



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO.468 OF 2017**

**LAWRENCE GACHAU KIHU.....1<sup>ST</sup> PLAINTIFF /RESPONDENT**

**ESTHER WAIRIMU KAGIRI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**HANNAH NJERI KIHU.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**EUNICE MWIHAKI KAMAU.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

**ROSEMARY WAIGWE WAMWEA.....5<sup>TH</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**MARY WANGUI MAINA.....DEFENDANT/APPLICANT**

**(sued on behalf of MAINA**

**KIHU deceased)**

**RULING**

1. This Notice of Motion filed on the 15/3/19 is brought under Section 3A of the Civil Procedure Act, Order 42 Rule 6(1), Order 51 Rule 1 and 4 of the Civil Procedure Rules. The Applicant sought the following orders;

a. Spent

b. That pending the hearing and determination of this application this honorable Court be pleased to stay execution of the judgement entered on the 15/11/18 and all other consequential orders and/or issue preservatory orders maintaining the status quo in respect of LR NO LOC2/KANDERENDU/63 (suit land).

c. That this honourable Court be pleased to stay execution of the judgement entered on 15/11/2018 pending the hearing and determination of the intended appeal and/or issue preservatory orders maintaining the status quo in respect of LR NO LOC 2/KANDERENDU/63.

2. The application is supported by the grounds adduced thereto and the supporting affidavit of the Applicant where she deponed that she is aggrieved with the judgement of this Court which was delivered on the 15/11/18 in favour of the Respondents in respect to the suit land. That she has lodged an appeal by way of Notice of appeal dated the 27/11/18. That she has an arguable appeal and if the judgement of this Court is not stayed the appeal will be rendered nugatory. That the Applicant has been in exclusive possession of the suit land and she stands to suffer substantial loss if the Respondents subdivided and disposed the suit land. That the Respondents have already convened a meeting with a view to subdividing the land and sell to third parties. Finally, that she will abide by any conditions issued by the Court in respect to security of costs.

3. The application is opposed vide the Replying Affidavit of the 1<sup>st</sup> Respondent sworn on the 25/4/19 and filed on the 21/6/19 wherein he deponed that the prayers sought in the Notice of Motion are tantamount to the Court setting aside its own judgement. That it is the Applicant who has custody of the title deed and hence the one who has the ability to sell the suit land. That the Applicant has not demonstrated any steps taken to prosecute her appeal and therefore she is not deserving of the orders sought herein.

4. Parties with leave of the Court elected to prosecute the Notice of Motion through written submissions. I have had the opportunity to read and consider the same and shall refer to them in the body of the ruling as I go along.

5. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the Notice of Motion.

6. Stay of execution is guided by Order 42 Rule 6 of the Civil Procedure Rules, thus:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”

7. Stay of execution is an equitable relief, which is exercised at the discretion of the Court. Like all discretionary reliefs, it must be exercised judiciously and upon the confines of the law. It must not be extensively callous or whimsical. For one to succeed in an application for stay of execution, the following must be satisfied, that:-

(a) The application was brought without delay;

(b) Substantial loss may result to the Applicant unless the stay is granted; and

(c) Security for the due performance of the order or decree has been provided.

8. Going by the record the judgment complained of was delivered on the 15/11/18. This application was filed on the 15/3/19, a period of four months. The Court finds and holds that there is no delay in bringing this application. It was filed timeously.

9. In respect to the 2<sup>nd</sup> requirement of proof of substantial loss, the Applicant has submitted that the suit land belongs to her husband which devolved to her upon succession and that the suit land has been in her custody and ownership to the exclusion of the Respondents who did not contribute to the acquisition of the same. She explained that she is apprehensive that the Respondents will subdivide the suit land and sell to third parties thus rendering her pending appeal nugatory. In addition, that she will face untold hardship if she is evicted from the suit land, she claims.

10. In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated: -

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

11. In this case and going by the decision in **Machira** above the Applicant has not proved the loss that she stands to suffer if the Court does not grant stay of execution orders. In the case of **James Wangalwa & Anor Vs Agnes Naliaka Cheseto(2012) EKLR**, Justice Gikonyo when confronted with a similar application stated as follows;

“ No doubt in law the act that the process of execution has been put in motion, or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule (6) of the Civil Procedure Rules. This is because execution is a lawful process. The Applicant must establish other factors which show the execution will create a state of the affairs that will irreparably affect or negate the very core of the Applicant as the successful party in the appeal”.

12. Except that the Respondents held a meeting to discuss the subdivision and disposal of the suit land, there is no proof given by the Applicant in respect to substantial loss.

13. That said, it is trite that absence of proof of any conditions set out in Order 42 Rule 2 will affect the Court's discretion to grant stay. The Applicant herein failed to demonstrate the substantial loss that she stands to suffer which is a key ingredient in this case. However, the Court must also balance the two competing rights as noted by Gacheru J. in **John Gacunja Njoroge -Vs - Joseph Njoroge** (supra). Also see **Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR** Ombwayo J **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** Mabeya, J and **Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR** where the Court set out thus;

“.....in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal.

14. In respect to the requirement of security of costs, Order 42 (6) (2) (b) states that it is the Court that orders the nature of security the Applicant should give as may ultimately be binding on the Applicant. This is to ensure that the discretion bestowed on the Court is not fettered.

15. In this case the Applicant has stated that she is willing to abide by the conditions of this Court in respect to security of costs. The Applicant has however not indicated nor disclosed the quantum. This being a decree for the transfer of land and exercising my discretion, I find and hold that the sum of Kshs. 200,000/- is sufficient security.

16. Balancing the rights of the parties and doing the best I can, the Notice of Motion dated the 15/3/19 is allowed in the following terms;

- a) The stay of execution is granted provided that the appeal is filed within 45 days from the date of this ruling.
- b) The Applicant to provide security for the due performance of the decree in the sum of Kshs. 200,000/- (Two Hundred Thousand only) within 15 days from the date of the ruling which sum should be deposited in an interest earning account in the joint names of both Advocates of the parties or a bank guarantee of a similar amount.
- c) The Applicant must file a written undertaking within 15 days from the date of this ruling that she shall not sell, lease, charge, mortgage or in any way interfere by herself her servants' employees and any person claiming under her the suit land pending the hearing and determination of the Appeal.
- d) If the Applicant fails to comply with a)-c) the stay lapses and the Application stands dismissed.
- e) Costs of the application shall be met by the Applicant.

**17. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 16<sup>TH</sup> SEPTEMBER 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Nderitu HB for Onyancha for the Plaintiffs/Respondents

Mr Kirubi HB for Karanja for the Defendant/Applicant

Kuiyaki and Njeri, Court Assistants