



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELC NO.18 OF 2018**

**MARTHA WANJIKU NYUTI**

**PARTICK NYUTU MWANGI**

**ANN MARGARET MWANGI.....RESPONDENTS /PLAINTIFFS**

**VS**

**SUSAN MWIHAKI NJOROGE.....APPLICANT/1<sup>ST</sup> DEFENDENT**

**KAMAU MATEGA.....RESPONDENT/2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR MURANGA.....RESPONDENT /3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Motion filed on the 3/7/19 is brought under Section 1A 1B 3A of the Civil Procedure Act, Order 10 Rule 11, Order 22 Rule 6, Order 40 Rule 1& 4 and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant sought the following orders;

a. Spent

b. The Hon Court be pleased to order stay of execution against the 1<sup>st</sup> Defendant in respect of the judgement and the decree of the Court and all consequential orders pending the hearing and determination of the application.

c. That the honourable Court be pleased to stay the execution of the judgement/decree obtained herein until the determination of the 1<sup>st</sup> Defendants Appeal.

d. The costs of this application abide by the outcome of the Appeal.

2. The application is supported by the grounds adduced thereto and the supporting affidavit of the Applicant who stated that the respondents have initiated the process of evicting her from the suit land LOC6/MUTHITHI/1041 where she has lived for over 75 years. That if evicted she will suffer substantial loss and the Appeal will be rendered nugatory. That the suit property being immovable will any way be available to the successful party on Appeal. That she has brought the application in good faith and to ensure justice prevails.

3. The application is opposed through the Replying Affidavit sworn by Martha Wanjiku Nyutu , the 1<sup>st</sup> Respondent who deponed that the judgment of the Court has been effected and the Applicant and her siblings have been evicted from the lands and the Plaintiffs have fenced off the suit land. That the orders of the Court have been registered on the titles as shown on the copies of searches attached. In any event the Applicant has not provided any security for costs. That the Appeal is therefore devoid of merits. That the respondents have no intention of selling the land and therefore the Appeal if successful will not be rendered nugatory.

4. The parties elected to file written submissions however save for the Applicant the respondents did not file any as at the time of writing the ruling.

5. The Applicant submitted that she has filed an Appeal which stands a high chance of success. She stated that the suit land is still registered in her name and therefore execution has not commenced as alleged by the respondents. That the Applicant stands to suffer irreparable harm if she is evicted form the suit land. That the Respondents shall not be prejudiced by the orders of stay if granted.

6. The issues for determination are; whether the orders of stay of execution should be granted; who meets the cost of the motion.

7. 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.”

8. 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.

9. Going by the record the judgment complained of was delivered on the 9/5/19. This application was filed on the 2/7/19. The Court finds and holds that there is no delay in bringing this application. It was filed timeously. Ground a) succeeds.

10. In respect to the 2<sup>nd</sup> requirement of proof of substantial loss, the Applicant has submitted that the respondent has threatened to execute the judgement against the Applicants. The Respondents responded with evidence that shows that the judgement has by large been executed. I have seen the searches which shows that the titles have been rectified and registered in the names of the Plaintiffs. There is also a pictorial that shows the land has been fenced following the eviction of the Applicant and her siblings.

11. In the case of **Peter Rugu Gikanga –vs- Hellen Murige Kabutha [2007] eKLR** Kimaru J declined to stay execution of a judgment which ultimately evicted the party the Court held that;

“...the Appellants have failed to establish that there is anything remaining, after the eviction of the Appellants, capable of being stayed. In any event, the Appellants have failed to establish what substantial loss they would suffer if stay of execution is granted when they have conceded that they have already been evicted from the suit land.”

12. The above decision is persuasive in that the Applicant has not availed or countered with evidence the averment of the Respondents that she has been evicted and no longer in actual possession. Further evidence of loss must be presented to allow a conclusion that indeed there is still reason to grant stay as the subject matter of the application still exists.

13. In the circumstances there is nothing for the Court to stay as execution has been commenced. The substratum of the subject matter is no longer existing. The application came too late in the day.

14. It is dismissed with costs payable by the Applicant.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 11<sup>TH</sup> DAY OF DECEMBER 2019.

J G KEMEI

JUDGE

**Delivered in open Court in the presence of:**

Kiriba HB for Karweru for the 1<sup>st</sup> – 3<sup>rd</sup> Plaintiffs/Respondents

T M Njoroge for the 1<sup>st</sup> Defendant/Applicant

2<sup>nd</sup> Defendant/Applicant: Absent

3<sup>rd</sup> Defendant/Applicant: AG is absent

Irene and Njeri, Court Assistants