



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 3 OF 2018

STEPHEN KIHARA GITHINJI.....APPELLANT/APPLICANT

VERSUS

JACKSON MUIRURI NDUATI.....RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 20th March 2018 brought under Order 42 Rule 6, Order 43(1) (g) and Order 51 Rule 1 of the Civil Procedure Rules, and Sections 1A, 1B, 3A 63(e) and 95 of the Civil Procedure Act and all other enabling provisions of the law where the Applicant seeks for the following orders.

a. Spent.....

b. Spent.....

c. That pending the hearing and determination of this Appeal this Honourable Court be pleased to grant a stay of execution of the ex-parte Judgement and /or Decree passed on the 4th Day of July, 2017 in Engineer Principal Magistrate's Court Civil Suit No. 22 of 2017

d. That this Honourable Court be pleased to set aside both the interlocutory and ex-parte judgement and /or decree passed by the Engineer Principal Magistrate's Court in Civil Suit No. 22 of 2017 on the 4th Day of July, 2017 in

e. That the costs of this application be provided for.

2. The said application is supported by the grounds set on the face of the application as well as on the sworn affidavits of Stephen Kihara Githinji the Appellant/Applicant.

3. By consent, parties agreed to dispose of the application by way of written submissions wherein leave was granted to the Appellant/Applicant to file and serve his written submissions within 30 days wherein corresponding leave was granted to the Respondent to file and serve his written submissions within 14 days upon service with an extension of interim orders.

4. On the 18th June 2018, the Respondent filed a Notice to act in person

5. While the Appellant /Applicant filed their submissions on the 20th July 2018, the Respondents on the other hand filed theirs on the 20th August 2018.

6. I have considered the said submissions to which I will summarize the same as herein under.

Appellant/Applicant's submissions.

7. It was the Applicant's submission that the sale agreement entered into by the parties in relation to the subject suit herein was null and void ab initio for reasons that the Appellant/ Applicant had no title to pass to the Respondent as the subject suit herein was still registered in the Applicant's deceased's father's name and thus the consent from the land control Board to sub-divide the land and/or transfer the suit land was incapable of being granted.

8. That the transaction therefore did not meet the threshold as per the provisions of Section 6(1) of the Land Control Act thus specific performance could not be claimed in respect to a transaction that was null and void. The only remedy available in the circumstance was for the recovery of the consideration under Section 7 of the Land Control Act.

9. That although the matter in the subordinate court proceeded by way of formal proof, yet the Respondent was not exempted in discharging his burden of proof in regard to the issues of law and fact as was held in the decided case of **Rosaline Mary Kahumbu vs National Bank of Kenya Ltd [2014] eKLR**

10. That the trial Magistrate had misdirected herself in not considering the points of law raised by the Applicant in their application to set aside the interlocutory and ex-parte judgment, and dismissing the said application all together, thus denying the Applicant a right to be heard on merit to the points of law raised therein. They relied on the decided case in **Pithon Waweru Maina vs Thuka Mugiria [1983] eKLR** to buttress their point.

11. That they had a good and arguable defence to warrant the setting aside of the interlocutory and ex-parte judgment entered in favour of the Respondent by the trial learned Magistrate. The Applicant thus prayed for the instant application to be granted on such terms as are just.

Respondent's submission

12. While relying on his sworn affidavit dated the 18th June 2018, the Respondent's contention, based on his 'man made' submission, framed the following issues for determination:

- i. Whether the Applicant will suffer substantial loss if the orders of stay are not granted
- ii. Whether the Applicant has provided actual security for the consideration by the court so as to its sufficiency (sic).
- iii. Whether the Applicant's application was preferred timelessly.
- iv. Whether the Applicant has established sufficient cause for grant of the orders of stay of execution.

13. It was the Respondents submission based on the first issue that he had been in actual possession of the suit land since the year 2010 wherein he had made significant improvement on the same having been sold ½ acre which was to be excised out of land parcel No. Nyandarua/Mikaro/253. The suit property was however registered in the Applicant's father's name. That the Applicant therefore would not suffer any substantial loss if the orders of stay were not granted or if the Appeal succeeded because he did not intend to dispose of the suit land upon which he had settled his family. In so submitting he relied on the decided cases of **John Wangalwa & Another vs Agnes Naliaka [2012] eKLR** and **David Kihara Murage vs Jacinta Karuana Nyangi & Another [2015] eKLR**.

14. On the second issue for determination, it was the Respondent's submission that the Applicant had not furnished any security for a grant of the order for stay which was a mandatory legal requirement pursuant to the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules. Reliance was placed on the decided case of **Kenya Commercial Bank Ltd vs Sun City Properties Limited & 5 Others [2012] eKLR**. Failure to furnish security rendered the application for stay a non-starter.

15. On the third issue raised for determination, it was the Respondent's submission that in granting the Applicant's application, his right of Appeal must be balanced equally against the right of the Respondent as a successful litigant to enjoy the fruits of his judgment. That there was no sufficient cause established by the Applicant herein to warrant the taking away of the Respondent's right to the enjoyment of the fruits of the judgment that was delivered in his favour. The Respondent relied on the decided case of **Antoine Ndiaye vs African Virtue University [2015] eKLR**.

16. The Respondent thus submitted that the courts' direction in the present case did not favour the Applicant and was for this reason that the court ought to let him enjoy the fruits of the Judgment.

Analysis and Determination

17. I have considered the application, the affidavit on record, and submissions by counsel as well as the law concerning stay of execution pending Appeal under 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 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.

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

- a) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- b) The application is brought without undue delay and
- c) 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.

19. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss he will suffer if the stay order was not made in his favour.

20. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

21. In the application before me, the Applicant has not pleaded that he would suffer any and neither has he provide any evidence on the kind of irreparable loss he would suffer if the order of stay was not granted. Further it is not in dispute that the Respondent has established his home on the said suit land and no evidence has been adduced that he is desirous of disposing the same of.

22. On the second condition, upon perusal of the court record, this Court finds that the delivery of the Judgment, in the matter being appealed against, was on the 4th July 2017 wherein the Applicant applied for stay of execution in the trial court on the 13th November 2017. The said application was dismissed vide a ruling dated the 13th March 2018 upon which the Applicant filed the present application on the 20th March 2018. I find that the said application is brought without undue delay.

23. On the last condition as to provision of security, I find that the Respondent has rightly submitted that the Applicant in the present application has not furnished and/or offered any security for a grant of the order for stay which was a mandatory legal requirement pursuant to the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules.

24. Section 3A. provides as follows:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

25. Having found that two conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Appellant/Applicant and further, having regard to the above captioned provisions of the law as stipulated under Section 3A of the Civil Procedure Act, this court is not inclined to grant the order of stay of execution so sought.

i. In the circumstance, the Appellant/Applicants’ Notice of Motion dated 20th March 2018 is hereby denied and dismissed with costs to the Respondent.

ii. *The Appellant/Applicant shall lodge his Appeal against the decree of the lower Court within 14 days from this date.*

iii. *That upon filing of the memorandum of Appeal in (ii) above, the Applicant shall prepare, file and serve his record of appeal within 45 days.*

Dated and delivered at Nyahururu this 28th day of January 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE