



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CIVL APPEAL NO.12 OF 2017

PETER MAGOTHE KIIGE.....APPELLANT/APPLICANT

VERSUS

PATRICK WAWERU MWANGI.....1ST RESPONDENT

LUCY NUNGARI WAWERU.....2ND RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated 25th July 2017, brought by the Applicant herein under **Order 42 Rule 6, Order 50 Rule 1** of the **Civil Procedure Rules, Sections 1A, 1B and 3A** of the **Civil Procedure Code, Cap 21 Laws of Kenya** and all other enabling provisions of law , wherein the Applicant has sought for the following prayers:-

- 1) Pending the hearing and determination of this Appeal there be a stay of execution of the Githunguri Principal Magistrates Court Order dated 29th June 2017, in Githunguri SPMCC No.39 of 2017.***
- 2) Pending the hearing and determination of this Appeal the Respondents be restrained in anyway from conducting excavation work, digging, roads, trenches, fencing off, kirting rock and soil on the property known as Ikinu/Githunguri/3860***
- 3) The costs of this Application be in the cause.***

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of ***Peter Magothe Kiige***. These grounds are:-

- a) The parties herein neighbor each other in the suit land and there has been no Contract between the parties in terms of Section 3(3) of the Law of contract for the sale of the suit land.***
- b) The appellant had provided an access road to the respondents who however for their own reasons decided to add another access road to the Appellant's portion of land and are digging and excavating road and soil, building roads and generally interfering with the Appellant's parcel of land.***
- c) In the suit subject of this appeal namely Githunguri SPMCC No. 39 of 2017, the Respondents were granted the impugned orders herein where the court failed to take cognizance of the fact that there were two roads in contention and thereby erred by giving the Respondents 'carte blanche' powers which they are now using to oppressively encroach onto the appellants portion of land.***
- d) The Respondents in defiance of the lower courts orders have unilaterally chosen to do whatever they wish on the Appellant's land this as a result of the imprecise orders issued by the said court.***
- e) The Magistrate failed to find that the Respondents had an alternative access road to the suit premises and they have now taken liberty to encroach onto the Appellants land using the impugned orders. In the said impugned orders the appellant was ordered to remove any barriers erected on the access road but the Respondents have cunningly chosen to use this order to oppressively enter and destroy the appellants land hence an order of stay and injunction is necessary to prevent waste and destruction of the appellants land.***

The Applicant in his *Supporting Affidavit* averred that he was the Defendant in ***Githunguri SPMCC No.39 of 2017***, and that the dispute emanates from the use and enjoyment of an access road with his property being the suit property. He averred that he offered to sell to the Respondents a ***quarter acre*** of land within the suit premises which they took possession of on payment of ***Kshs.1 million*** deposit and that he also provided them with an access road to the said premises. He further averred that the Respondents were accessing the suit premises

through their adjacent property that hosts the *St Teresa School*. He further averred that the access road the Respondents are seeking to use leads to 2 parcels which he desires to sell and that the Learned Magistrate in *Githunguri SPMCC No.39 of 2017* ignored that the Respondents had another access road and instead found the access road to be the one that leads to the two parcels of land that he desires to sell and after the orders were made, the Respondents have now encroached onto his property and are destroying and wasting his land as evidenced by *annexure B*. He urged the court to issue a stay and injunction orders.

The Application is opposed and the Respondents through the first Respondent and with the authority of the 2nd Respondent filed a *Replying Affidavit* and averred that they entered into a *Sale Agreement* with the Appellant for purchase of a $\frac{1}{4}$ acre of land at *Kshs.2 million*, to be hived off from the suit property and upon payment of the deposit, they took possession of the property and developed it. It was his contention that the agreement allowed them to utilize and access the said portion of land after paying 1 million deposit and that the appellant as to provide access road of *six metres* to them. He further averred that they paid the appellant the full purchase price and having taken possession, upon payment of the full amount. He further averred that the Appellant blocked their access road necessitating them to file a Civil suit at *Githunguri Senior Principal Magistrates Court* and the court made a finding that the Appellant be restrained from blocking the access road and to remove the barriers erected on the access road. It was his contention that the appellant failed to adhere by the *Court Order*, even after being served and that necessitated them to seek assistance of the Police and the said access was cleared. He further averred that the Application is overtaken by events and the court was urged to dismiss the Appellant's application.

