



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
MISC CIVIL APPLICATION NO. 8 OF 2019

JOSEPH KITHAKA GITERU.....DEFENDANT/APPLICANT

VERSUS

JAMES NJOGU KATHENGE.....PLAINTIFF/RESPONDENT

RULING

The Applicant vide a Notice of Motion dated 22nd May 2019 under *Section 1A and B CPA, Order 50 Rule 6 and Order 42 Rule 6 CPR* sought the following orders:

1. Spent.
2. That there be a temporary stay of execution of this Honourable Court's order issued on 28th March 2019.
3. That this Honourable Court be pleased to grant stay of execution pending the hearing and determination of this application.
4. That this Honourable Court be pleased to grant stay of execution pending the hearing and determination of the intended Appeal.
5. That this Honourable Court be pleased to grant the Applicant leave to appeal against the judgment delivered on 28th March 2019 out of time.
6. The costs of this application be provided for.

The application is premised on the affidavit of the Applicant in support thereof and grounds apparent on the face of the said application. The application is supported by a further affidavit together with annexures sworn on 3rd July 2019.

The Respondent opposed the said application with a replying affidavit sworn on 25th June 2019.

APPLICANT'S CASE

In his affidavit in support of the application, the Applicant stated that he was aggrieved by the judgment in PMCC No. 89 of 2014 (Kerugoya) where the Court made a declaration that land parcel number KABARE/GACHIGI/938 belongs to the Respondent/Plaintiff and that his registration as proprietor of the said parcel of land be cancelled and that the Respondent/Plaintiff be registered as the new proprietor. A permanent injunction has also been issued restraining him by himself, his agents or servants from selling, transferring, alienating, wasting, damaging, trespassing and/or howsoever interfering with the suit land parcel No. KABARE/GACHIGI/938. A copy of the decree is annexed to the further affidavit issued on 15th May 2019. Also attached to the further supporting affidavit is a letter by the firm of Munene Muriuki & Co. Advocates for the Applicant addressed to the Chief Magistrate Kerugoya requesting to be supplied with certified copies of the judgment and proceedings in the lower Court Case No. 89/2014 which is the subject of this appeal.

In his replying affidavit, the Respondent opposed the application saying that soon after the judgment was read, he notified the defendant through the area Chief and asked him to make arrangements to transfer the suit land. he stated that the suit property was given to him by his late father but the Appellant got the same transferred to his name through fraud. He said that he had been utilizing the suit property before the Appellant caused it to be transferred to himself through fraud. He stated that the Applicant has not given sufficient reasons for the delay in filing the appeal within the stipulated period. He wants the Court to dismiss the application for lack of merit.

LEGAL ANALYSIS

An application for stay pending appeal will not be granted unless the conditions in **Order 42 Rule 6 of the Civil Procedure Rules** are satisfied. **Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:

- 1. Substantial loss may result to the applicant unless the order was made.**
- 2. The application was made without unreasonable delay; and**
- 3. 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.**

The Applicant in this case has attached a copy of the decree in PMCC No. 89 of 2014 (Kerugoya) in which an order declaring the suit property L.R. No. KABARE/GACHIGI/938 as belonging to the Respondent and a permanent injunction restraining the Applicant from trespassing into the suit property he is currently residing has been issued. I am satisfied that the Applicant is likely to suffer substantial loss unless the orders sought are granted in the interim period. The Applicant has attached a letter by his advocate addressed to the Chief Magistrate dated 30/5/2019 requesting for certified copies of the proceedings and judgment. The Applicant has also annexed a copy of a draft Memorandum of Appeal to the supporting affidavit. I am equally satisfied that the application has been made without unreasonable delay. As regards the third condition, the Courts usually make orders for suitable security for the due performance of the decree as the parties wait for the outcome of the appeal. It is a discretion to be exercised by the Court depending on the nature and circumstances of each case.

It is important to note that a litigant that has lost his case is entitled to appeal against the same. It follows therefore that a matter is deemed concluded after going through the due course all the way to the apex Court if need be. The Courts must therefore balance the rights of a successful litigant who should not be denied the fruits of his judgment and that of an unsuccessful litigant exercising his undoubted right of appeal.

In my view, I find the application merited and allow the same in the following terms:

- 1. There shall be a stay of execution for 12 months from the date hereof.**
- 2. The costs of this application to be costs in the cause.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20th day of September, 2019.

E.C. CHERONO

ELC JUDGE

20TH SEPTEMBER, 2019

In the presence of:

1. Maina Kagio holding brief for Munene Muriuki for Applicant
2. Plaintiff/Respondent/Advocate – absent
3. Mbogo – Court clerk – present