



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 151 OF 2014

(FORMERLY KERUGOYA E.L.C. NO. 647 OF 2013)

LAURENZIA WANJUKI.....1ST PLAINTIFF

FLORENCE WANJA MWANIKI.....2ND PLAINTIFF

VIRGINIA RWAMBA NJOKA.....3RD PLAINTIFF

VERSUS

ELIAS MUGENDI NJERU

CATHERINE MARIGU MWANIKI (Sued as the legal representatives

of the estate of SIMEON NJERU DIFATHA – Deceased)....DEFENDANTS

RULING

1. By a notice of motion dated 25th November 2018 brought under **sections 3A, 1B, 3A & 63(e) of the Civil Procedure Act (Cap 21), Order 42 Rule 6 and Order 51 Rule 10 of the Civil Procedure Rules** (hereinafter *the Rules*) and **all other enabling provisions of the law**, the Plaintiffs sought an order for stay of execution of the judgment delivered by this court on 22nd November 2018 pending the hearing and determination of an intended appeal to the Court of Appeal.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Plaintiffs were aggrieved by the said judgment and hence intended to challenge it before the Court of Appeal. It was further contended that unless a stay was granted the Plaintiffs might suffer substantial loss if they are evicted from the suit property. They also contended that the intended appeal, if successful, might be rendered nugatory in the absence of a stay. The said application was supported by an affidavit jointly sworn by the 3 Plaintiffs on 25th November 2018. The said affidavit simply reiterated and expounded upon the grounds set out in the motion in support of the application.

3. The Defendants opposed the said application by filing grounds of opposition dated 14th December 2018 which contained general grounds for opposing such application. It was contended that the application was bad in law, *mala fides* and an abuse of the court process. It was also contended that the Plaintiffs had not demonstrated that they would suffer any substantial loss and that they had not provided any security for due performance of the decree.

4. The Defendants also filed a replying affidavit sworn jointly on 14th December 2018 in opposition to the said application. The Defendants reiterated the points set out in their grounds of opposition and stated that the Plaintiffs had not demonstrated that the intended appeal was arguable with overwhelming chances of success. It was contended that the application was brought in bad faith merely to frustrate the Defendants from enjoying the fruits of the judgment. They urged the court to dismiss the application with costs.

5. When the said application was listed for hearing on 17th December 2018, the 1st Plaintiff prosecuted it orally on behalf of the Plaintiffs. She prosecuted it on the basis of the grounds set out in their motion and the supporting affidavit. The Defendant's advocate, on the other hand, opposed the said application on the basis of the grounds of opposition and the replying affidavit.

6. The court has considered the Plaintiffs' said application, the Defendant's grounds of opposition and replying affidavit and the oral submissions made by the parties. The main question for determination herein is whether the Plaintiffs have made out a case for the grant of an order for stay under the law.

7. Order 42 Rule 6(2) of the Rules stipulates 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.

8. The Plaintiffs are, therefore, required to demonstrate the risk of substantial loss; expeditious filing of the application; and the provision of security for due performance of the decree where applicable. There is no doubt that the application for stay was filed without undue delay. The judgement was delivered on 22nd November 2018 and the application dated 25th November 2016 was filed on 26th November 2018. The court finds that no security is required from the Plaintiffs for due performance of the decree. They are not the current registered proprietors of the suit property. They, or at least some of them, are in occupation thereof. There is no risk that they can alienate or deal with the suit property so as to make it unavailable upon conclusion of the intended appeal. The suit property is still registered in the name of the Defendant's late father.

9. The court has considered the question of substantial loss in this matter. There is no doubt that at least the 1st Plaintiff is in possession of the suit property and has been in possession for a considerable period of time. The Defendants have never been in possession. The court is reasonably satisfied that the Plaintiffs may suffer substantial loss if they were to be evicted before the intended appeal is heard and concluded. The Plaintiffs are entitled to exercise their right of appeal to the Court of Appeal without the risk of such appeal being rendered nugatory, if successful. It is now legally recognized that such eventuality may constitute substantial loss within the meaning of **Order 42 Rule 6 of the Rules**. The Plaintiffs do not have to demonstrate that they have an arguable appeal with overwhelming chances of success as was argued by the Defendants.

10. The upshot of the foregoing is that the court finds merit in the Plaintiffs' notice of motion dated 25th November 2018. Accordingly, the court makes the following orders;

a. There shall be a stay of execution of the decree pending the hearing and determination of the intended appeal or for a period of two (2) years from the date hereof, whichever comes first.

b. The Deputy Registrar shall supply the Plaintiffs with copies of the proceedings for purposes of appeal within 45 days from the date hereof.

c. Costs of the application shall be costs in the intended appeal.

11. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 13TH day of MARCH 2019.

In the presence of the 1st Plaintiff in person and Ms. Kiai holding brief for Mr. Kathungu for the Defendants and in the absence of the 2nd and 3rd plaintiffs.

Court clerk: Muinde

Y.M. ANGIMA

JUDGE

13/3/2019