



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC APPEAL NO.53 OF 2013**

**AGNES WAHURA KAMAU.....APPELLANT/APPLICANT**

**=VERSUS=**

**PURITY MBETE .....1<sup>ST</sup> RESPONDENT**

**HILARY CHUMO.....2<sup>ND</sup>RESPONDENT**

**RULING**

1. This is ruling in respect of a Notice of Motion dated 4<sup>th</sup> October 2018 which seeks the following orders.

***1. Spent***

***2. Spent***

***3. That there be an interim stay of execution of the ruling of the Senior Resident Magistrate Court at Milimani dated 20<sup>th</sup> September, 2018 and other consequential orders thereto pending the inter parties hearing of this application.***

***4. That the costs of his application be provided for.***

2. The appellant /applicant had filed a suit at the Chief Magistrates Court Milimani Commercial Courts against two defendants who are the respondents in this appeal. The case is CMCC No.618 of 2018. The applicant contemporaneously filed an application seeking injunctive orders. The trial magistrate granted injunctive orders in favour of the applicant. The first respondent moved the court for variation of the injunctive orders granted in favour of the applicant. On 20<sup>th</sup> September 2018 the trial magistrate granted stay of the injunction on which had been granted in favour of the applicant. The trial magistrate made a further order that the rental income from the disputed property be deposited in court pending hearing and determination of the suit.

3. The dispute in the lower court relates to properties known as Nairobi Block 107/1442 and 1443 belonging to *James Maina Gathigo*. The said *James Maina Gathigo* is said to have disappeared in 2009 after allegedly being abducted by unknown people. He has never surfaced since then. The applicant and the first respondent both claim to have been married to him.

4. The trial magistrate made the order of deposit of rent from the two suit properties in court because both the applicant and the first respondent were claiming to be entitled to the same. The applicant has now moved to this court seeking stay of execution of the trial Magistrate's orders of 20<sup>th</sup> September 2018. The applicant contends that she is the one who constructed the buildings which are on the suit properties and that she has been collecting rent since 2009 and that the trial magistrates' order for rent to be deposited in court will cause her substantial loss as that is her only source of income.

5. The first respondent has opposed the applicant's application through a replying affidavit sworn on 21<sup>st</sup> November 2018. The first respondent contends that the applicant's application is frivolous and vexatious and ought to be dismissed. The first respondent states that the suit properties belonged to her husband James Maina Gathigo. In 2009 she filed HCCC No.309 of 2009 against her in-laws who were interfering with the properties of James Maina Gathigo. She was granted injunctive orders and that the applicant herein was not a party to the suit. The first respondent contends that the orders of 20<sup>th</sup> September 2018 made the disputing parties to be at the same level and that the same should not be set aside. She states that she is not benefitting from the rental income and therefore the application should not be granted.

6. I have considered the applicant's application as well as the opposition to the same by the first respondent. I have also considered the oral

submissions by the counsel for the applicant and the counsel for the first respondent. The only issue for determination herein is whether the applicant has met the threshold for grant of stay of execution.

7. In an application of this nature, the applicant is expected to meet the following conditions. First that the application is brought without undue delay, second that the applicant will suffer substantial loss should stay be rejected and third, that there is security for due performance of the decree or order as may ultimately be binding upon the applicant.

8. In the instant case, the impugned ruling was delivered on 20<sup>th</sup> September 2018. The present application was filed on 5<sup>th</sup> October 2018. I do not find this to be an unreasonable delay given the circumstances of this case. Demonstration of substantial loss is the cornerstone for grant of stay of execution pending appeal. In this case the applicant is claiming that the rental income is the one which has been assisting her and that she is the one who constructed the rental houses. According to the documents presented by the applicant, she claims to have been the one who was allocated the plots in issue. At the same time, she claims that the first respondent is claiming to be a wife of her husband who disappeared in 2009.

9. It is not yet determined who between the applicant and the first respondent was married to *James Maina Gathigo*. One or both the disputants could have been married to *James Maina Gathigo*. There is no evidence that *James Maina Gathigo* has been presumed to be dead as per the law. As early as 2009 when the said *James Maina Gathigo* was said to have disappeared, the first respondent was fighting over his properties. The applicant has stated in her documents that the first respondent was asked not to interfere with the properties of *James Maina Gathigo* until he was confirmed to have gone missing and a presumption of death made.

10. There is no evidence of any substantial loss which the applicant will suffer to warrant stay of execution of the orders of the trial court. I find that the applicant has failed to demonstrate that she will suffer substantial loss. I proceed to dismiss the application with costs to the first respondent.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 31<sup>st</sup> day of January 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Maruja for Applicant

Mr Omari for Respondent

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**