



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL CASE NO. 43 OF 2018**

GEORGE MWANGI MUNYUA.....1<sup>ST</sup> APPELLANT/APPLICANT

DAVID GATHUMBI MUNYUA.....2<sup>ND</sup> APPELLANT/APPLICANT

MARY NJERI LUI.....3<sup>RD</sup> APPELLANT/APPLICANT

ROBERT WAWERU MUNYUA.....4<sup>TH</sup> APPELLANT/APPLICANT

CHARLES MUNYOROKU.....5<sup>TH</sup> APPELLANT/APPLICANT

BETH NJERI ONGONGL.....6<sup>TH</sup> APPELLANT/APPLICANT

ALBERT NJAHIA OGONGL.....7<sup>TH</sup> APPELLANT/APPLICANT

**VERSUS**

STANLEY KIARIE KIMANI.....1<sup>ST</sup> RESPONDENT

DORCAS WANGUI MUNYUA..... 2<sup>ND</sup> RESPONDENT

**RULING**

The Appellants/Applicants herein filed a **Notice of Motion Application** in Gatundu **MELC No. 9 of 2018**, wherein they sought to be enjoined as interested parties in the suit. The said Application for joinder is dated **25<sup>th</sup> October, 2018** and a Ruling dismissing the same was issued on **3<sup>rd</sup> December, 2018**. However, the Subordinate Court had entered Judgment in favour of the 1<sup>st</sup> Respondent on **25<sup>th</sup> June, 2018** and before execution of the said Decree, the Appellants herein filed the Notice of Motion dated **25<sup>th</sup> October, 2018**.

After the dismissal of the said Notice of Motion on **3<sup>rd</sup> December, 2018**, the Appellant filed the instant Notice of Motion dated **14<sup>th</sup> January, 2019**, and sought for Stay of proceedings in **MELC No. 9 of 2018** at Gatundu Law Courts, sought also for stay of execution of the Judgment/Decree in **MELC No. 9 of 2018**, at Gatundu Law Courts pending the hearing and determination of the appeal and for any other Orders that the Court may deem fit to grant.

The Application is premised on the grounds stated on the face of the application among them that they filed a Notice of Motion dated **28<sup>th</sup> October, 2018** seeking to be enjoined in **MELC No. 9 of 2018** at **Gatundu Law Courts** with intention of Challenging an alleged sale of the suit property **Ndarugu/Mbogoro/T144** by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent. However, the said application was dismissed on **3<sup>rd</sup> December, 2018**. That 1<sup>st</sup> Respondent is in the process of executing the said Decree and if the orders sought are not granted, they stand to suffer irreparable loss and damage since the suit property is a **family** land and the applicants are on the verge of losing the same. That their appeal has high chances of success and the Respondents are unlikely to compensate them with costs in the event the appeal succeeds. Further that the Respondents will not suffer any prejudice and the balance of convenience tilts in their favour.

The application is also supported by the affidavit of **George Mwangi Munyua** the 1<sup>st</sup> Applicant herein who reiterated the averments made on the grounds in support of the application.

The application is contested and 1<sup>st</sup> Respondent **Stanley Kiarie Kamau** filed a Replying Affidavit dated **27<sup>th</sup> February, 2019** and averred that he bought the suit property from the 2<sup>nd</sup> Respondent on **12<sup>th</sup> October, 2015** and paid the full purchase price of **Kshs. 575,000/=**.

However the 1<sup>st</sup> Respondent could not transfer the suit property to her because she alleged that she was not in possession of the original title deed. Consequently, the 1<sup>st</sup> Respondent filed Gatundu **MELC No. 9 of 2018** and the 2<sup>nd</sup> Respondent filed a Defence wherein she admitted having sold the suit property to the 1<sup>st</sup> Respondent but could not effect the said transfer because the original title deed was with a 3<sup>rd</sup> party. Thereafter, Judgment on admission was entered on **25<sup>th</sup> June, 2018**. However, the Applicant sought to be enjoined as interested parties after the suit had been filed which application was dismissed. He further averred that he is in possession of the suit property and that the same is registered in his name as is evidence from the official search dated **31<sup>st</sup> January, 2019**. He urged the Court to reject the said application.

The 1<sup>st</sup> Respondent filed the grounds of opposition dated **27<sup>th</sup> February, 2017** and averred;

- 1. The Appellants/ Applicants lack locus to file the appeal as they are not a party to Gatundu MELC case no. 9 of 2010**
- 2. The Appeal was filed without leave of the Court.**
- 3. The Memorandum of Appeal was filed on 20<sup>th</sup> December 2018 and not served within the stipulated time.**
- 4. The Appellants have no proprietary rights over the suit property**
- 5. The Appellants/ Applicants have no basis to file an appeal**
- 6. The Appellants have no property.**

The Application was canvassed by way of written submissions which this court has carefully considered and renders itself as follows:-

There is no doubt that the 2<sup>nd</sup> Respondent did sell the suit land to the 1<sup>st</sup> Respondent. There is no doubt that a Judgment was entered in favour of the 1<sup>st</sup> Respondent on **20<sup>th</sup> June, 2018**. Further the applicants herein had sought to be enjoined in the Gatundu **MELC No. 9 of 2018** after the Judgment and their Application was rejected and/or dismissed.