The Application was dispensed with via written submissions and the Applicant/Appellant through the *Law Firm of Macharia Kahonge & Co. Advocates* filed their submissions on *10th November 2017*. It was submitted that the Appellant has made out a case to warrant the orders sought. It was submitted that the non-compliance with the requirement of seeking the *Land Control Board Consent* rendered the Contract between the parties *voidable abinitio*. It was further submitted that the balance of convenience tilts in favour of granting Stay. The Court was urged to allow the Application.

The Respondents through the *Law Firm of Gikenye Mugo & Rienye & Co. Advocates*, filed their submissions on the *14th February 2018*, and submitted that the Applicant came to court with dirty hands and the interim orders were granted through material non-disclosure and misrepresentation of facts. It was further submitted that the Application seeks *Stay* and does not seek to analyze the merits or demerits of Appeal and/or Judgment of the Lower Court. The Respondent relied on various decided cases and submitted that the Applicant has not established a prima facie case with probability of success and the Court was urged to decline to grant the orders sought.

The Court has now carefully considered the instant *Notice of Motion* application which is brought under *Order 42 Rule 6(2)* and *Sections 1A, 1B and 3A* of the *Civil Procedure Act Order 42 Rule 6 (2)* of the *Civil Procedure Act* provides:-

“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.

It is evident that the Applicant has sought for *Stay of Execution* of the *Orders* issued by *Senior Principle Magistrate's Court, Githunguri* on *29th June 2017*.

The said *Orders* were to the effect that the *“Defendant thereon (who is the Appellant/Applicant herein) be restrained from building, constructing or erecting a fence or denying the Plaintiffs access road serving the rear end of $\frac{1}{4}$ of an acre in all property known as Ikinu/Githunguri/3860 pending the determination of the suit.* Further, the *Defendant who is the Appellant herein do remove the barriers, fence and gate erected on the road of access of $\frac{1}{4}$ an acre in land parcel No.Ikinu/Githunguri/3860 pending the hearing of the suit. The OCS Githunguri was to enforce the said Orders”.*

The Appellant was aggrieved by the above stated Orders and has come to court seeking *Stay* of the said Orders pending the hearing and determination of the Appeal.

There is no doubt that the Appellant and the Respondents were involved in a Sale and purchase of $\frac{1}{4}$ acre of land from land parcel *No.Ikinu/Githunguri/3860*. The said parcel of land is owned by the Appellant herein. The purchase price was *Kshs.2,000,000/=* and it was alleged after the Plaintiffs who are Respondents herein, deposited *Kshs.1,000,000/=*, and were granted access to the said parcel of land.

However, a dispute arose wherein the Plaintiffs (who are Respondents herein) alleged that the Defendant (who is the Appellant herein) completely failed and/or neglected to transfer the $\frac{1}{4}$ acre of land to the Plaintiffs (Respondents herein). The Respondents filed *Githunguri SPMCC No.39 of 2017*, wherein they sought for various orders among them an Order directing the Defendant (Appellant) to remove the barriers, fence and/or gate erected on the road of access of $\frac{1}{4}$ an acre in all that property known as *Ikinu/Githunguri/3860*.

Simultaneously to the said suit, the Respondents herein (who were Plaintiffs in *SPMCC No.39 of 2017*, filed a *Notice of Motion* application dated *8th May 2017*, seeking for various interlocutory orders. Among the said orders sought was an Order for removal of barriers, fence and gate erected on the road of access of $\frac{1}{4}$ acre in land parcel *No. Ikinu/Githunguri/3860* pending the hearing and determination of the suit. This is one of the prayers sought in the *Plaint* and it is indeed a Mandatory injunction which is granted in very exceptional circumstances. Further grant of the said prayer did determine one of the prayers sought in the *Plaint*. The Appellant/Applicant was aggrieved by the said Orders of interlocutory injunctions and came to court to seek for *Stay of Execution* of the said Orders. Stay of the said Orders were granted on interim basis which Orders have been extended severally.

