



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 9 OF 2020

GITONGA WILLIE , CATHERINE NGONYO GITONGA AND

SAMMY GITARI NYAGA (As trustees of Christ

Victory Ministries International).....APPELLANT/APPLICANT

VERSUS

ANN WANJA KINGARA.....RESPONDENT

(Being An Appeal From The Judgment And Decree of the Chief Magistrates Court Kiambu (Hon. S Atambo, Senior Principal Magistrate Presiding) Given on the 3RD Day of February 2020 in the Chief Magistrates Court At Kiambu Civil Suit No. 234 Of 2005)

BETWEEN

ANN WANJA KINGARA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST DEFENDANT

GITONGA WILLIE, CATHERINE NGONYO GITONGA AND

SAMMY GITARI NYAGA(As trustees of Christ

Victory Ministries International).....2ND DEFENDANT

RULING

The matter for determination is the Notice of Motion Application dated **10th February 2020**, by the Appellant/ Applicant seeking for orders that;

1. This Honourable Court be pleased to grant an order for stay of execution of the Decree of the Lower Court in Kiambu CMCCC No. 234 of 2005, pending the hearing and determination of this Appeal.

2. That cost of this Application be in the cause.

The Application is premised on the grounds that the Appellant/ Applicant is dissatisfied with the Judgment and resultant Orders of the lower Court and has preferred an Appeal.

The case is in respect of land for which the Appellant/ Applicant holds title and if the Decree is executed, the Appellant/ Applicant will suffer substantial and irreparable loss, which cannot be compensated by an award of damages. Further that if the Decree is executed, the Appeal will be rendered nugatory. That the Appeal raises weighty and triable issues for the determination by this Court and it had been brought with quick dispatch and the Appellant is willing to give an undertaking as to any damages that the Respondent may suffer.

The Application is supported by the Affidavit of **Bishop Winston Gitonga Willie**, who reiterated the contents of the grounds on the face of the Affidavit and averred that the suit in the lower Court relates to title Number **Kiambu / Municipality Block 11/340**, registered in

the name of the Appellant/Applicant. That the Respondent claimed the suit property to be site for a parcel of land known as **Unsurveyed Business cum residential Plot No. 7-Kiambu Municipality**, which she purported to have been allotted vide an allotment letter dated **27th September 1993**. That Appellant/ Applicant was allotted the land on **12th August 1993**, before the Respondent.

It was his contention that though there is a discrepancy between the land that the Appellant/ Applicant holds measuring **0.2 ha** as compared to the one claimed by the Respondent **0.06ha**, the Respondent was curiously awarded the entire land registered in the Applicant's favour by the lower Court. Further that the Appellant/ Applicant is in occupation and possession of the suit property and has developed a **Church, Residential units, Restaurant and various shops**, and in the best interest of Justice, the substratum of the Appeal should be preserved as the Appeal raises weight issues. That the Appellant/ Applicant is anxious to have the appeal heard and determined expeditiously and thus the Respondent does not stand to suffer any prejudice.

The Application is opposed and the Respondent, **Ann Wanja Kingara**, swore a Replying Affidavit on **4th March 2020**, and averred that upon the delivery of the Judgment, the Appellant/Applicant was ordered to vacate the suit premises and further execute transfer documents. That her Advocate has advised her that the Application raises no triable issues at Appeal, as the Appellant/ Applicant has annexed documents that had already been placed before the presiding Magistrate. Further that a **title deed** and **Certificate of search** does not prove that the Appellant/ Applicant is the true owner of the suit property since no proof of payment was provided.

She further averred that she had proved her case on the balance of probabilities and the Court found that the Certificate of lease issued pursuant to the Appellant's/ Applicant's occupation were invalid as it was anchored on **illegality** and she should not suffer prejudice due to the Appellant/Applicant failing to conduct due diligence. It was her contention that the Court already made a determination in her favour and she stands to suffer irreparable and substantial loss that cannot be compensated by an award of damages as the Appellant/ Applicant is still in occupation.

She urged the Court to dismiss the Application, but in the event the Application was to be allowed, the Appellant/ Applicant should be ordered to deposit **Kshs. 200,000/=** in Court until the determination of the Appeal in order to alleviate the loss she is suffering.

