



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NYAHURURU**  
**ELCA NO 16 OF 2018**

**STEPHEN MWIHIA MARAGARA.....APPELLANT/APPLICANT**

**VERSUS**

**MWANGI KAMURARA (suing as Legal Representative of the Estate of**

**MWANGI KAMURARA MATHIGI.....RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 19<sup>th</sup> December 2018 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules, and any other applicable provisions of the law where the Applicant seeks for orders;.

a. **Spent.....**

b. **Spent**

c. That pending the hearing and Determination of the Appeal, there be a stay of execution of the orders issued on the 29<sup>th</sup> November 2018 and the proceedings in Nyahururu CMC ELC No. 341 of 2018

d. The costs of this application be provided for.

2. The said application is supported by the grounds set on the face of the application as well as on the sworn affidavit of Stephen Mwihia Maragara the Appellant/Applicant.

3. On the 15<sup>th</sup> October 2019, the application was argued orally wherein counsel for the applicant submitted that their application sought to stay the execution of the orders issued on 29<sup>th</sup> November 2018 and the proceedings in Nyahururu CMC ELC No. 341 of 2018. She relied on the grounds on the face of the application and the affidavit of Stephen Mwihia to further submit that the Applicant purchased ½ acre of land in the year 2004, from David Irungu Macharia, the son of the deceased Monica who was the proprietor of the whole property. The said land was to be excised from LR. Nyandarua/ Sabugo/85 as per the sale agreement marked as SMM1 and Certificate of translation.

4. That the Applicant thus took possession and planted over 300 cypress trees which he harvested sometime in June 2018 and sold them. Subsequently the Respondent filed Succession Cause No. 49 of

2017 in the CM's Court Nyahururu upon which the Applicant filed for a revocation of the same. On the 24<sup>th</sup> September 2018, an order was issued by Honourable Magistrate restraining the Respondent from evicting the Applicant herein from the suit property pending hearing and determination of the summons of revocation of grants.

5. It was while there was the subsistence of orders granted on 24<sup>th</sup> September 2018, that the Respondent herein filed suit in the Chief Magistrate's court being CMC ELC No. 341 of 2018 seeking for orders of temporal injunction. Interim orders of injunction were granted on the 29<sup>th</sup> November 2018 without taking into consideration the submissions by counsel for the Applicant herein.

6. It was therefore their submissions that in the existence of orders before the lower court, the Applicant here stood to be held in continuous contempt of the court orders which had amounted to eviction orders, the Applicant having had taken possession of the suit land in the year 2004. That the Applicant had already been fined Ksh 40,000/- as a result of those orders and if the proceedings at the trial court were permitted to continue, the Applicant would be fined time and again thus exposing him to suffer substantial loss.

7. The Applicant submitted that their Memorandum of Appeal had been filed two days after the ruling of the lower court and therefore the same had been filed expeditiously. That as to the security to be deposited in court pending the determination of the Appeal, it was the Applicant's submission that they were willing to deposit any amount that the court deems fit as security.

8. The Applicant, while relying on their attached list of authorities, thus sought that the court exercises its discretion as provided for under Section 63 of the Civil Procedure Act, to grant them the orders so sought.

9. In response to the application and in opposition thereto, the Respondent's submission was that Counsel for the Applicant had submitted on half untruths. That the suit in CMC ELC No. 341 of 2018 was instituted on 20<sup>th</sup> September 2018 as per their annexure MK5. Thereafter, the Applicant had been issued with interim orders on the 20<sup>th</sup> September 2018. That it was during that period of time, that the Applicant filed an application dated 24<sup>th</sup> September 2019 in Succession Cause No. 49 of 2017.

10. That although the Applicant had submitted that the sale agreement was executed in the year 2004, yet the alleged seller was a son of the deceased proprietor who had passed away in the year 2000 as per their annexure marked as MK3. The grant of letters of administration had subsequently been issued on the 29<sup>th</sup> June 2017.

11. That during the period from the year 2000 to 2017, the deceased's estate had no administrator. That the provisions of Section 45 of Succession Act was clear on the issues on intermeddling with the Estate of a deceased person. That the Applicant herein was an intermeddler in law as the person who sold him the suit land no authority to transfer any title.

12. That since the application sought stay pending an Appeal, the Respondent relied on the authority of **Cosmas Marete vs Bundi Mwiti [2016] eKLR** where the court declined to give stay of proceedings since there were no chances of success.

13. That on the issue as to when the Applicant took possession of the suit land, the Respondent's submission and while relying on the sworn affidavit of Mwangi Macharia of the 21<sup>st</sup> December 2018, was that they had noticed the Applicant start to trespass on the land sometime in July 2018 wherein pursuant to instructions to their Counsel, a demand letter dated the 13<sup>th</sup> September 2018 had been served upon him.

14. That when the Applicant did not cease from the acts of trespass, they had filed suit in Nyahururu CMC being ELC No. 341 of 2018, the subject matter of the present Appeal. Interim orders of the 20<sup>th</sup> September 2018 were issued whose effect was to halt any activity on the suit land pending the final

determination of the application for injunction. Service was effected upon the Applicant who vide his Affidavits sworn on 24<sup>th</sup> September 2018 and 30<sup>th</sup> June 2019, deponed that he started depositing building materials (as per the attached photos of the suit land-annexure MK5) and the construction of his house in the year 2018. It could therefore not have been possibly true that he had been living on the suit land since the year 2003.