It is also evident that the 1<sup>st</sup> Respondent has now been registered as the proprietor of the suit property as is evident for the Certificate of Official Search dated **31<sup>st</sup> January, 2019**. It is also evident that the suit land was registered in the name of 2<sup>nd</sup> Defendant in 1966. The 2<sup>nd</sup> Respondent was therefore the registered owner of the suit property prior to 2015.

The Applicants did not seek to be enjoined in Gatundu **MELC of 2018**, when the said suit was initiated. However they sought to be enjoined at the execution stage.

For Stay of execution, the Law is very clear on the principles to be considered. See **Order 42 Rules 6 (2) which 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.”**

Further in the case of **Kenya Power & lighting Co. Ltd Versus Esther Wanjiru Wokabi (2014)** elects the Court held that;

**“To my mind the Court’s discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following main principles;**

- a) Whether the applicant has established that he/she has a prima facie arguable case.**
- b) Whether the application was filed expeditiously and;**
- c) Whether the applicant has established sufficient cause to the satisfaction of the Court that is in the interest of justice to grant the orders sought**

The court has considered the Pleadings herein and the annexures thereto. It is evident that the Decree sought to be stayed has already been executed and effected. The suit land is now registered in favour of the 1<sup>st</sup> Respondent. The Applicants cannot stay what has already been effected. See the case of **Co-operative Bank of Kenya Limited ...Vs... Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the Court held that;

**“This court also appreciates the need to avoid giving orders in vain. In William Lerikan Konchellah & another ...Vs... Julius Tabarai Ole Maito Tampushi [2014] eKLR the court in refusing to grant stay under Rule 5 2 (b) held that courts do not act in vain and therefore cannot grant stay for an event that has already taken place.” Similarly, in International Centre for Policy & Conflict...Vs... Kamlesh Mansukhlal Damji Pattni & 5 others [2013] eKLR the Court stated: “There is no doubt that the criminal case facing the Respondents was terminated in execution of Mutava J’s judgment. The sureties have already been discharged by the court. We are not persuaded that there is anything to stay in this matter”.**

Further the Applicant are not parties in *Gatundu MELC No. 9 of 2018*. They cannot seek for Stay of execution in a matter where they are not parties. See the case of *Zephir Holdings Limited ...Vs... Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya [2014] eKLR* where the Court held that;

*“I have perused the record, and it is clear that neither the 1<sup>st</sup> nor 2<sup>nd</sup> interested parties participated in the suit. Indeed they were not parties in the cause of action of the suit. The 2<sup>nd</sup> Interested Party is a purchaser of the suit property in a public auction as the highest bidder. The public auction and the sale of the suit property were sanctioned and approved by the Court. The claim by the 1<sup>st</sup> Interested Party is that the Plaintiff wrongfully attached the suit property believing the same to be that of the Defendant. It was argued that, at the point of sale, the attached property legally belonged to the 1<sup>st</sup> interested party. Those points are well put. But, the 2<sup>nd</sup> interested party is saying that the court did not sanction the joinder of both interested parties in this suit, which means, therefore, that the 1<sup>st</sup> interested party cannot legally and technically bring the application before the court without first seeking the leave of court to be enjoined in the case. A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.”*

The Court finds that the Appellants/Applicants herein cannot seek for Stay of a decree in a matter whenever they are not parties yet. The Court finds that the Applicants are also not registered owners of the suit property and there was no evidence of trust at all.

The Applicants are challenging the order of dismissing their non-joinder to the suit. That issue should be addressed first before any order of Stay of execution can be addressed.

For the above reasons the court finds the Appellants/Applicants Notice of Motion application dated **14<sup>th</sup> January 2019** is not merited. The said Application is dismissed entirely with costs to the Respondent's.

The Appellants should strive to prosecute their appeal expeditiously. For the above reasons, the Appellants are directed to file their Record of Appeal within a period of **30 days** from the date hereof. The matter to be mentioned on **17<sup>th</sup> October 2019** before the Deputy Registrar to confirm such compliance and for further directions.

It is so ordered.

**Dated, Signed and Delivered at Thika this 15<sup>th</sup> day of July 2019.**

**L. GACHERU**

**15/7/2019**

**JUDGE**

In the presence of

Mr. Maina holding brief for Mr. Njehu Ndungu for the applicant

Mr. Kimathi for 1<sup>st</sup> Respondent

Mr. Kimathi holding brief for Mr. Njiri for 2<sup>nd</sup> Respondent.

Lucy-Court Assistant

**Court:** Ruling read in open Court in the presence of the above Advocates.

**L. GACHERU**

**15/7/2019**

**JUDGE**