The Respondents have averred that the Orders granted by the *SPM Court, Githunguri* have already been enforced and therefore this application has been overtaken by events. However, no evidence of such enforcement was attached.

In considering whether to Stay Execution of the Orders pending Appeal, the Court is not so much concerned with the merit of the Appeal but on whether the conditions stipulated in Order 42 Rule 6(2) have been met.

These conditions are:-

i. Sufficient cause

ii. Substantial loss

iii. No unreasonable delay

iv. Security as to costs

As the Court determines the instant application, it will take into account that a successful litigant should not be deprived of the fruits of his success and that grant of Stay of Execution is discretionary. The Court too will have to balance the rights of a successful litigant and also the possibility of not rendering the proposed Appeal nugatory. See the case of *Behns Emporium...Vs...Moses H. Matiga (1990) LWR 10*, where the Court held that:-

“Stay of Execution should be granted if refusal would render the Appeal nugatory”.

The Appellant has alleged that the *Learned Magistrate* in *SPMCC No.39 of 2017*, issued mandatory orders without any consideration whether the Respondents had established exceptional circumstances. The Court has indeed considered the *Memorandum of Appeal* and has noted that the Appellant/Applicant has an arguable Appeal and further if the Stay is not granted, then there is a possibility that the Appeal would be rendered nugatory. See the case of *Dr. Willis Badia....Vs...Lake Supplies, Nairobi Civil App. No.224 of 1995*, where the Court held that:-

“Principles guiding grant of Stay of Execution pending appeal, arguable Appeal and whether the Appeal if successful would be rendered nugatory”.

The Applicant/Appellant has demonstrated that if *the Stay of Execution* is not granted, then the Appeal would be rendered nugatory and that is a sufficient cause for grant of the sought stay.

Further, the removal of the barriers and fence would mean that the disputed access road would be excavated, wasted and opened for use before the disputed issues are resolved. In the event that the Appellant becomes the successful litigant in the Appeal, then with the said excavation and wastage, the Appellant/Applicant will have suffered substantial loss.

On whether there was no unreasonable delay, it is evident that the impugned *Court Order* was issued on **29th June 2017**, and the instant application was filed **on 25th July 2017**. Though there is a delay of about **30 days**, the Court finds that delay is not unreasonable to warrant this Court deny the Applicant the Stay sought. This is an Appeal over an interlocutory Order and the Court finds no reason to demand for any security to be deposited by the Appellant/Applicant before grant of the Stay Order.

The Appellant has also sought for injunctive orders to restrain the Respondents from conducting any excavation or digging roads on the sit property until the Appeal is heard and determined. It is trite that injunction pending Appeal is granted to preserve the subject matter pending the hearing and determination of the action so that the rights of any Appellant are safe guarded to prevent the Appeal if successful from being rendered nugatory. See the case of *Otieno...Vs...Ougo & Another*

(Civil Appeal No.2) [1987] eKLR, where the Court held that:-

“The usual rule is that an injunction is granted to preserve the subject matter pending the hearing and the determination of the action so that the rights if any of an appellant are safeguarded to prevent the appeal if successful, from being nugatory.”

Since the interlocutory order granted by the Lower Court was to the effect that the Appellant herein do remove the barriers and/or fence on the disputed parcel of land, the Court finds that there is need to preserve the said suit property and thus the Order of injunction is necessary.

Having now carefully considered the instant *Notice of Motion* application dated **25th July 2017**, the *Court finds it merited and it is allowed entirely in terms of prayers No.3 & 4 with costs being in the cause.*

Further, the Appellant to ensure that the Appeal herein is set down for hearing expeditiously and not later than 30 days after the date of this Ruling.

It is so ordered.

Dated, Signed and Delivered at Thika this 17th day of May 2019.

L. GACHERU

JUDGE

In the presence of

No appearance for Appellant/Applicant

No appearance for Respondents

..... - Court Assistant

L. GACHERU

JUDGE

17/5/2019