the suit land where she would be rendered destitute. That she stood to suffer irreparable damages that could not be compensated because she had established a matrimonial home on the suit parcel of land. That further the Respondents would then be at liberty to deal with the land adversely thereby rendering her Appeal nugatory.

20. On the second condition, there is no dispute that the impugned judgment was delivered on the 30th June 2020 wherein the Applicant

sought for stay of execution vide the current application dated the 4th August, 2020 I find that the said application is brought without undue delay.

21. On the last condition, I find that although the application has not volunteered any security for the due performance of such decree yet the court has discretion to order that security be furnished in any case where it thinks fit.

22. In the foregoing the Court finds that the Applicant has demonstrated a reasonable likelihood of loss if stay is not granted. The Respondent on the other hand does not stand to suffer any loss if stay is granted. This effect the Court orders as follows:

i. The Application dated 4th August, 2020 is hereby allowed and there shall be stay of execution of the judgment delivered in Mukuru-ini PM ELC No. 28 of 2018 pending the hearing and determination of the Applicant's Appeal

ii. A temporary injunction is hereby issued restraining both the Applicant and the Respondent and/or their servants and agents from alienating, selling or dealing adversely in any way with the property known as No. Gikondi/Gikondi/2094-2096 pending the hearing and determination of the Applicant's Appeal.

iii. The Applicant shall within 30 days from the date of this ruling deposit Kshs.100,000/=(one Hundred Thousand) in Court. In default, the stay shall automatically lapse.

iv. That the Applicant/Appellant shall within 60 days from the date of this ruling compile, file and serve upon the Respondents a complete record of Appeal.

v. The Deputy Registrar is directed to call for the proceedings of the lower Court record for admission of this Appeal to be heard expeditiously.

vi. There shall be no Costs.

It is hereby ordered.

Dated and delivered at Nakuru this 17th day of December 2020

M.C OUNDO

ENVIRONMENT & LAND JUDGE