



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 61 OF 2017**

**ERNEST M. MUGAMBI.....PLAINTIFF**

**VERSUS**

**JACOB HENRY KIRIMI.....1<sup>ST</sup> DEFENDANT**

**JACOB KABUTU KANGANGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me is a Notice Motion Application filed in court on 13 December 2018 and brought pursuant to the provisions of Order 42 (b) (1) & 2, Order 51 Rule 1 Civil Procedure Rules, Section 3A Civil Procedure Act and all other enabling provisions of the Law in which the defendant/applicant seeks a stay of execution of the judgment dated 31<sup>st</sup> October 2018 and or decree in the matter pending the hearing and determination of the intended appeal.

2. The gist of the application is that the applicant being dissatisfied with the judgment in this case, filed a notice of appeal intending to file an appeal, that the said appeal has high chances of success and that if the stay was not granted, the applicant would suffer irredeemably and the appeal would further be rendered nugatory.

3. The application was opposed via preliminary objection/grounds of opposition filed by the plaintiff in court on 20<sup>th</sup> December 2018, contending that the application was fatally defective as it had been inter alia brought under the wrong provisions of law, that the decree which was sought to be stayed had not been annexed to the application and that the applicant had not satisfied the conditions as set out under Order 42 (6) (2) of the Civil Procedure Rules, 2010.

4. When the matter came up for hearing on 31<sup>st</sup> January 2019, the parties were directed to file written submissions. Briefly, it was submitted for the applicant that Section 3A of the Civil Procedure Act gives the court unlimited power to make such orders as may be necessary to meet the ends of justice or to prevent the abuse of court process and that under Section 63 (e) of the same Act in all interlocutory applications, courts are assigned the unfettered discretion where it is so prescribed in order to salvage justice from defeat, to make such orders as appear to be just, fair and expeditious.

5. Further, it is submitted that for an order of stay to be granted, the court has to be satisfied that the applicant has met the provisions of Order 42 Rule 6 namely; whether the applicant has demonstrated sufficient cause, whether substantial loss will occur if the order is not granted and whether the application has been brought without unreasonable delay.

6. On the other hand it was submitted for the plaintiff/ Respondent that the instant application was a ploy to prevent the plaintiff from enjoying the fruits of his judgment and the court had to balance the rights of a successful litigant and those of the applicant seeking stay and that further the application did not meet the threshold for granting of stay as stipulated in Order 42 Rule 6 of the Civil Procedure Rules 2010.

7. I have carefully considered the instant application and the rival submissions by the parties. The 2<sup>nd</sup> defendant is essentially seeking an order of stay of execution of the judgment delivered on 18<sup>th</sup> October 2018, in which the court ordered the plaintiff to be registered as the proprietor of land title number Ntima/Igoki/2504 by way of adverse possession. 8. Order 42 Rule 6 of the Civil Procedure Act in which applications of these nature are premised provides as follows:

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

***2) No order for stay of execution shall be made under sub-rule (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. From the above provision, it is clear that the court must be satisfied that there is "**sufficient cause**" to grant a stay. Similarly, the court must be satisfied that the applicant will suffer substantial loss if the order is not made; that the applicant is willing to give such security for the due performance of the decree or order in issue, as may ultimately be binding on him or her.

9. In the instant case the court had ordered that the plaintiff be registered as the proprietor of Land Title Number Ntima/Igoki/2504 by way of adverse possession. The applicant however is not on the suit land. I find that applicant has to some limited extent demonstrated that he has sufficient cause since he is set to lose the proprietorship of his land. On the other hand I am alive to the fact that respondent /plaintiff is the one who is in occupation of the suit land.

10. Taking into totality all the circumstances in this case, I allow the application on the following terms;

11. The application for stay of the Judgment is allowed for a period of one year provided that applicant is to deposit a sum of sh. 100,000 as security in this court within 30 days from the date of this ruling failure to which the order of STAY OF JUDGMENT shall automatically lapse.

12. The Plaintiff/ Respondent is to remain on the suit land.

13. Applicant is to meet the costs of this application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 15<sup>TH</sup> MAY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Murira holding brief for Kiome for 2<sup>nd</sup> applicant

Muthomi for plaintiff/respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**