



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 31 OF 2015

FRANCIS GITHAKA MUNENE

JOSPAT KITHIGA MUNENE

STANLEY GAKONO MUNENE

PETERSON MUTHIKE MUNENE.....APPLICANTS/PLAINTIFFS

VERSUS

STEPHEN MURATHI NJOGU.....RESPONDENT/DEFENDANT

RULING

This is in respect to the defendant's Notice of Motion dated 8th December 2016 in which he seeks the following orders:

- 1. Spent.**
- 2. Spent.**
- 3. Spent.**
- 4. That the Honourable Court be pleased to issue a stay of execution of the orders issued on 30th August 2016 pending the hearing and determination of the intended appeal.**
- 5. That costs of this application be provided for.**

The application is based on the grounds set out therein and supported by the affidavit of **STEPHEN MURATHI NJOGU** the defendant.

The gravamen of the application is that following this Court's judgment dated 19th August 2016, a decree was issued on 30th August 2016 declaring the plaintiffs to be entitled by adverse possession of over 12 years to all that land comprised in title No. MUTIRA/KIANJEJE/290. The Court further directed the Land Registrar to register the plaintiffs as proprietors of the said land parcel.

The defendant has filed **NYERI CIVIL APPLICATION No. 84 of 2016** seeking leave to file and appeal against that judgment out of time and it is his case that the appeal is arguable with a probability and if the decree is executed, that appeal will be rendered nugatory. Further, that the plaintiffs will not suffer any prejudice if this application is allowed.

The application is opposed and the plaintiffs have filed grounds of opposition thereto describing it as incompetent, bad in law and an abuse of the Court process which should be dismissed.

By consent of the parties, the application was canvassed by way of written submissions which have been filed by **MS KIRAGU** advocate for the plaintiffs and **MS MAKWORO** advocate for the defendant.

I have considered the application, the grounds of opposition and the submissions by counsel.

Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides as follows:

6(1) "No appeal or second appeal shall operate as a stay of execution or proceeding 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.

6(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 un-reasonable 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” Emphasis added.

It is clear from the above that a party seeking an order for stay of execution pending appeal must meet the following conditions:

1. Show sufficient cause.

2. Demonstrate that unless stay is granted, he might suffer substantial loss.

3. The application must be made *without un-reasonable delay*.

4. Give such security as the Court may order for the due performance of such decree or order as may ultimately be binding on him.

The judgment sought to be appealed was delivered on 19th August 2016 and the decree was issued on 30th August 2016. This application was filed on 8th December 2016 almost four (4) months later. No explanation has been given for that delay which I consider to be inordinate taking into account the fact that the judgment was delivered in presence of counsel for the defendant. That delay, in my view, is sufficient to dispose off this application.

That notwithstanding, in KENYA SHELL VS BENJAMIN KARUGA KIBIRU & ANOTHER 1986 K.L.R 410, PLATT Ag. J.A (as he then was), stated the following about an application of this nature:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.

Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondent should be kept out of their money”.

In the same case, GACHUHI Ag. J.A (as he then was) added the following:

“In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted”.

See also SILVERSTEIN VS CHESONI 2002 1 K.L.R 867 and MUKUMA VS ABUOGA 1988 K.L.R 645. The defendant has not demonstrated what substantial loss, if any, he will suffer if the order for stay pending appeal is not granted. He depones to having “*an arguable appeal with a probability of success*”. It is not within the province of this Court as the trial Court to comment on the intended appeal in the Court of Appeal. Besides, and for good reasons, that is not a requirement under Order 42 Rule 6 of the Civil Procedure Rules. The defendant has also stated that if the order for stay is not granted, the intended appeal will be “*rendered nugatory*”. However, no evidence has been availed to suggest that the plaintiffs intend to alienate the land subject of this case. And with regard to the averment that the plaintiffs “*will not suffer any prejudice if the application is allowed*”, an order for stay of execution is in the discretion of the Court and unless there is “*sufficient cause*” shown, the Court will not deprive a litigant of the fruits of his judgment. Counsel for the defendant has in her submissions referred me to the case of BUTT VS RENT RESTRICTION TRIBUNAL 1982 K.L.R 417 for the proposition that there are no overwhelming hindrances against granting the order for stay. In that case, however, MADAN J.A (as he then was) added that a “*Court will grant a stay where special circumstances of the case so require*”. I do not see what “*special circumstances*” exist in this case having already found that the defendant has not shown any “*sufficient cause*” to warrant the orders sought and is also guilty of inordinate delay which has not been explained.

The up-shot of the above is that the Notice of Motion dated 8th December 2016 is dismissed with costs to the plaintiffs.

B.N. OLAO

JUDGE

26TH JANUARY, 2018

Ruling delivered, dated and signed in open Court at Kerugoya this 26th day of January 2018

Mr. Mwangi for Ms Makworo for Applicants present

Ms Kiragu for the Respondent present

Respondent present.

B.N. OLAO

JUDGE

26TH JANUARY, 2018