



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 51 OF 2014

1. PETER MBURU KIMANI

2. LUCY WAITHERERO MWANGI

3. ALICE NJERI MBURU

4. JAMES KARANJA MWANGI

5. BONIFACE KIMANI MWANGI

6. CHARLES NGUYA MWANGI

7. JANE WAITHERA NNAMDI

8. ESTHER WAMBUI KIARIE

9. NELSON KIBE MWANGI

10. NELSON MACHARIA MWANGI.....PLAINTIFFS

VERSUS

TITUS KIGORO MUNYI.....DEFENDANT

RULING

1. By a notice of motion dated 30th April 2019 brought under **Sections 3, & 3A of the Civil Procedure Act (Cap. 21), Order 42 Rule 6 of the Civil Procedure Rules 2010** (hereafter *the Rules*) **and all enabling provisions of the law**, the Defendant by original action sought the following orders:

a) Spent

b) Spent

c) *That there be stay of execution of the judgement/decree in this case pending the filing, hearing and determination of the intended appeal in the Court of Appeal against judgement/decree in this case.*

d) *That there be an order of inhibition inhibiting the registration of any transfer, charge, sub-division or any other dealings with land parcel No. Mbeti/Gachoka/473 pending the filing, hearing and determination of the intended appeal against the decree in this case in the Court of Appeal.*

e) *The status quo in respect of the occupation and use and the registration and/or proprietorship of land parcel No. Mbeti/Gachoka/473 be maintained to wit that the Defendant/Applicant do continue occupying and utilizing the said land and the proprietorship do remain as it is now in the name of Peter Mburu Kimani and Tabitha Muthoni pending the filing, hearing and determination of the intended appeal against the decree in this case in the Court of Appeal.*

f) *The costs be provided for.*

2. The said application was based upon the grounds set out on the face of the motion and supported by the affidavit of the Defendant sworn on 30th April 2019. It was contended that the Defendant intended to appeal against the judgement and decree of this court dated 28th March 2019; that the Plaintiffs will not suffer prejudice if the orders sought are granted; that the Defendant has been in occupation of the suit property since 1970.

3. The 1st Plaintiff filed a replying affidavit sworn on 13th May 2019 in opposition to the said application on his own behalf and on behalf of his co-Plaintiffs. It was contended that the Defendant's application lacked merit since the intended appeal had no probability of success. It was also contended that the Defendant had never settled the costs of the Plaintiff ordered in previous proceedings, to wit, *Kerugoya ELC No. 63/2013 (OS)* and *Nyeri Civil Appeal No. 28/2014* with respect to the suit property.

4. The Plaintiffs contended that they were entitled to the fruits of their judgement. They further sought to have the Defendant provide security for costs should the court be inclined to grant a stay of execution.

5. When the said application was listed for hearing on 20th May 2019 the parties agreed to canvass the same through written submissions. The Defendant was given 30 days to file and serve his whereas the Plaintiffs were given 30 days thereafter to file and serve theirs. The record shows that the Plaintiffs filed their submissions on 10th September 2019 but the Defendant's submissions were not on record at the time of preparation of the ruling.

6. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the submissions on record. The principles to be considered in granting or declining an application for stay of execution of a decree are set out in **Order 42 Rule 6 (2)** of the **Rules** as follows:

“(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.”

7. In the case of **Butt Vs Rent Restriction Tribunal (1979)eKLR** the court made the following observations with respect to an application for stay pending appeal:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett LJ in *Wilson Vs Church* (No 2) 12 Ch. D ([1879] 454 at P 459. In the same case, Cotton LJ said at P 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

8. So, what is the meaning of the term “nugatory?” In the case of **Shah & Partners Ltd Vs National Social Security Fund Board of Trustees & 3 Others [2018] eKLR** the Court of Appeal quoted the meaning of the term “nugatory” as rendered in the case of **Stanley Kangethe Kinyanjui & Tony Ketter & 5 Others [2013] eKLR** as follows:

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd V Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

9. The court has considered the contents of Defendant's supporting affidavit on the issue of substantial loss or the appeal being rendered nugatory. The court takes the view that if an intended appeal were to be rendered nugatory then that may constitute substantial loss within the meaning of **Order 42 Rule 6(2)** of the **Rules**. The Defendant's case is that he has been residing on the suit property since 1970 and has extensively developed it over the years. He stated that he had no other home. It was not, however, contended that he would not be able to recover the suit property from the Plaintiffs should he succeed on appeal.

10. The court has considered the history of the litigation between the parties. The Defendant initially sought the sit property through an originating summons for adverse possession. He lost both before the Environment and Land Court and the Court of Appeal. He then filed the instant suit which he lost before this court. He now intends to appeal to the Court of Appeal. Whereas the Defendant undoubtedly has a right of appeal, it must be remembered that the Plaintiffs are the successful litigants so far. The Defendant has lost in at least 3 judicial fora where the Plaintiffs have succeeded.

11. The Defendant must, therefore, demonstrate substantial loss unless a stay of execution is granted. There is some evidence that the Defendant has been in possession of the suit property for a considerable period of time and that he has settled thereon with his family. His family life might be seriously interrupted if he were to be evicted before the hearing and determination of the intended appeal. There is also a risk that should the suit property be alienated it may be kept out of the Defendant's reach should his appeal ultimately succeed. The court is thus of the opinion that the Defendant shall suffer substantial loss unless a stay of execution is granted.

12. The Defendant must, however, provide some form of security for costs as one of the conditions for granting a stay. There is uncontroverted evidence that the Defendant has never paid costs on previous litigation over the suit property which he lost. The court shall therefore direct the Defendant to deposit some amount in court as security for costs of the instant suit. The court shall also direct the Defendant to file his appeal within a limited period.

13. The upshot of the foregoing is that the court is inclined to grant the Defendant a conditional stay of execution of the decree. Consequently, the court makes the following orders;

a) There shall be a stay of execution of the decree dated 28th March 2019 subject to the following conditions:

i. The Defendant shall deposit in court a sum of Kshs.500,000/- as security for the Plaintiff's costs in this suit within 30 days from the date hereof.

ii. The Defendant shall file his appeal within a period of 45 days from the date hereof.

iii. In default of compliance with the above conditions the stay shall lapse automatically.

b) An order of inhibition is hereby issued to prevent further dealings with Title No. Mbeti/Gachoka/473 for a period of two (2) years.

c) The order of stay and the inhibition shall be in force for a period of two (2) years from the date hereof or until conclusion of the appeal, whichever comes first.

d) Costs of the application to the Plaintiffs.

14. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 17TH DAY of OCTOBER, 2019.

In the presence of Ms. Nzekele holding brief for Mr. Okwaro for the Defendant and in the absence of the Plaintiffs.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

17.10.19