



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC SUIT NO. 346 OF 2017**

**STEPHEN WANJAU MWANGI, OBADIAH KARIUKI MWANGI**

**AND DAMARIS WANJIKU MWANGI** (Administrators o of the Estate

of Moses Mwangi Wanjau).....**PLAINTIFFS**

**=VERSUS=**

**PATRICK TUMUTI KIMUTWE**.....**DEFENDANT**

**RULING**

**INTRODUCTION**

1. This is a ruling in respect of two applications. The first application is dated 24<sup>th</sup> January, 2019. It is brought by the Defendant and it seeks stay of execution pending appeal. The second application is dated 10<sup>th</sup> March, 2019. It is brought by the Plaintiff. It seeks police assistance to enforce the Court's orders given on 17<sup>th</sup> January, 2019.

**The First Application**

2. Besides the prayer seeking stay of execution, the Plaintiff sought leave of Court to allow the firm of D.K. Wanyoike & Company Advocates to come on record in place of the firm of Gulenywa Jonathan Advocate. This prayer has since been spent as there was a consent filed allowing the firm of D.K. Wanyoike & Company Advocates to come on record for the Defendant. The Defendant contends that he has preferred an appeal to the Court of Appeal against judgment delivered on 17<sup>th</sup> January, 2019 which among other

orders directed the eviction of the Defendant from the disputed property.

3. The Defendant contends that if stay of execution is not granted, the appeal which has been filed will be rendered nugatory.

4. The Defendant's application was opposed by the Plaintiff based on a replying affidavit sworn on 3<sup>rd</sup> April, 2019. The Plaintiff contends that the notice of Appeal filed herein was irregularly filed by a firm of Advocates who were not on record for the Defendant and that therefore it cannot form the basis of an application for stay pending appeal. The Plaintiff further contends that the Defendant has not demonstrated that he will suffer substantial loss if stay of execution is not granted and further that the Defendant has not demonstrated that he has a meritorious appeal.

5. I have considered the application by the Defendant as well as the opposition thereto by the Plaintiff. I have also considered the submissions filed by the parties herein. The only issue which emerges for determination is whether stay of execution should be granted. The conditions for grant of stay of execution pending appeal are clear. Firstly, the application has to be brought without unreasonable delay. Secondly, there has to be demonstration that the Applicant will suffer

substantial loss if stay is not granted. Thirdly, there has to be security for the due performance of the decree which will ultimately bind the Applicant.

6. In the instant, case the judgment being impugned was given on 17<sup>th</sup> January, 2019. This application was filed on 24<sup>th</sup> January, 2019. There was therefore no delay in bringing the application. On whether there is demonstration of substantial loss, it is important to note that there is no attempt by the Defendant to demonstrate what substantial loss he will suffer if stay of execution is not granted. Whereas the Defendant is entitled to appeal against the judgment of the Court, the Plaintiff is also entitled to enjoy the fruits of his judgment. Demonstration of substantial loss is the cornerstone for grant of stay. If the same is not demonstrated, no stay can be granted. In the instant case I find that the Defendant has not demonstrated that he will suffer substantial loss.

7. There is no need to address the issue of security if there is no demonstration of substantial loss. Before I conclude this ruling, the Plaintiff argued that the notice of appeal was filed by an Advocate who had not formally come on record as there was a judgment in

place and no change of Advocates had been effected as provided under Order 9 Rule 9 of the Civil Procedure Rules.

8. The process of Appeal is a separate process and a party is at liberty to appoint a lawyer other than the one who acted for him in proceedings which culminated in the impugned judgment. I therefore do not find any merit in the argument by the Plaintiff that there is no competent appeal upon which this application can be made. However all in all, I find that the Defendant's application lacks merit. The same is hereby dismissed with costs to the Plaintiff.

### **The Second Application**

9. In this application, the Plaintiff contends that there was a request by him for police to assist in implementing the Court order but that the police advised him that the judgment did not direct them to assist in the implementation of the Court order. The Plaintiff therefore contends that it is necessary for the Court to order the police to assist in the demolition of the structures and for the smooth process of eviction.

10. The Plaintiff's application is opposed based on grounds of opposition filed in Court on 16<sup>th</sup> May, 2019 and a replying affidavit sworn on 14<sup>th</sup> May, 2019. The Defendant contends that the Plaintiff's application is

premature, misconceived, defective and lacks merit. The Defendant further contends that the decree has not been extracted herein and that he has commenced investigations regarding the title held by the Plaintiff; that there is a Preliminary Report by the County Government regarding the title held by the Plaintiff and that therefore he has high chances of success in his appeal.

11. I have considered the Plaintiff's application as well as the opposition to the same by the Defendant. There is already a judgment which was given in favour of the Plaintiff. The Defendant was given 30 days within which he was to move out of the suit property. The Defendant did not move out. The Plaintiff is seeking police assistance in evicting the Defendant. The police had already been contacted to assist but they declined on grounds that the judgment did not direct that they be involved. It is therefore necessary that the application be allowed so that the police can assist in the implementation of the Court order. I therefore allow the application dated 10<sup>th</sup> March, 2019 in terms of Prayer (2) and (4). It is so ordered.

**Dated, Signed and delivered at Nairobi on this 25<sup>th</sup> day of June, 2019.**

**E.O.OBAGA**

**JUDGE**

In the absence of the parties who had notice of date and time of delivery of Rulings.

Court Clerk Hilda