



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. 54 OF 2004**

**JOSEPH M'ITONGA.....PLAINTIFF/RESPONDENT**

**VS**

**M'NKUMBUKU M'KIRIGIA.....DEFENDANT/APPLICANT**

**RULING**

1. By a Notice of Motion dated 28.08.2018 the Applicant lodged an application by certificate of urgency filed on same day seeking the following orders; -

a. Spent.

b. That the Court hereby be pleased to stay execution of decree herein in H.C.C. No.54/2004 Environment and Land Court pending hearing and determination of this application and pending hearing and determination of the intended appeal.

c. The Court do make any other orders it deems just to grant

d. Costs of this application be provided for

2. The grounds for the application are as follows; -

a. The Applicant is aggrieved by orders made in ELC No.54.2004 and has filed a notice of appeal with intention to file an appeal to the Court of appeal which the Applicant is preparing to file in due course.

b. If stay is not granted the Applicant and his family stand to lose over 4 acres of land where he and his nine sons have built their homes, done extensive developments and have occupied the said land all their lives.

c. The Respondent shall not suffer any prejudice or loss since the position he has been occupying is not affected by the decree and will have continued access to it.

d. The intended appeal has very high chances of success and if stay is not granted the appeal shall be rendered nugatory.

3. The application was supported by the affidavit of Applicant who deposes that he is the registered owner to the suit land which measures approximately 11.98. That both parties to the suit have their parcels well demarcated and separated by a fence and each party has made developments thereon and enjoy quiet possession. That the Respondent filed suit claiming ½ share of the entire suit land to which the Appellant filed a counterclaim which was dismissed as per the judgment delivered on 28/6/2018. That he has since filed a notice of appeal against the said judgment to the Court of appeal and he believes the appeal has great chances of success. He is apprehensive that if the decree is executed he and his family will suffer irreparable loss as they have built permanent houses thereon and planted indigenous trees and other vegetation which may not be compensated in monetary terms. He is of the opinion that the Respondent will not suffer any loss if the application is allowed as he still has access to his portion of land. He prays for stay of execution and claims that the suit land was obtained solely from his efforts.

4. The Respondent through his replying affidavit opposed the application stating that the Applicant would not suffer irreparable loss because the Appellant and his family are already in occupation of half share of the suit land whilst the Respondent is in occupation of half share. He claims that the concluded suit was mainly to ensure that the Appellant's title is cancelled and a title to the half share of the suit land be issued to the Respondent in line with the already established mode of user, occupation and possession of the suit land. He explains

that the suit land is family land that was registered in the Appellant's name who is his brother to hold in trust for him but the brother (applicant) has adamantly refused to part with the half share he held in trust. He claims that survey was already done and the suit land divided in 4.4 acres for each party accordingly since 2001 and each party has been in occupation of the half share therefore the alleged 2 acres is a fallacy from the Appellant.

5. In addition, he stated that this Court extensively heard the testimony of 10 witnesses before arriving at the judgement in his favour and avers that further delay in execution of that judgement will be holding the respondents in limbo and denying him the rights he deserves in respect to proprietorship of his rightful share of the suit land. He avers that costs of cancellation of title can be adequately be compensated through monetary terms. He claims that the application is a tactic to delay the enjoyment of his legally obtained judgement.

6. In the supplementary affidavit the Appellant denies that the suit land was family land and claims it was his own which he gave to his family because they had no land. He denies that survey was done on the land and that the Respondent is not in occupation of half share. That the transfer of title will occasion great loss to the Applicant that cannot be compensated in monetary terms. That he has a right to appeal under Order 42 rule 6 and has annexed a memorandum of appeal dated 5/9/2018.

7. Parties were directed to file written submission however none were filed by the time of this ruling. That notwithstanding the Court will proceed to determine the application.

8. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

9. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

a) The application was brought without delay;

b) Substantial loss may result to the Applicant unless the stay is granted; and

c) Security for the due performance of the order or decree has been provided.

9. Going by the record the judgment complained of was delivered on the 28/6/18. The application for stay was filed on 28/8/18. The application was filed within 60 days after the judgment. The Court finds and holds that in the circumstances of this case there is no delay in bringing this application. It was filed timeously. Ground No a) succeeds.

10. Regarding the issue of substantial loss that is likely to be suffered by the Applicant, the Court pronounced itself in the case of **James Wangalwa & Anor. Vs Agnes Naliaka Cheseto 2012 (eKLR)**, thus:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been

sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process...The Applicant must establish other factors which show that the essential core of the Application as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni [2002] KLR 867** the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

12. The case of **Absalom Dora vs. Turbo Transporters 2013 eKLR** the Court hold as follows:-

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.”

13. In this case the Applicant has urged the Court that he is the registered owner of the suit land. He averred that the Respondent is currently occupying 2 acres of the suit land and if the stay orders are not granted the land might be subdivided and 50% of the suit land transferred to Respondent by the time the appeal is concluded thus rendering his appeal nugatory. In the case of **John Gacunja Njoroge –Vs – Joseph Njoroge Nyeri ELC No. 5/15** the Court noted that substantial loss has to be proved failure to which the Applicant will not succeed .This position was also upheld in **Teresiah Wairimu –Vs- Wanjiku Mwangi Thika ELC 9/17** where the Respondent was in possession and the Appellant /Applicant failed to demonstrate that there was substantial loss. In both cases the applicants did not succeed since the Plaintiff /Respondent was in possession.

14. The Court notes that the existence of an appeal is not an automatic right to stay and the Applicant must satisfy the Court that stay is merited. In this case, the Applicant has persuaded the Court that if execution is conducted in pursuance to the decree, then his appeal will be rendered nugatory. It is to be noted that the Applicant has not demonstrated substantial loss in this case.

15. That notwithstanding, in considering an application for stay of execution, the Court will be guided by the provisions of the law, judicious application of discretion in the delicate balancing act of two competing rights as noted by the Court in **John Gacunja Njoroge –Vs – Joseph Njoroge** (supra). Also see **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR**; **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR**; and **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** where the Court set out thus

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal”

16. As regards security of costs, order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the applicant. This is to ensure that the discretion bestowed on the Court is not fettered. In this case the Applicant has not shown any willingness to pay security for the due performance of the decree or order. The security required by the provisions of the rules is not necessarily the value of the subject matter. It is to secure the due performance of the decree such as costs of the suit. This being a decree for the transfer of land and exercising my discretion, I find and hold that the sum of Kshs. 60,000/- is sufficient security.

17. The upshot is that the Notice of Motion dated 28/8/18 is allowed on conditional stay in the following terms;

- a. The stay of execution is granted provided that the appeal is filed within 45 days from the date of this ruling.
- b. The Applicant to provide security for the due performance of the decree in the sum of Kshs. 60,000/- (Sixty Thousand only) within 15 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both Advocates of the parties or a bank guarantee of a similar amount.
- c. If the Appellant fails to comply with a) and b) the stay lapses and the Application stands dismissed.
- d. Costs of the application in the cause.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MERU THIS DAY OF 8<sup>TH</sup> DAY OF APRIL, 2019.**

**J. G. KEMEI**

**JUDGE**

**In the presence of;**

C/A Mutwiri

Maheli holding brief for Ms. Mutinda for Plaintiff/Respondent

Ms. Gachango for Defendant/Applicant