15. That the trial court in its ruling had noted that the Applicant was not in possession of the land at the time the orders were issued, hence the reason why the court had found the Applicant in contempt. That it was not humanly possible to construct a permanent house within 2 months and start living there. The Respondent's submission was that the construction and subsequent entry onto the suit land had occurred during the subsistence of court orders of injunction.

16. That the said construction was meant to defeat the ends of Justice as the Applicant knew that the Respondent was about to institute Civil proceedings. The Respondent was entitled to be protected by the court. The Respondent relied on the cases of **Kenya Tea Growers Association vs Francis Atwoli (2012) eKLR** and **Kenya Wildlife Service vs Mutembei (2017) eKLR** to buttress their submission. That the Applicant herein did not merit to have the court's discretion exercised in his favor.

17. In rejoinder, the Applicant submitted that service of interim orders on the 21<sup>st</sup> September 2018 were effected upon the Applicant in 'his house'. An indication that the Applicant was already living on the suit land as depicted by the photos attached to the Affidavit dated the 24<sup>th</sup> September 2019.

#### **Determination.**

18. I have considered the application herewith, wherein the Applicant in a clever way has sought for two orders in a single application being orders of;

- i. stay of execution of the orders issued on the 29<sup>th</sup> November 2018 and
- ii. Stay of the proceedings in Nyahururu CMC ELC No. 341 of 2018

19. I have also considered the authorities, as well as the reasons given for and against the said application(s). The law concerning stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows:

*No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 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 Applicant.*

20. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- a) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- b) The application is brought without undue delay and
- c) 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.

21. In the application before me, the Applicant has pleaded that he would suffer substantial loss if he is continually held in contempt of the court orders. Further that if the said orders are executed the same will result into his eviction from the suit land. On this point alone, I am in agreement that the Applicant has discharged the first condition as provided for under Order 42 Rule (6) (2) of the Civil Procedure Rules. I am also in agreement that the Applicant did file his application without undue delay which thus discharges the Second condition as stipulated in the Act. On the last condition as to provision of security, the Applicant in the present application has indicated his willingness to furnish security for a grant of the order for stay of execution.

22. **Moving on to the second set of the orders sought by the Applicant to wit** Stay of the proceedings in Nyahururu CMC ELC No. 341 of 2018, it is trite law that the court's discretion in deciding whether or not to grant stay of proceedings as sought must be guided by any of the following three main principles;

- a) Whether the applicant has established that he/she has a prima facie arguable case.
- b) Whether the application was filed expeditiously and
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

23. At this point, it is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues.

24. Going by the submissions and the annexures herein attached to the Respondent's response to the application dated the 19<sup>th</sup> December 2018, I find that the suit land herein being No. Nyandarua/Sabugo/85 was registered to the deceased person one Mwangi Kamurara Mathagi on the 17<sup>th</sup> May 1991. The proprietor herein subsequently passed away on the 4<sup>th</sup> November 2000 wherein letters of administration to his Estate were taken out on the 29<sup>th</sup> June 2017 by the Respondent herein.

25. It is also clear that before the said letters of administration had been taken out, the Applicant herein entered into a sale agreement with one David Macharia on the 10<sup>th</sup> November 2003 for the sale ½ acre of land to be excised from LR. Nyandarua/ Sabugo/85, the subject suit herein.

26. Section 45 of the Law of succession prohibits anyone from intermeddling with property of deceased person and stipulates that:

*45 (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

27. On the other hand, section 82 of the same Act provides:-

*"Personal representative shall, subject only to any limitation imposed by their grant, have the following powers-*

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;*

b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

ii. ....

ii. no immovable property shall be sold before confirmation of the grant;" (Emphasis supplied

28. I find that the said David Macharia intermeddled with property of deceased person as he did not hold a valid title to the suit property to sell and transfer the same to the Applicant. *The contract of sale between the applicant and the said beneficiary (David Macharia) of the estate of the deceased which was entered into before the grant of Letters of Administration and before the confirmed Grant, was invalid for offending the provisions of Sections 45 and 82 of the Law of Succession Act. The Applicant herein purchased property from the Estate of the deceased before the confirmation of Grant at his own peril.*

29. **Ringera J** (as he then was) in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** held as follows:

*“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)*

30. The Respondent, having demonstrated that the Applicant had intermeddled with the estate of the deceased, I find that the Applicant has not established a prima facie case to be accorded the orders so sought in his application for stay of proceedings in the CMC ELC No. 341 of 2018. I also find that the sequence of steps to be followed into whether to grant stay of proceedings is sequential so that the second condition can only be addressed if the first one is satisfied.

31. Consequently, I dismiss the application dated 19<sup>th</sup> December 2018 with costs to the Respondent. The interim orders are herein vacated.

32. Since the record of Appeal has been filed on the 19<sup>th</sup> December 2018, the same shall be served within the next 30 days for the hearing of the Appeal herein.

**Dated and delivered at Nyahururu this 3<sup>rd</sup> day of December 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**