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

The Appellant/Applicant has sought for stay of execution of the Judgment delivered by **Hon. S. Atambo** on **3rd February 2020**, allowing the Respondent's case and therefore ordering that the Appellant/Applicant vacates the suit property and the title deed issued in favour of the Appellant be cancelled

The guiding provisions of the Law with regards to Stay of Execution are 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.**

In the case of **Civil Appeal No.107 of 2015, Masisi Mwita..Vs...Damaris Wanjiku Njeri (2016) eKLR**, the Court held that:-

"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs... Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

"The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions,namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013) as follows:-

"In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."

These twin principles go hand in hand and failure to prove one dislodges the other"

This Court will then proceed to determine whether the Appellant/Applicant herein has satisfied the required standard for grant of stay orders pending Appeal. First, the Applicant must show that he will suffer substantial loss. It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of **Canvass Manufacturers Ltd...Vs...Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**, where the Court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.

Further in the case of Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991, the Court held that:-

“For the court to order a stay of execution there must be:-

- i. Sufficient cause***
- ii. Substantial loss***
- iii. No unreasonable delay***
- iv. Security and the grant of stay is discretionary”.***

Further the Court will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. Again, the Court will take into consideration that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), where 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”.

On whether the Appellant/ Applicant will suffer substantial loss, it is not in doubt that the instant suit is currently registered in the name of the Appellant/ Applicant. The Appellant/ applicant is currently in possession of the suit property and the Respondent in her plaint had sought for vacant possession and cancellation of the title held by the Appellant/ Applicant which orders were granted by the trial Court.

The Appellant/ Applicant has appealed against the said orders that have granted the Respondent vacant possession, and have also cancelled his title. The Appellant/ Applicant is in possession and there are buildings on the suit property. Therefore the Court finds that if the stay is not granted, and the Appellant/ Applicant is evicted from the suit property, then it will have suffered substantial loss given that it is in possession and that no amount of damages will be able to compensate it. Further the Appellant/ Applicant is in possession of a **title deed** which the trial Court has ordered that it be cancelled and that the Appellant/ Applicant signs the transfer documents, failure to which the **Executive officer** should sign the said documents .

It is the Court’s considered view that if the title in favour of the Appellant/ Applicant is cancelled before the appeal is heard and determined and the same is registered in the name of the Respondent, the Respondent will be at liberty to deal with the suit property as she deems fit including but not limited to disposing of it and subdividing the same. In the event that the Appellant/ Applicant is successful in the appeal, it is Court considered view that the **Appeal** will have been rendered nugatory and the Appellant/ Applicant will definitely suffer substantial loss as apart from cancellation, the sui property might be disposed of, thus rendering the Appeal a mere academic service.

The Appellant/ Applicant must also satisfy the Court that the Appeal was brought without inordinate delay. The instant Application was filed on **10th February 2020**. The Court delivered its Judgment on **3rd February 2020**. There was no ordinate delay in filing the instant Application.

Therefore the Court finds and holds that the Application seeking for the stay execution is **merited** as the Court has already held above that the Appellant/ Applicant will suffer substantial loss and the Appeal will be rendered nugatory.

The Court is conscious of the fact that the Respondent must also be allowed to enjoy the fruits of her Judgment and balancing the same with the idea that the suit property must be preserved, the Court finds that it will be in order if the Appellant/ Applicant is ordered to pay the **Kshs. 200,000/=** as security for costs.

Having now carefully considered the instant **Notice of Motion Application** dated **10th February 2020**, the Court finds it merited and allows it entirely with costs being in cause. The Appellant/ Applicant is ordered to deposit in Court the sum of **Kshs.200,000/=** as security for costs within a period of **30 days** from the date hereof.

It is so ordered.

Dated, signed and Delivered at Thika this 3rd day of December, 2020.

L. GACHERU

JUDGE

3/12/2020

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 **15th 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. Wachira and Mr. Ndegwa for the Appellant/Applicant

Mr. Omondi holding brief for Mr. Gachie for the Respondent

L. GACHERU

JUDGE

3/12/2020