



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 09 OF 2018

GRACE CIANJOKA NTHIGAI.....APPELLANT

VERSUS

IDER KEERUA.....1ST RESPONDENT

JOSELINE MWIMBI.....2ND RESPONDENT

HARRIET KANINI.....3RD RESPONDENT

RULING

1. This application is dated **18th December, 2018** and seeks orders:

1. That this application be certified urgent and service be dispensed with in the first instance and the court be pleased to grant prayer 2 herein.
2. That pending the hearing and determination of this appeal, this court be pleased to grant stay of execution of the judgment and decree of the Chief Magistrate Court Chuka Civil Suit No. 124 of 2016 issued on 21st November, 2018.
3. The cost of this application be provided for.

2. The application has the following grounds:

1. That judgment in the lower court was delivered on 21st November, 2018.
2. That the respondents are now bent on subdividing and executing the court orders of 21st November, 2018.
3. That the applicant is apprehensive that the respondents may engage services of a surveyor anytime thereby subdividing the suit land LR; Karingani/Mugirirwa/3423.
4. That if stay is not granted the applicant is bound to suffer loss and damages for her developments on the suit land will be demolished and destroyed.
5. That the applicant is apprehensive that the one acre that the plaintiff/respondents were awarded by the court may be curved from the applicant's parcel of land LR; Karingani/Mugirirwa/3423.
6. That the applicant stands to suffer immense loss and ought to be rendered landless and destitute for she will be left with a very small piece of land.
7. That the applicant holds LR; Karingani/Mugirirwa/3423 absolutely and does not hold the same in trust for anybody.
8. That the orders sought are the best and most apt in the circumstances.
9. That no party stands to suffer any prejudice in the event the orders sought are granted for they will meet the ends of justice.

3. The application is supported by the affidavit of Grace Cianjoka Nthiga sworn on **18th December, 2018** which states:

I, GRACE CIANJOKA NTHIGA a resident of Chuka in Tharaka Nithi County and of Post Box Number 52-60400 Chuka hereby make oath and swear as follows:

1. That I am an adult female of sound mind hence competent to swear this affidavit.
 2. That I am the registered owner of the property known as L.R. No. Karingani/Mugirirwa/3423.
 3. That judgment in this suit was delivered on 21st November, 2018.
 4. That the respondents are now bent on subdividing and executing the court orders of 21st November, 2018.
 5. That I was condemned unheard which is an affront to the principles of natural justice that a person should not be condemned unheard.
 6. That I am apprehensive that the respondent may engage services of a surveyor anytime thereby subdividing the land.
 7. That if stay is not granted I am bound to suffer loss and damages for her developments on the suit land will be demolished and destroyed.
 8. That I am apprehensive that the one acre that the plaintiffs/respondents were awarded by the court may be curved from the applicant's parcel of land LR; Karingani/Mugirirwa/3423.
 9. That I stand to suffer immense loss and to be rendered landless and destitute for I will be left with a very small piece of land.
 10. That I hold LR; Karingani/Mugirirwa/3423 absolutely and does not hold the same in trust for anybody.
 11. That the orders sought are the best and most apt in the circumstances.
 12. That no party stands to suffer any prejudice in the event the orders sought are granted for they will meet the ends of justice.
 13. That what I have deponed to herein above is true to the best of my knowledge save to information sources whereof have been disclosed and matters deponed to on belief the grounds whereupon have been given.
4. The application was canvassed by way of written submissions.
5. The applicant's written submissions dated **8th April, 2019** are reproduced in full herebelow in exactly the way they were filed by way of a soft copy. Any spelling or other mistakes, if they exist, are ascribable to the applicant's advocate.

APPLICANT'S WRITTEN SUBMISSIONS IN SUPPORT OF THE APPLICATION DATED 18TH DECEMBER 2018

May it please you my Lord, before you is an application for stay of execution of the judgement and decree in Chief Magistrate Court Chuka Civil suit 124/2016 pending the hearing and determination of the appeal before this honourable court.

My Lord, the main issue for determination before this honourable court is:-

- **Whether the stay pending appeal is merited?**

The principles that guide court in determining whether an application for stay pending appeal is merited, are well set out **Order 42 Rule 6 (2) of the Civil Procedure Rules**.

Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the Court that:-

- **Substantial loss may result to him/her unless the order is made;**
- **That the Application has been made without unreasonable delay; and**
- **The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.**

The **Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion in an application for stay of execution pending appeal and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that

an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion."

My Lord, the applicant's prayer for stay of execution is premised on the grounds that inter alia; that the intended appeal has high chances of success, the appeal if successful will be rendered nugatory and substantial loss will be suffered if the execution is not stayed pending the appeal as the respondents are hell bent on subdividing and selling the suit land to the detriment of the applicant.

The applicant in her present application and supporting affidavit has demonstrated to this court that through a succession cause No.86 of 1988 at Embu, she received her share of her deceased's husband estate in KARINGANI/MUGIRIRWA/3423 to hold absolutely and not hold in trust for anyone. The applicant has attached in her further supporting affidavit, a certificate of confirmed grant to prove the same.

It would thus occasion her great injustice and suffering if her right of an absolute proprietor in Land is not protected and her land taken away from her.

Further my Lord, this application was made on time, the applicant has deposited in court security for costs and the Respondents shall not suffer any prejudice if the application is allowed.

