



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC.APPEAL NO.9 OF 2017**

**TERESIAH WAIRIMU (Suing as the Administrator of the Estate  
of PETER EVANS RUNGU MUGO).....APPELLANT**

**-VERSUS-**

**WANJIKU MWANGI.....RESPONDENT**

**RULING**

The matter for determination is the Appellant's/Applicant's **Notice of Motion** application dated **4<sup>th</sup> October 2016**, which is brought under Order 42 Rule 6(1)(2), Order 50 Rules 1&3 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya. The Applicant has sought for the following orders:-

**1) Spent.**

**2) That pending the hearing and determination of the Applicant's intended Appeal, this Honourable Court do grant a stay of execution of the Subordinate Court's Judgement and Orders given on 6<sup>th</sup> August 2015, by Hon. Ndungi and read by Hon. A. M. Maina, Principal Magistrate in Gatundu SRMCC No.153 of 2011(OS).**

**3) That the costs of this application be provided for.**

This application is premised upon the grounds stated on the face of the application and on the **Supporting Affidavit** of **Teresia Wairimu**. These grounds are:-

**1) That the Applicant is aggrieved by the entire Judgement and Orders of the Subordinate Court delivered by Hon. D. M. Ndungi on 6<sup>th</sup> August 2015 in SRMCC No.153 of 2011(OS).**

**2) That the Applicant has filed a Memorandum of Appeal against the aforesaid Judgement.**

**3) That the intended Appeal is arguable and has overwhelming chances of success.**

**4) That unless this Honourable Court grants the orders sought herein, the Applicant's intended Appeal will be rendered nugatory since the subject matter of the suit being Land Parcel No.Ruiru East/Juja East Block 2/1705, may be transferred to third parties.**

**5) That it is in the interest of justice that this application be allowed.**

In her **Supporting Affidavit**, the Applicant **Teresia Wairimu** averred that a Judgement was entered by the **Resident Magistrate's Court** at **Gatundu** on **6<sup>th</sup> August 2015** as per **annexture TW1**. She further averred that she was dissatisfied with the said Judgement and she filed a **Memorandum of Appeal** marked **TW2**. Further that she had filed an application for stay of execution wherein she was granted the said *exparte* orders but they lapsed on **10<sup>th</sup> December 2015**, when her Advocate failed to attend court. She further averred that she later filed the instant application and she is apprehensive that the Appeal might be rendered nugatory should the Respondent transfer the suit property to the third parties and further the estate of her husband will suffer loss and damage. It was her allegations that the Respondent will not suffer any loss or damage as she has never been in possession of the suit property. She urged the Court to allow the instant application.

This application is contested by the Respondent who filed **Grounds of Opposition** and averred that the application is **fatally defective** as drawn, that the Applicant lacks **locus standi** and there is no valid Appeal. She also alleged that the application is an **abuse of the court**

*process*, and should be dismissed with costs.

Further, the Respondent, **Wanjiku Mwangi** filed a **Replying Affidavit** on 22<sup>nd</sup> November 2016, and averred that she has had control and care of the suit land since the same was issued to her by **Juja Farm Company**. She therefore alleged that the Applicant will not suffer any irreparable loss, as she has never had possession of the suit land or even the title to land.

She also averred that the Appellant's Appeal has no merit and/or probability of success and the instant application should be dismissed. She reiterated that she has always had **possession, care and control** of the suit property and that this property is never part of the estate of **Peter Evans Rungu Mugo (deceased)**. She urged the Court to dismiss the instant application as it has not met the established ingredients for grant of the orders sought.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law and the Court will render itself as follows:-

There is no doubt that a Judgement was entered in favour of the Respondent herein **Wanjiku Mwangi** on 6<sup>th</sup> August 2015. The Judgement was written by **D. M. Ndungi, Ag Senior Resident Magistrate** but delivered by **A. M. Maina (Principal Magistrate)** on behalf of **Hon. Ndungi**. Among the orders issued in favour of the Respondent (Plaintiff therein) is a declaration that the entry on the title abstract of land parcel **No. Ruiru East/Juja East Block 2/1705** reflecting the name of **Peter Evans Rungu Mugo (deceased)** was **irregular, fraudulent and illegal ab initio**. Further an order directing the **Land Registrar, Thika District** to deregister the registration of the deceased as proprietor to the suit land and in place thereof retain the suit land in the name of its original owner **Wanjiku Mwangi**. It is also evident that the Appellant herein was aggrieved by the said Judgement and she filed a **Memorandum of Appeal** stating various grounds to support her Appeal. She urged the Court to allow her Appeal and subsequently quash and set aside the said Judgement of the lower court and all its consequential orders.

