



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

ELCA CASE NO. 29 OF 2018

**LOISE NJERI KARUGA (Suing as the representative of the estate of
DAVID KARIUKI KARINGO).....APPELLANT**

VERSUS

PATRICIAH WAHITO NJIRU.....RESPONDENT

(An Appeal from the Judgement/Decree of the Honourable V.O. Nyakundi Senior

Resident Magistrate dated 19th September 2018 in Embu Chief Magistrates'

Civil Case No. 257 of 2015)

RULING

1. By a notice of motion dated 19th December 2018 brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules, sections 1A, & 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Appellant sought an order for stay of execution of the judgement and decree of Hon. V.O. Nyakundi (SRM) dated 19th September 2018 in Embu CMCC No. 257 of 2015.
2. The said application was based upon the grounds set out on the face of the motion and supported by the Appellant's affidavit sworn on 19th December 2018. The Appellant contended that she would suffer substantial loss unless the stay was granted; that her intended appeal had overwhelming chances of success; and that the application had been filed without unreasonable delay.
3. The Respondent filed a replying affidavit sworn on 25th February 2019 in opposition to the said application. She stated that she was a purchaser for value of *Title No. Mbeti/Kiamuringa/2393* (hereinafter the *suit property*) from the Appellant's deceased husband. It was her contention that she took possession of the suit property upon purchase and developed it.
4. It was the Respondent's case that at the time she bought the suit property the Appellant was separated from her late husband and that she only emerged upon his death to claim the suit property which had long been sold.
5. The Respondent further contended that the Appellant had not demonstrated the risk of substantial loss; that she had not provided any security for due performance of the decree; and that the application had not been filed without unreasonable delay.
6. When the said application was listed for hearing on 27th February 2019, the advocates for the parties agreed to canvass it through written submissions. The Appellant was granted 30 days within which to file and serve written submissions whereas the Respondent was granted 30 days upon the lapse of the period granted to the Appellant to file and serve hers.
7. The record shows that the Respondent filed her submissions on 8th May 2019 but there is no indication of the Appellant having filed any by the time of preparation of this ruling.
8. The court has considered the Appellant's said application for stay of execution, the Respondent's replying affidavit in opposition thereof as well as the submissions on record. In order to be eligible for an order of stay, an applicant must meet the three requirements set out under **Order 42 Rule 6(2) of the Civil Rules Procedure** namely,
 - a. Demonstration of substantial loss.

b. Filing of the application without unreasonable delay.

c. Provision of security for due performance of the decree.

9. It would appear from the material on record that the Appellant is not in possession of the suit property. The property has been in possession of the Respondent at all material times. It has not been demonstrated what substantial loss or peculiar hardship the Appellant might suffer unless the stay is granted. On the contrary, there is a risk that if execution is stayed, the Appellant may well get registered as proprietor through succession proceedings and alienate the suit property. There is no indication of a stay being in place in the succession proceedings relating to the estate of her deceased husband.

10. The other aspect for consideration relates to the delay in filing the application for stay. Although the Appellant contended in her notice of motion that the application for stay was filed expeditiously, that is not supported by the material on record. The material on record indicates that the judgement the subject of the appeal was delivered by Hon. V.O. Nyakundi on 19th September 2018. The record further indicates that the application for stay was filed on 19th December 2018.

11. There was a delay of about three months between the date of the judgement and the date of the application for stay. Whether a delay of three months is reasonable or unreasonable depends on the circumstances of each case and the explanation rendered for the delay. The court has noted that in the instant case, the Appellant has not rendered any explanation for the delay of three months in the filing of the application. The court, therefore, finds and holds that the application for stay was not filed without unreasonable delay.

12. The upshot of the foregoing is that the court finds no merit in the Appellant's application for stay. However, in order to ensure that the suit property is available to either of the parties who might ultimately succeed on appeal the court shall order the registration of a prohibitory order against the suit property immediately upon execution of the decree. The latter order shall be made under **section 3A of the Civil Procedure Act (Cap. 21)**.

13. The court therefore makes the following orders for disposal of the application:

a. The notice of motion dated 19th December 2018 is hereby dismissed with costs.

b. An order of inhibition under **section 68 of the Land Registration Act** shall be registered against *Title No. Mbeti/Kiamuringa/2393* immediately upon registration of the Respondent as proprietor in order to preserve the suit property until the conclusion of the appeal or further orders.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20TH day of JUNE, 2019.

In the presence of Ms. Muthoni holding brief for Mr. Mugendi for the Respondent and in the absence of the Appellant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

20.06.19