



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 50 OF 2017

CHRISTOPHER NJERU.....PLAINTIFF

VERSUS

EUGENIO NJAGI M'CHEGE.....DEFENDANT

RULING

1. By a notice of motion dated 21st September 2018, brought under **Order 42 Rule 6 of the Civil Procedure Rules 2010, section 3A Civil Procedure Act (Cap 21) Laws of Kenya and all other enabling provisions of the law**, the Defendant sought a stay of execution of the judgement delivered on 12th July 2018 and all consequential orders pending the hearing and determination of *Nyeri Civil Appeal No. 139 of 2018* against the said judgement.

2. The said application was based upon the grounds set out on the face of the motion, the gist of which was that the Defendant might suffer irreparable loss and damage and that the pending appeal might be rendered nugatory unless a stay is granted.

3. The application was supported by an affidavit sworn by the Defendant on 19th September 2018 which expounded on the grounds set out in the motion. The Defendant contended that his appeal had high chances of success and that he would suffer irreparable loss and damage if the suit property was registered in the name of the Plaintiff.

4. The Plaintiff filed a replying affidavit sworn on 15th October 2018 in opposition to the said application. It was contended that the Defendant had failed to demonstrate what irreparable loss or damage he might suffer unless the stay was granted. It was further contended that the pending appeal had no chances of success and that the instant application was merely a delaying tactic meant to deny him the fruits of his judgement.

5. When the said application was listed for hearing on 16th October 2018, the Advocates for the parties agreed to canvass it through written submissions. The record shows that the Defendant filed his submissions on 26th October 2018 but there is no indication of the Plaintiff having filed any.

6. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the submissions on record. The main question for consideration is whether or not the Defendant has satisfied the conditions for the grant of the order of stay sought.

7. The provisions of **Order 42 Rule (2) of the Civil Procedure Rules** provide as follows;

(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) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(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.

8. Although the Defendant has not explained in his application and a supporting affidavit what kind of substantial loss he may suffer, his advocate has submitted that there is a danger of the suit property being alienated before the appeal is heard and concluded thereby rendering the appeal nugatory.

9. The Plaintiff was not given an opportunity to respond to the Defendant's said apprehension through an affidavit. That issue only arose through the written submissions from the Defendant's advocate. It was not made clear if the Defendant would be content with an order of inhibition being registered against the suit property immediately upon the registration of the Plaintiff as proprietor so as to prevent further dealings or transactions with the suit property. The Defendant did not address the risk of disposal of the suit property by him pending the hearing and determination of the pending appeal.

10. The court is of the opinion that there is a possibility of substantial loss if the suit property is alienated before the conclusion of the pending appeal. The court is further of the view that such substantial loss may render the pending appeal nugatory. The court shall, therefore, make the following orders in order to safeguard the suit property pending the hearing and determination of the intended appeal;

a. A stay of execution of the judgement dated 12th July 2018 is hereby granted for a period of 3 years on condition that the Defendant shall deposit the original title documents for the suit property in court within 15 days from the date hereof.

b. An order of inhibition is hereby issued to prevent the registration of any transactions with respect to *Title No. Gatari/Nembure/3685* pending the conclusion of *Nyeri Civil Appeal No. 139 of 2018*.

c. Costs of the application shall abide the result of the pending appeal.

11. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of FEBRUARY, 2019.

In the presence of Ms. Ndorongo for the Plaintiff and Mr. Morris Njage holding for Mr. Muthoni for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

07.02.19