



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**E & L CASE NO. 136 OF 2017**

**(Formerly HCCC No. 156 of 1995)**

**ROSE NJIRU (ACTING AS THE LEGAL REPRESENTATIVE OF THE**

**ESTATE OF M'NCEERI M'RUTERE).....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN NICHOLAS MUTHURI.....DEFENDANT/RESPONDENT**

**RULING**

1. By Notice of Motion dated 7<sup>th</sup> November 2018, the Applicant seeks the following orders:-

(a) ...spent

(b) THAT pending inter-partes hearing of the application, an order be issued staying execution of the judgment delivered herein against the plaintiff/applicant on 29/8/2018 and all consequential decree issued herein on 25/10/2018.

(c) THAT pending hearing and determination of the intended appeal in the Court of Appeal at Nyeri, an order be issued staying execution of the judgment delivered herein against the plaintiff/applicant on 29/8/2018 and all consequential decree issued herein on 25/10/2018c.

(d) THAT costs of the application abide the outcome of the intended appeal.

2. The application is premised on the following grounds:-

(1) THAT the defendant/respondent has threatened to levy execution, by evicting the plaintiff/applicant and her family from the suit land.

(2) THAT the plaintiff/applicant timeously filed a notice of appeal dated 5/9/2018.

(3) THAT the applicant and her family shall suffer substantial loss if forcibly evicted from the suit land which is the only source of livelihood. She is ready to offer security as may be ordered by the court.

(4) THAT the applicant has developed the entire suit land and has made this application timeously.

3. The Application is supported by Affidavit of Rose Njiru sworn on 7/11/2018 which reiterates the grounds of the application.

4. The Respondent opposed the application and filed a Replying affidavit sworn on 19/11/2018 in which he contends that the applicant does not stand to suffer any substantial loss if the orders sought are not granted as the court record shows that she has land adjacent to that of the respondent and that most of the developments captured in the photographs annexed in her affidavit are actually on her own land; that the applicant has not offered any security for due performance of the decree sought to be stayed and that the application lacks merit.

5. The applicant filed a supplementary affidavit sworn on 17/12/2018 in response to the replying affidavit.

6. On **10/12/2018**, the court ordered parties to canvass the application via submissions which they filed and exchanged.

### **The Applicant's Submissions**

7. The applicant has submitted that under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** this Honourable Court has the discretion to consider and grant an application for stay of execution pending hearing and determination of an appeal.

8. In essence, the applicant has argued that she has satisfied all the conditions that must be met in order to be granted the stay orders sought.

9. On the issue of substantial loss, the Applicant has argued that she has demonstrated that unless the stay sought is granted, she and her family shall suffer profound and monumental loss once evicted from the suit land. It is stated that the respondent has not denied that the applicant and her family have been continuously and extensively living on, utilizing and developing the entire suit land for over 47 years. It is also averred that it is also not denied that the applicant and her family has made extensive developments on the suit land as evidenced by photographs annexed to the supporting affidavit as '**RN6**'. Further, the plaintiff avers that it is not denied that the bodies of the applicant's late husband, son and granddaughter are buried in the suit land as evidenced by photographs annexed to the supporting affidavit as '**RN7**' and that it is not denied that the applicant and her family live and depend on the suit land as their ancestral land and have no other to depend on.

10. As to whether the appeal would be rendered nugatory, the applicant has argued that she has already filed and served the appeal being **Nyeri COA No. 232 of 2018**. It is further argued that if the orders sought are not granted, the applicant and her family shall be evicted from the suit land and that in the event the aforementioned appeal succeeds thereafter, such success will be rendered nugatory by the eviction exercise. The applicant cited: **County Government of Kwale vs. Saumu Said Nyanya & 3 others (2017) eKLR, Waweru Mwaura vs. Mary Wanjiru Njenga (2016) eKLR, and Amal Hauliers Limited vs. Abdulnasir Hassan (2017) eKLR** in support of her application

11. The applicant has also argued in her submissions that the instant application was filed without unreasonable delay.

12. According to the applicant's submissions, she has already indicated at **paragraph 11** of the supplementary affidavit sworn on **17/12/2018** that she has unequivocally expressed willingness to offer such security as the honorable court may deem fit and expedient to order.

13. It has been argued that the defendant has not demonstrated in his replying affidavit any prejudice which he may suffer if or once the stay order is granted.

14. In sum it is submitted that the application herein is meritorious and the Applicants have duly and satisfactorily complied with all the necessary conditions that must be met before the orders are granted.

### **The Respondent's Submissions**

15. The Respondent cites **Order 42 Rule 6** of **Civil Procedure Rules**. His main contention is that there has been unreasonable delay in filing the instant application by the applicant.

16. The respondent submits that the judgment in this matter was delivered on **29/8/2018**, and the notice of appeal herein promptly filed. However, the present application was not filed until **7/11/2018** after the defendant expressed intention to execute.

17. He also avers that even despite being in court during delivery of judgment, the applicant did not make even an informal application for stay and that the formal application was not filed within reasonable time and so this court should not entertain the instant application.

### **Analysis and Determination**

18. **Order 42 Rule 6** of the **Civil Procedure Rules** provides that:-

**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in as 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 sub rule (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.**

19. The main issue raised by the respondent is that there was inordinate delay by the applicant in filing the instant application. It is not in dispute that the judgment appealed was delivered on the **29<sup>th</sup> August 2018** and that the instant application was lodged on **7/11/2018**, about two and a half months later. The supplementary affidavit also shows that an appeal against the judgment whose execution is sought to be

stayed has been filed and it was issued the number **Nyeri Civil Appeal No 232 of 2018**. This fact is also not disputed.

**20.** I find that there was no undue delay in filing the application. The much emphasized fact that the application was allegedly filed after the respondent intimated that he would execute the decree does not alter my observation in that regard.

**21.** This is an application arising out of a long standing dispute that was instituted as a suit in the year **1995**. Much as it should be recognized that a judgment creditor has every right to enforce his decree, the inescapable fact in our jurisprudence is that in appropriate cases - and I have no doubt that this is one of them - every aggrieved party has a right to lodge an appeal. In the matter at hand the applicant, having filed the appeal in December **2018** has satisfied me that the appeal is in place and that she is serious about pursuing that appeal. One more of the conditions set by **Order 42 Rule 6** has been amply satisfied by the applicant.

**22.** Secondly I find the undisputed fact that the respondent has not been in occupation of the suit land compelling enough so as to usher in the conclusion that he would not suffer any irreparable harm.

**23.** On the other hand the affidavit evidence presented by the applicant sufficiently demonstrates that if the judgment or decree was executed before the appeal is finalised she would indeed be evicted from the land upon which she has effected many a development. I am persuaded that the appeal would be rendered nugatory by that event. A third condition in **Order 42 Rule 6** has thus been met.

**24.** Upon examining the application, the affidavits and the detailed submissions, I find that the instant application is meritorious. In the interests of justice and so as not to prejudice the applicant if the appeal is found meritorious, I order as follows:

**(a) The application dated 7/11/2018 is allowed in terms of prayers (3) and (4) thereof.**

**Dated and signed at Kitale this day of 2019.**

**MWANGI NJOROGI**

**JUDGE**

**ENVIRONMENT AND LAND COURT,**

**KITALE**

**Delivered in open court at Meru this 31st day of October, 2019.**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**MERU**