



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 11A OF 2019

SUSAN MUTHONI NDEGE.....APPELLANT

VERSUS

CATHERINE KARIMI KAMAU.....1ST RESPONDENT

SUSAN WAMBURA KAMAU.....2ND RESPONDENT

JANE MUTHONI MURIMI.....3RD RESPONDENT

RULING

The appellant who is also the applicant has filed the Notice of Motion dated 10th June 2019 under **Order 51 Rule 1, Order 42 Rule 6 CPR and Section 1A, 1B & 3A CPA**. The applicant is seeking the following orders:

1. Spent.

2. That this Honourable Court be pleased to grant the appellant an order of stay of execution of the judgment/Decree of the Hon. E.O. Wambo – SRM in Kerugoya ELC Case No. 146 of 2018 dated 16th May 2019 pending the hearing and determination of this application inter-partes.

3. That this Honourable Court be pleased to grant the appellant an order of stay of execution of the

Judgment/Decree of the Hon. E.O. Wambo – SRM in Kerugoya ELC Case No. 146 of 2018 dated 16th May 2019 pending the hearing and determination of Appeal No. 11 of 2019 already filed.

4. That the costs of this application abide the results of the intended appeal.

That application is premised on grounds apparent on the face of the said application and the affidavit of the applicant sworn the same date.

The respondents by way of a replying affidavit sworn on 19th August 2019 opposed the said application.

APPLICANT'S CASE

The applicant in her grounds on the face of the said application stated that her appeal is arguable and raises bona fide and/or plausible issues with high chances of success. She also stated that unless the stay order is granted, her Appeal will be rendered nugatory and that she is ready and willing to abide by any condition imposed by this Honourable Court for the due performance of the decree. She stated that she has satisfied the principles for the grant of stay pending appeal.

RESPONDENTS CASE

The respondents through their joint affidavit evidence contend that the appellant has not demonstrated what irreparable loss and/or damages she is likely to suffer should the application not be granted. The respondents stated that the appeal and the application are just meant to deny the plaintiffs the fruits of a successful judgment.

ANALYSIS AND DECISION

I have considered the application and the rival submissions. I have also considered the documents and the applicable law. An application for

stay pending appeal under **Order 42 Rule 6 (2) CPR** requires that the Court considering such an application must of necessity balance between the rights of a successful litigant and that of an unsuccessful litigant who wishes to exercise his undoubted right of appeal. The Court has to weigh the two competing interest so that rights of the unsuccessful litigant whose appeal if it succeeds ultimately will not reap a barren judgment. In an attempt to balance the two competing interests, the rules Committee formulated the conditions set out in **Order 42 Rule 6 (2)** which provide as follows:

“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 appellant”

The subject matter of this appeal is said to be an ancestral land. If indeed the suit property is ancestral land as alluded by the applicant and if execution is not halted and the suit land is disposed of to a third party, the applicant may not get an equivalent land with ancestral attachment. This Court is satisfied that unless the application is granted, he will suffer irreparable loss that cannot be compensated by damages. The other condition is that such application must be brought without unreasonable delay. The judgment before the lower Court was delivered on 16th May 2019. The application before me was filed on 10th June 2019 less than one month later. I also find a period of less than 30 days not inordinate in the circumstances of this case. On the third ground, the applicant has given an undertaking to comply with any condition this Honourable Court may give for the due performance of the decree herein.

In that regard, I am equally satisfied that the applicant has demonstrated his willingness to comply with any conditions that this Honourable Court may give for the due performance of the decree should the orders be granted. The upshot of my analysis is that the application dated 10th June 2019 is merited and the same is allowed in the following terms:

(1) An order of stay of execution of the Judgment/Decree of Hon. E.O. Wambo – SRM in ELC Case No. 146/2018 (Kerugoya) for a period of twelve (12) months only be and is hereby issued.

(2) The costs of this application to abide this appeal.

READ, DELIVERED and SIGNED at Kerugoya in open Court this 4th day of October, 2019.

E.C. CHERONO

ELC JUDGE

4TH OCTOBER, 2019

In the presence of:

1. Mr. Ombongi holding brief for Wambugu Kariuki
2. Mr. Asimwe holding brief for Ngigi Gichoya
3. Wachira – Court clerk – present