



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

MISC. CIVIL APPLICATION NO. 9 OF 2019

AGNES NJOKI KIIGE MUCHIRA.....1ST APPLICANT

JAMES MWENDIA KIIGE.....2ND APPLICANT

JOSPHAT MWAI KIIGE.....3RD APPLICANT

EPHANTUS NDAMBIRI.....4TH APPLICANT

VERSUS

SAMSON GACHOKI KAMITI.....1ST RESPONDENT

JAMES GITARI KAMITI.....2ND RESPONDENT

RULING

The applicants vide a Notice of Motion dated 30th May 2019 sought the following orders:

- 1. That this Honourable Court be pleased to grant stay of execution of the decree in CMCC 319 of 2008 pending hearing and determination of this application.***
- 2. That this Honourable Court be pleased to grant stay of execution of the decree in CMCC 319 OF 2008 pending hearing and determination of the intended appeal.***
- 3. That this Honourable Court be pleased to grant the applicants leave to appeal against the judgment delivered on 18th December 2018 out of time.***
- 4. That the costs of this application be provided for.***

In his supporting affidavit to the said application sworn the same date, the 2nd applicant with authority from his co-applicants deponed that the judgment in CMCC No. 319 of 2008 was delivered in their absence and/or their advocate on 18th December 2008. The applicants further stated that they were dissatisfied with the said judgment and intend to lodge an appeal and that they have been living in the suit property and have nowhere to go.

The 1st respondent filed a replying affidavit opposing the said application. According to the respondents, the judgment in CMCC No. 319 of 2008 was delivered in the presence of the applicants' lawyer who was obliged to inform them the outcome of their case. The respondents further stated that the applicants are not truthful in that they have not disclosed when they became aware of the judgment in CMCC No. 319 of 2008. The respondents stated that no prejudice will be occasioned if the application is not granted since the applicants have another land at South Ngariama registered in the name of the 3rd and 4th applicants and a plot at Kutus Village No. 231. They therefore sought to have the said application dismissed with costs.

ANALYSIS AND DECISION

The issue for my determination is the grant of an order of stay of execution pending an intended appeal under **Order 42 Rule 6 CPR**. **The said order** provides for grounds in which an applicant must satisfy the Court before orders of stay pending appeal is granted. First, an applicant is required to show that substantial loss may result unless the order is made. The second ground is that the application has been

made without unreasonable delay and finally, the applicant must give such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him. In this case, the applicant has not shown what substantial injury or loss he may suffer unless the order of stay is granted. From the supporting affidavit and the submissions by the applicant, their contention is that they have been on the suit land doing farming for more than a decade and that they have nowhere else to go. In the replying affidavit at paragraph 10 thereof, the respondent stated that the applicants will not be prejudiced if the orders are not granted as they have another parcel of land at South Ngariama registered in the names of the 3rd and 4th respondents and a plot at Kutus Village No. 231. A copy of allotment of the said plot was annexed thereto. Those averments on oath were not controverted by the applicants in their supplementary affidavit sworn by James Mwandia Kiige on 26th September 2019. I find that the applicants have not proved to the satisfaction of this Court that they will suffer substantial loss unless the order is granted. Regarding the second ground, the impugned judgment/order being appealed against was delivered by the subordinate Court on 18th December 2018. This application was filed on 30th May 2019. The explanation given by the applicants for the delay is that they were not notified of the date of the judgment. Their advocate was not also notified of the same. However, the advocate who was appearing for the applicants in the lower Court did not swear an affidavit confirming that indeed he was not notified of the delivery of the judgment. The applicants have not indicated how they came to know of the delivery of judgment if indeed they were not notified. I find that the delay to file this application has not been explained satisfactorily. On the third and last ground, I find that the applicants have not given any security or undertaking for the due performance of such decree or order as may ultimately be binding on them. In *Elena D. Korir Vs Kenyatta University (2012) e K.L.R, Justice Nzioka Makau* held thus:

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & another Vs Thornton & Thipin Ltd (1993) K.L.R 365 where the Court of Appeal (Gicheru J.A, Chesoni J.A. & Cockar Ag. J.A) held that:

“The High Court discretion to order stay of execution of its order or decree is fettered by three conditions, namely:

Sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo Vs Straman, E.A. Ltd (2013) as follows:

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These Twin principles go hand in hand and failure to prove one dislodges the other”.

I absolutely agree with the above decision and have nothing useful to add. In the final analysis, I find the application dated 30th May lacking merit and the same is hereby dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of December, 2019.

E.C. CHERONO

ELC JUDGE

13TH DECEMBER, 2019

In the presence of:

1. Mr. Maina Kagio
2. Mr. Munene Maina holding brief for Munene Muriuki
3. Mbogo – Court clerk