



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 27 OF 2020**

**CHARLES NYINGI KABINU.....APPELLANT/APPLICANT**

**VERSUS**

**FLORENCE WAMBUI KAMAMI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RUIRU LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**HON.ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated **22<sup>nd</sup> May 2020**, brought by the Appellant/ Applicant seeking for orders that;

**1. This Honourable Court be pleased to grant orders of stay of execution of the Judgement and orders delivered on 29<sup>th</sup> April 2020, by Hon. C.A Otieno –Omondi in Ruiru MCLE No. 38 /2019 pending the hearing and determination of the Applicants intended appeal.**

**2. That the costs of this Application be provided for.**

The Application is premised on the grounds that the Appellant/Applicant is dissatisfied by the decision of the trial Court delivered on **29<sup>th</sup> April 2020** in **MCLE 38 of 2019**, and intends to appeal against the whole decision. That the Appellant/ Applicant has filed the **Notice of Appeal** dated **19<sup>th</sup> May 2020**, within the stipulated period of the time as law requires for Appeal. Further that the Appellant/Applicant has applied for certified copies of the proceedings to enable him to prepare for the Records of the Appeal, of which he has not been supplied with. That it is in the interest of Justice that **Stay Orders** be granted pending the hearing and determination of the appeal.

In his Supporting Affidavit, **Charles Nyngi Kabinu** averred that in the Judgment delivered on **29<sup>th</sup> April 2020**, which he intends to appeal against, the trial magistrate dismissed his Counter claim to the 1<sup>st</sup> Respondent's Plaintiff and failed to consider that he was one of the members of **Githunguri Ranching Company Limited**, which Company allocated him **L.R Ruiru Kiu Block 2/4877**, and the 1<sup>st</sup> Respondent was entitled to make a follow up of his land from **Githunguri Ranching Company Limited**.

That upon the delivery of the Judgment, he filed a Notice of Appeal dated **19<sup>th</sup> May 2020**. That he applied for certified copies of the proceedings on the **19<sup>th</sup> May 2020** and the trial Magistrate did not grant stay of execution, leaving him with a great chance of losing his plot. That if the Judgment is executed, it will prejudice the intended Appeal. It was his contention that his Appeal has high chances of success and if his application is not granted, he will suffer irreparable loss.

The Application is opposed and the 1<sup>st</sup> Respondent **Florence Wambui Kamami**, swore a Replying Affidavit on **20<sup>th</sup> July 2020**, and averred that the Application is legally and fatally defective and infringes on all known legal provisions. She averred that the Application offends the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** as there is change of Advocates. That there is no Appeal filed yet in Court and therefore the instant Application offends the provisions of **Order 42 of the Civil Procedure Rules** and hence fatally defective. Further that the Judgment having been delivered on **29<sup>th</sup> April 2020**, and with no Appeal having been filed within **30 days**, the Application hangs in the air and there is no proper Appeal.

She contended that she lives on the suit property and she constructed a permanent house in **2012**, and the Appellant/ Applicant has never been on the suit property and has nothing to lose. She urged the Court to dismiss the Application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered and it is the Court's considered view that the issue for determination is ***whether the Applicant/Appellant is entitled to the orders of stay of Execution pending Appeal.***

The Applicant has sought for stay of execution orders against the Judgment of **Hon. C. A Otieno –Omondi** delivered on **29<sup>th</sup> April 2020**.

Grant of stay of execution pending Appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules**, the relevant part of 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 cancellation of the Applicant's title and if the Judgment is executed, it follows that the said title would be transferred to the Respondent who in turn would be free to do whatever she wants with the said suit property including disposing and charging it.

Therefore, it is the Court's considered view that the same will have caused the Applicant substantial loss considering that the issue of land is so emotive.

However, the Court is alive to the fact that stay of execution pending Appeal is granted so that the Applicant's right of Appeal are safeguarded and the Appeal if successful, is not rendered nugatory. In this case, it is not in doubt that the Applicant is yet to file an Appeal before this Court. Indeed, on **18<sup>th</sup> November 2020**, the Applicant indicated to Court that he had not filed an Appeal.

It is further not in doubt that the time within which the Applicant is allowed to file an Appeal has since lapsed and 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 there being no Appeal that has been filed against the Judgment, the Court is not satisfied that there is anything that would be rendered nugatory, that 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.”

The Upshot of the foregoing is that the **Notice of Motion Application** dated 22<sup>nd</sup> May 2020 is found **not** merited and the same is dismissed entirely with costs to the 1<sup>st</sup> Respondent.

It is so ordered.

**Dated, signed and Delivered at Thika this 10<sup>th</sup> day of December, 2020.**

**L. GACHERU**

**JUDGE**

**10/12/2020**

**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**

**M/s Macharia holding brief for Mr. Kanyi Kiruchi for the 1<sup>st</sup> Respondent.**

**No appearance for the Applicant**

**No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent**

**L. GACHERU**

**JUDGE**

**10/12/2020**