



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO.422 OF 2017

ESTHER WANJIKU MWANGI

JAMES NGARACHU CHEGE.....APPLICANTS/PLAINTIFFS

WILSON GITONGA NGARACHU

JOHN KAMAU NGARACHU

VS

WAMBUI NGARACHU (sued as the legal representative of the estate OF

NGARACHU CHEGE - DECEASED).....RESPONDENTS/DEFENDANT

RULING

1. This Motion filed on the 31/5/19 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. There be stay of execution of the judgment entered on the 25/4/2019 pending the hearing and determination of the application interpartes.

c. There be stay of execution of the judgment entered on the 25/4/2019 pending the hearing and determination of the intended appeal.

d. Costs of the application.

2. The application is supported by the grounds adduced thereto and the supporting affidavit of the 2nd Applicant where he deponed that he is aggrieved with the judgment of this Court which was delivered on the 25/4/19 in favour of the Respondents in respect to the suit land. That he has filed a Notice of Appeal dated the 8/5/19. That he has an arguable appeal and if the judgment of this Court is not stayed the appeal will be rendered nugatory. That his former counsel failed to make an application for stay after the judgment was pronounced in Court and the Respondents may proceed with execution thus rendering his appeal nugatory.

3. The Applicant maintains that he has an arguable appeal with a high probability of success. He deponed that the Respondents has threatened to execute the judgment by blocking access road to the Applicant's home. That it is ready and willing to comply with any such conditions as to the provisions of security.

4. Whilst urging the Court to exercise its discretion in his favour he deponed that the application has been filed promptly.

5. The motion is opposed vide the Replying Affidavit filed by the Respondents in which she interalia deponed that; the application is incompetent and bad in law and is unmeritorious; the notice of appeal was served within 14 days instead of 7 days permitted by law; no application has been made by the Applicant requesting for typed proceedings to demonstrate their quest to file an appeal; decree has not been extracted and thus there is no immediate threat of execution against the Applicants; Applicant has not demonstrated the substantial loss they stand to suffer nor how the intended appeal will be rendered nugatory in the event execution is done

6. The Respondents further deponed that the Applicants have continued to forcefully unlawfully and illegally use the access road through her land. That their hands are soiled and cannot succeed in beseeching a Court of equity for an equitable relief such as stay of execution.
7. That granting the orders as sought by the Applicants will prejudice her in that the enjoyment of the fruits of her judgment will be delayed.
8. In the alternative the Respondents urged the Court that in the event that it allows the application, it should be granted subject to conditions and limited in time.
9. Parties with leave of the Court elected to prosecute the 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.
10. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the motion.
11. 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.”

12. 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.

13. Going by the record the judgment complained of was delivered on the 25/4/19. This application was filed on the 31/5/19, a period of 35 days. The Court finds and holds that there is no delay in bringing this application. It was filed timeously. Ground No a) succeeds.

14. In respect to the 2nd requirement of proof of substantial loss, the Applicant has submitted that the Respondents have threatened to execute the judgment against the Applicants by blocking the access road to their homes.

15. 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.”

16. In this case and going by the decision in **Machira** above the Applicants have not proved the loss that they stand 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 CPR. 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”.

17. 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 Applicants herein failed to demonstrate such substantial loss that they stand 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.

18. 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.

19. In this case the Applicants have stated that they are willing to abide by the conditions of this Court in respect to security of costs. The Applicants have however not indicated nor disclosed the quantum. I find and hold that the sum of Kshs. 300,000/- is sufficient security for costs.

20. Balancing the rights of the parties and doing the best I can, the motion dated the 31/5/19 is allowed in the following terms;

- a. The stay of execution is granted provided that the appeal is filed within 60 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. 300,000/- (Three Hundred Thousand only) within 30 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. If the Applicant fails to comply with either of (a-b) above the stay lapses and the Application stands dismissed, 60 days from this date.
- d. Costs of the application shall be met by the Applicant.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS DAY OF 7TH NOVEMBER 2019.

J G KEMEI

JUDGE

In the presence of:

Plaintiff/Applicant - Chege for 1st, 2nd, 3rd and 4th

Defendant/Respondent – Ndegwa

Ms Irene and Ms Njeri, Court Assistant