



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 121 OF 2017

(Formerly NYERI HCCC NO. 142 OF 2011(OS))

EDITH WANGARI WANDUNA.....PLAINTIFF/RESPONDENT

-VERSUS-

JOSEPH KINYUA MUKIRI.....1ST DEFENDANT/APPLICANT

CHRISTOPHER GATHUA MUKIRI....2ND DEFENDANT/APPLICANT

RULING

1. Through the notice of motion dated **11th July 2017**, the applicants Joseph Kinyua Muriuki and Christopher Gathua Mukiri, seek an order of stay of execution of the judgement and decree issued by this court on 5th October, 2016 pending the hearing and determination of the intended appeal.

2. The application is premised on the grounds that the application has been filed without delay; that the applicants have filed an appeal against the judgment herein; that despite been aware of the pending appeal, the respondents have secretly extracted a the decree and served it on the Land Registrar Nyeri, to cancel the applicants titles for land parcels Kirimukuyu/Ngandu/615 and 616. It is the applicants case that unless the orders sought are granted, in addition to the appeal being rendered nugatory, he will suffer irreparable/ substantial loss.

3. The application is supported by the affidavit of **Joseph Kinyua Muriuki** in which the grounds thereon are reiterated. In addition, the applicant deposes that he has applied for certified copies of proceedings and judgment which are yet to be provided by the court, prepared a draft Memorandum of Appeal and is willing to comply with such conditions as may be set by the court including offering security for performance of the decree.

4. In reply and opposition to the application, the plaintiff filed grounds of opposition dated **21st July, 2017** that the application is frivolous, vexitious, an abuse of the court process, an afterthought having been filed 9 months after issuance of the decree and that the applicants have not demonstrated that they have an arguable appeal to warrant an order of stay of execution.

5. When the matter came for hearing, counsel for applicant **Mr. Waweru Macharia**, urged the court to allow the application so that the applicant's appeal which has high chances of success is not rendered nugatory. He further urged the court to balance the applicants right of appeal against the respondents right of execution. He explained that the applicants are still in occupation of the suit property and are willing to comply with any conditions set by the court.

6. In reply, counsel for the respondents, **Mr Kingori**, submitted that there has been inordinate delay in filing the application; no explanation has been offered regarding the delay and the applicant has not demonstrated that he has an arguable case.

Law applicable to the application

7. This being an application for stay pending appeal, the law applicable to the application is found in **Order 42 Rule 6(2)** of the Civil Procedure Rules which provides as follows:-

“(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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

8. On whether substantial loss may result to the applicants unless stay of execution is ordered, I begin by pointing out that this test is the Cornerstone of the jurisdiction of the Court's in granting stay of execution. In this regard, see the case of **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018** where the Court of Appeal stated that:

“It is usually a good rule to see if Order 41 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 jurisdiction for granting stay”

9. In the instant case, the applicants have demonstrated that they stand to suffer substantial loss unless the order sought is granted. A decree has already been extracted and presented to the Land Registrar for cancellation of the title deeds registered in the names of the applicants. I hold the view that without any order stopping the cancellation of the titles as ordered by the court, nothing stops the Land Registrar from cancelling the impugned title deeds and issuing a new one to the plaintiff before the appeal is heard and determined.

10. On the issue of whether the application was filed without delay, it is noted that the instant application was filed on 12th July 2017, about nine (9) months from the date the decree appealed from was issued. No explanation has been given why the applicants had to wait for nine (9) months to bring the instant application. In the circumstances, I agree with the respondent that there was inordinate delay in bringing the application for stay.

11. On the issue of security, I note that the applicants have intimated their willingness to abide with any order for security that this court may make.

12. **Order 42 Rule 6(2)** of the Civil Procedure Rules set out the conditions to be fulfilled by an applicant seeking an order of stay. The more critical issues the court needs to consider are whether the applicant stands to suffer substantial loss and the question of security. In the circumstances of this case, I find the applicants have demonstrated that they stand to suffer substantial loss and are willing to abide with any order for security that this court may make. Consequently, I allow the application on condition that the applicant shall, within 40 days from the date of this ruling, deposit in an interest bearing account to be opened in the name of the advocates of the parties herein, the sum of Kshs. 300,000/=. The applicants shall also within twenty one days from the date of this ruling, file an undertaking to prosecute the appeal filed herein without unreasonable delay.

Dated, signed and delivered in open court at Nyeri this 5th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Waweru Macharia for applicant/defendant

Mr. King'ori h/b for the defendant/respondent

Court assistant - Esther