It is our submission that in an application for stay of execution pending appeal, the court is concerned with preserving the rights of both parties pending the appeal. It is the duty of this honourable court to hold the ring even-handedly without prejudicing the issue pending the appeal.

It is in the interest of justice that the application be allowed.

We so pray my Lord.

DATED AT CHUKA THIS 8th DAY OF April, 2019

MUTHOMI GITARI & CO

ADVOCATES FOR THE APPLICANT

6. The respondent's written submissions are reproduced in full herebelow in exactly the way they were filed by way of a soft copy. Any spelling or other mistakes, if they exist, are ascribable to the respondents' advocates.

RESPONDENTS' WRITTEN SUBMISSIONS ON THE NOTICE OF MOTION DATED 18TH DECEMBER, 2018

YOUR LORDSHIP,

1. The Appellant filed the Notice of Motion dated 18th December, 2018 seeking the orders on the face of the said Notice of motion.

2. On 3rd April 2019, the 1st Respondent on her own behalf and on behalf of the 2nd and 3rd Respondent filed a replying affidavit sworn of even date.

3. The Appellant filed a further affidavit to supplement the one filed together with the said Notice of motion.

4. We invite the Court to peruse the proceedings in the lower Court but not limited to the Affidavit of service.

5. **ISSUES**

a) Whether the judgment delivered on 21st November, 2018 was sound and well-reasoned?

b) Whether or not the Notice of motion and appeal is meritorious?

6. **Resolving issues**

Whether the judgment delivered on 21st November, 2018 was sound and well-reasoned?

7. We submit that the judgment delivered on 21st November, 2018 was sound, well-reasoned anchored on the principles of natural justice and equality and should be upheld by this Court.
8. The Honourable Magistrate had a chance to see, hear and determine the evidence of the witnesses at the trial.
9. The Appellant cannot plead ignorance of her own cause for failure to participate in the proceedings despite being served with hearing Notices and affidavit of service are on record.
10. The Appellant filed statement of defence but she did not attend hearing to adduce evidence. That averments in pleadings are not evidence. *In the case of **Francis Otile Versus Uganda HCCS No.210 of 1989**, it was held that court cannot be guided by pleadings since pleadings are not evidence and nor can they be a substitute therefore.*
11. It's our submissions that Respondents' case stood unchallenged at the lower court and thus the statement of defence was unsubstantiated. And the lower court delivered ruling based on evidence adduced at the trial.

12. Whether or not the Notice of motion and appeal is meritorious? The Answer is 'NO'

13. We submit the Appellant has not exhausted all the avenues before filing the Appeal. The Appellant failed to invoke Order 10 Rule 11 of the Civil Procedure Rules to set aside the said Judgment and if she was not served Order 16 Rule 5 of the said Rules provide for cross-examination of the process server.
14. It is our humble submission that Order 10 Rule 11 of the Civil Procedure Rules 2010 and order 16 Rule 5 Of the Civil Procedure Rules would have provided the Appellant an avenue to ventilate her issues without the instant appeal.
15. It is our submission that Article 50 of the Constitution provides for fair trial however, this does not apply were the Appellant was served and failed to attend Court. The indolence of the Appellant should not be entertained when she waived her right to adduce evidence during the hearing.
16. It is our submissions that the Court can only interfere with the Lower Court in the exercise of its judicial discretion if satisfied that

i. *The Judge misdirected himself on law or,*

ii. *That he misapprehended the facts,*

iii. *Or that he took into account considerations of which he should not have.*

iv. *Or that his decision albeit a discretionary one, was plain ruling-see **Mbogo & Anor versus Shah (1968) EA 93, Mrao Ltd –Versus First American Bank of Kenya LTD & 2 others (2003) eKLR.***

17. We submit that the Honourable Magistrate applied the law and facts as adduced during the hearing.
18. The Appellant being the mother of the Respondent has a duty to provide shelter to her daughters and a place they can call home. The Respondents and the Appellant are both daughters and widow of the late M'Nthigai Kianya respectively.
19. It is our humble submissions that the Notice of Motion and appeal has no merits and should be dismissed with costs.
20. That's all.

DATED at NAIROBI this 24th day of April, 2019

DRAWN & FILED BY:

MURIMI MURANGO & ASSOCIATES - ADVOCATES,

7. The authorities the parties have proffered to buttress their assertions have been elaborated upon and the principles involved enunciated in their written submissions. There is, therefore, no need to regurgitate them.
8. I have considered the pleadings, the submissions and the authorities proffered by the applicant and the respondents in support of their diametrically opposed assertions.
9. I find that the application has raised triable issues. I also note that the applicant has deposited security with court.
10. In the circumstances,

- i) Prayer 2 in the application is granted and a stay of execution is granted pending hearing and determination of the intended appeal.
- ii) The deposit for security deposited with court should be held by the court until finalization or dismissal of the intended appeal.
- iii) The applicant is ordered to file a record of appeal within 14 days after delivery of this ruling failing which the court may deem the intended appeal inadmissible.
- iv) The record of appeal should be served upon the respondents within 14 days after delivery of this ruling.
- v) Parties will come to court for directions on **12th June, 2019**.

11. Costs shall be in the cause.

12. It is so ordered.

Delivered in open Court at Chuka this 22nd day of May, 2019

in the presence of:

CA: Ndegwa

Muthomi present for Appellant

Murimi Murango for the Respondent

P.M. NJORGE

JUDGE