Subsequent to filing of the **Memorandum of Appeal**, the Appellant filed a **Notice of Motion** dated 30<sup>th</sup> September 2015 and sought for stay of the Magistrate's Orders in **Civil Suit No.153 of 2011 (OS)**. However the said application was withdrawn vide a **Notice to Withdraw** under **Order 25 Rule 1** of the **Civil Procedure Rules**, filed on 6<sup>th</sup> October 2016. Thereafter, the Appellant/Applicant filed the instant application which has been opposed by the Respondent.

The application is brought under Order 42 Rule 6 and the grounds to be considered in deciding this application are as provided by **Order 42 Rule 6(2)** of the **Civil Procedure Rules** which states:-

*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.*

It is evident from the above provisions of law that the Court has discretion to issue an Order for stay of execution but the said discretion must be exercised judicially. See the case of **Canvass Manufacturers Ltd...Vs...**

**Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853**, where the Court held that:-

*“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised”.*

Further in the case of **Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, the Court held that:-

*“For the court to order a stay of execution there must be:-*

- i. Sufficient cause*
- ii. Substantial loss*
- iii. No unreasonable delay*
- iv. Security and the grant of stay is discretionary”.*

As the Court also embarks in determination of this application, it will take into account that it is not the practice of the Courts to deprive a successful litigant of the fruits of his/her litigation. Further the Court will take into account that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of **Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, where the Court held that:-

*“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right*

***of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.***

The conditions that the Applicant herein should satisfy is as stated in Order 42 Rule 6(2). The Court will now consider each of the condition and juxtapose them with the available evidence herein to determine whether the Applicant is deserving of the orders sought.

Firstly, the Applicant must satisfy that she will **suffer substantial loss**, unless the orders sought are issued. It is evident that the Court did direct that the entry on the title abstract issued in the name of **Peter Evans Rungu Mugo** was **irregular** and **fraudulent**. The Court further directed that the **Land Registrar Thika**, deregister the registration of the said **Peter Evans Rungu Mugo(deceased)** as a proprietor and retain the suit land in the name of its original owner **Wanjiku Mwangi**, the Respondent. It is evident that both **Wanjiku Mwangi** and **Peter Evans Rungu Mugo (deceased)** had title to the suit land. The Respondent alleged that she is the one in possession and that the Appellant has never been in possession of this parcel of land. Even without going to the merit of the Appeal, if the Appellant was never in possession, then if orders sought herein are not granted, there is no evidence that she will suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny a successful litigants the fruits of his/her Judgement. Further, the Appellant should also have an assurance that her Appeal will not be rendered nugatory. However, taking into account that the Appellant herein was not in possession, then she has not satisfied this Court that she will suffer substantial loss if the orders sought are not granted.

The Applicant must satisfy the Court that the application was made without **unreasonable delay**. The Court noted that the **Memorandum of Appeal** was filed on **27<sup>th</sup> August 2015**, and an application for stay was filed on **3<sup>rd</sup> September 2015**. However, the said application was withdrawn and the instant application was filed on **4<sup>th</sup> October 2016**. By then, the Respondent had already applied for execution of the same. The execution sought to be stayed was initiated by the Respondent before the instant application was filed. Therefore the Court finds that there was **unreasonable delay** in **filing** this application and the stay of execution has been **overtaken by events**. See the case of **Jane Jeptoo Sawe...Vs...Estate of Sylvester Kimaqut Sang Represented by Jennifer Chebet Sang, Civil App No.49 of 2015**, where the Court of Appeal held that:-

***“The order of stay of execution that the Applicant seeks has been overtaken by events and cannot in the present circumstances be granted as it would serve no useful purpose”.***

Equally, the Court herein finds that the sought **Order** of stay of execution would not serve any purpose herein.

On the issue of such security as the court orders, the Court finds that the same is not applicable to this case as the Court has found that the Order of stay of execution would serve no purpose herein.

Having now carefully considered the instant application, the written submissions, the cited authorities and the relevant provisions of law, the Court finds that the said application is not merited and it is dismissed entirely with costs to the Respondent.

Further, the Court directs the parties should prepare the Appeal for hearing expeditiously. For that reason, the Court directs the Appellant to cause the matter to be listed before the Judge for directions under Section 79B of the Civil Procedure Act within the next **30 days** from the date hereof.

It is so ordered.

***Dated, Signed and Delivered at Thika this 2<sup>nd</sup> day of March 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

No appearance for Appellant/Applicant (But Applicant present in court)

No appearance for Respondent

Lucy - Court clerk.

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**2/3/2018**