



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ELCA CASE NO. 6 OF 2019**

**ESTHER WAMAHIGA NDUNGU alias**

**ESTHER WAMAHIGA KIMUNYE**

***(substituted for NDUNGU MATHENGE***

***who herself was substituted***

**by GEORGE KAMAU NDUNGU).....1<sup>ST</sup> APPELLANT**

**MUTHEE MURAGE.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**STEPHENE KURIA KIENJE.....1<sup>ST</sup> RESPONDENT**

**NJENGA KIENJE.....2<sup>ND</sup> RESPONDENT**

**PHILIP MICHAEL KARANJA.....3<sup>RD</sup> RESPONDENT**

**JOHN MBURU KIENJE.....4<sup>TH</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, NYERI.....5<sup>TH</sup> RESPONDENT**

**THE DISTRICT SURVEYOR.....6<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY, NYERI.....7<sup>TH</sup> RESPONDENT**

**RULING**

1. The appellants George Kamau Ndungu and Muthee Murage (hereinafter referred to as the applicants) brought the notice of motion dated **4<sup>th</sup> February, 2019** seeking among other orders, stay of execution of the judgment delivered on 19<sup>th</sup> December, 2018 by Honourable W. Kagendo, Chief Magistrate in Nyeri CMCC No. 430 of 2006. They also prayed that the 1<sup>st</sup> and 4<sup>th</sup> respondents be restrained from cutting down trees within Nyeri/Endarasha/415, 416 and 507 pending the hearing and determination of the application and the appeal herein.
2. The application is premised on the grounds that the applicants have appealed against the decision of the lower court and if the orders sought are granted, no party shall suffer any prejudice.
3. In support of the application, George Kamau Ndungu filed the affidavit he swore on 4<sup>th</sup> February, 2019. In that affidavit, the applicant has reiterated the grounds on the face of the application. In addition, he has deponed that the 1<sup>st</sup> and 4<sup>th</sup> respondents in purported execution of the judgment have started cutting down trees in the suit parcels and resurveying the land.
4. He has annexed the following documents to prove the averments contained therein;
  - (a) A copy of the judgment appealed from marked GKN1.

(b) A copy of the Memorandum of Appeal filed in this appeal, marked EWN2.

(c) Photographs showing felled trees, marked EWN3.

5. In opposition to the application, the 4<sup>th</sup> respondent on his behalf and on behalf of the 1<sup>st</sup> – 3<sup>rd</sup> respondents, filed a replying affidavit sworn on 7<sup>th</sup> March, 2019 where he contends that the applicants have not shown what loss or substantial loss (if any) they stand to suffer if the orders sought are denied; that the applicants have not satisfied the conditions for grant of the orders sought. It is his contention that he did not cut down trees on Nyeri/Endarasha 415 and 416 but only cut the trees he planted in parcel No. 507 with authority from the area chief and Kenya Forest Service.

6. In support of his averments he has annexed;

(a) A copy of the area map for Endashara Settlements scheme, marked JMK1.

(b) A cash receipt of Kshs.30/= from Forest Department marked JMK 2.

(c) An application for authority to fell trees (not marked)

(d) Letters by the Assistant Chief, Charity Sub-location dated 21<sup>st</sup> December, 2018 and 12<sup>th</sup> January, 2019 ( not marked).

(e) A letter by the Assistant Chief Endaracha Sub-location dated 28<sup>th</sup> February, 2019 addressed to the Subcounty Forest Officer Kieni West (not marked).

(f) A certificate of origin for farm forest produce from Kenya Forest Service dated 1<sup>st</sup> March, 2019 (not marked)

7. Terming the application to be intended to mislead the court and delay the delivery of justice, the 4<sup>th</sup> respondent urges the court to dismiss it.

8. The relief of stay of execution pending appeal is governed by **Order 42 Rule 6** of the Civil Procedure Rules. In determining an application for stay pending appeal, a court should be guided by the three prerequisites provided under **Order 42 Rule 6** of the Civil Procedure Rules. These are:-

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;

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.

**Has the applicant herein satisfied the above requirements?**

9. Starting with the requirement that the application must be brought without unreasonable delay, the instant application was filed within two months after the judgment appealed from was delivered. Although the filing of the application was not done immediately, two months delay cannot be said to be unreasonable delay in bringing the application.

10. On whether substantial loss may result to the applicants unless stay of execution is ordered, I begin by pointing out that this test is the Cornerstone of the jurisdiction of the superior Courts in granting stay of execution. In this regard, see the case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** where the Court of Appeal stated that:

***“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay”.***

11. A similar position was taken in the case of **Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto** where it was held that:

***“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”***

12. In applying the above principles to the circumstances of this case the applicants have averred that the 1st and 4th respondents are felling down trees in parcel Nos. Nyeri/ Endarasha/415, 416 and 507. They have annexed photographs showing felled trees. The 4th respondent has admitted that he cut trees in Nyeri/ Endarasha/501 but denies cutting down trees in Nyeri/Endarasha/415 and 416. He has annexed documents showing he was given authority by Kenya Forest Service to cut 10 Greaveria Robusta trees and 4 Eucalyptus trees in land parcel No. 507 (see JMK1 and JMK2). These averments have not been controverted by the applicants. The photographs marked EWN3 show cut trees but do not show from which parcel of land the trees have been cut. The applicants have not demonstrated how the cutting of trees in parcel

No. 507 will cause them to suffer substantial loss. The applicants are under a legal obligation to, by way of evidence, prove that they indeed stand to suffer substantial loss. It has been held, in many cases, that the mere fact that the subject matter of the appeal is land is not proof that the applicant will suffer substantial loss.

13. On the issue of security, I note that the applicants have expressed willingness to abide by any conditions the court will impose for granting stay order although they have not specifically stated that they are willing to furnish security for due performance of such decree as may ultimately issue against them.

14. Having found that the applicants have failed to demonstrate what substantial loss, if any, they stand to suffer if stay of execution is not granted, I decline to grant the order of stay sought and to restrain the 1<sup>st</sup> and 4<sup>th</sup> respondents from cutting down trees in parcel No. Nyeri/Endarasha 507. Consequently, I dismiss the application with costs to the 1<sup>st</sup> – 4<sup>th</sup> plaintiffs/respondents.

Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 29th day of April, 2019.**

**L N WAITHAKA**

**JUDGE**

Coram:

N/A for the applicant

N/A for the respondents

Court assistant - Esther