



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO 422 OF 2017(O.S)**

**ESTHER WANJIKU MWANGLI.....1<sup>ST</sup> APPLICANT/RESPONDENT**

**JAMES NGARACHU CHEGE.....2<sup>ND</sup> APPLICANT/RESPONDENT**

**WILSON GITONGA NGARACHU.....3<sup>RD</sup> APPLICANT/RESPONDENT**

**JOHN KAMAU NGARACHU.....4<sup>TH</sup> APPLICANT/RESPONDENT**

**VS**

**WAMBUI NGARACHU (sued as the legal representative of the estate**

**OF NGARACHU CHEGE - DECEASED).....DEFENDANT**

**RULING**

1. On 17/7/2017, the Plaintiffs filed an Originating Summons simultaneously with a Notice of Motion of even date seeking, *inter-alia*, orders to compel the Defendant to open up the access road (read path way) through land parcel Loc.8/Kaganda/73. After hearing the Notice of Motion, the Court in a Ruling delivered on 18/12/2017 directed the Defendant to open up the access road passing through land Parcel No. Loc. 3/Kaganda/73 and restore water pipes laid along the access road within 30 days from the said date. In addition, the Court directed that if the Defendant failed to comply with the order stated in the preceding sentence, the Plaintiffs under the supervision of the Officer Commanding Police Station (OCS) of the area be at liberty to open up the access road passing through land Parcel No. Loc. 3/Kaganda/73 and restore water pipes laid along the said access road.

2. The Ruling referred to in paragraph one above provoked the filing of two applications, being:-

a) Chamber Summons dated 3/1/18 by the Defendant seeking stay of execution of the orders made on 18/12/17.

b) Notice of Motion dated 8/1/18 by the Defendant seeking to cite the Plaintiffs for contempt of the Court in relation to the orders made on 18/12/17.

Both applications were filed under the High Court (Vacation) Rules.

3. I shall deal with both the applications in turn.

**The application for stay of execution dated 3.1.18**

4. The Defendant's application for stay of execution is premised on the grounds set out below:-

a) The Notice of Motion dated 17<sup>th</sup> day of July 2017 was determined and Ruling made on 18<sup>th</sup> day of December 2017.

b) The Defendant was not satisfied with the said Ruling and intends to appeal before Nyeri Court of Appeal, which appeal has high chances of success.

c) The Defendant filed a notice of appeal on 19<sup>th</sup> December 2017 and served the same accordingly.

d) The Defendant applied for certified copies of proceedings and ruling to facilitate preparation of the appeal but the same are yet to be supplied by the Honourable Court.

e) The Plaintiffs may execute the Court orders resulting from the said Ruling while the intended appeal is pending and unless the stay orders are granted by the Honourable Court the Defendant stands to suffer irreparable loss and damages.

f) On 24<sup>th</sup> day of December 2017, the Plaintiffs entered into land parcel number Loc.8/Kaganda/73 belonging to the Defendant and destroyed crops such as bananas and maize among others. They also destroyed barbed fencing wire by cutting of pieces thereof. This was in blatant disregard of the Honourable Court's order of 18<sup>th</sup> December 2017.

g) That running battles and skirmishes ensued. Chaos is the order of the day. The Defendant's son was arrested and locked in Kahuro Police Station under OB/NO.10/24/12/2017 for trying to explain the contents of the Honourable Court's orders, which had given a grace period of 30 days from 18<sup>th</sup> December 2017. The police were unperturbed inexplicably.

h) That on 26<sup>th</sup> December 2017, the Plaintiffs once more entered the said land parcel causing breach of peace, exchange of blows, chaos and running battles ensued. The Defendant reported the matter to Kahuro Police Station vide OB/NO.16/26/12/2017, which the Defendant also reported assault case OB/NO...26/12/2017 respectively.

i) It is paramount that peace be maintained to contain the volatile environment and it is for the interest of justice so to order and no prejudice shall be invited to any party.

j) The Defendant beseeches the Honourable Court to stay the execution of the Ruling made on 18<sup>th</sup> day of December 2017 and the consequential orders pending the hearing and determination of the intended appeal.

5. In her Supporting Affidavit, the Defendant stated that she is aggrieved by the Ruling delivered on 18/12/17 and hence her intention to appeal. She cited the following 4 grounds of appeal which she intended to proffer in the Court of Appeal:-

a) That the Learned Judge erred in law in observing that the Applicants /Respondents had established a prima facie case at the interlocutory stage yet no trial has been carried out to substantially determine the contended issues.

b) That the Learned Judge contradicted her observation holding that the twenty(20) years rule has first to be proved but proceeded to order that the access road be opened and water pipes laid yet the Applicants /Respondents had not proved the duration of time if at all nor the existence of the road or footpath which was contested.

c) That the Learned Judge erred in law by failure to adhere to temporary injunctions rules and principles as laid down in the case of **Giella –vs- Cassman Brown (1973) E A 358**.

d) That the Learned Judge erred in law by distorting the status quo from the one existing at the time of institution of the suit contrary to the principles of various reported cases such as **Nandan Pictures –vs- Art Pictures Ltd & Others Air 1956 CAL 428**.

6. That she filed and served the Notice of Appeal on the Plaintiffs on the 19/12/17.

7. She contends that pursuant to the said orders of the Court issued on 19/12/17, the Plaintiffs entered into her land and destroyed crops and barbed fence in blatant disregard to the Court orders. That skirmishes ensued from this action of the Plaintiffs resulting to her son being arrested and locked up in Kahuro Police Station vide OB No. 16/26/12/2017. That the Court had given the Defendant 30 day's grace period to comply with the orders but the Plaintiffs took matters into their own hands. She attached a Notice of Appeal as well as photographs to show the alleged destruction.

8. In response to the Defendant's application for contempt of Court the 2<sup>nd</sup> Plaintiff on his own behalf and that of the other 3 deponed that upon extraction of the order by their Advocates, they requested the Defendant to comply with the orders and when she failed/declined or adamantly refused to comply they resolved to open the access road in the presence of the O.C.S of the area. He contends that in the process one Irungu Ngaraihu (Son of the Defendant) assaulted one Gitonga by biting him on the arm, an incident that was reported to Kahuro Police Station, Murang'a.

9. With regard to the application for stay of execution the Plaintiffs contended that the Defendant is still the owner of the suit property, there is no threat to any wastage or alienation and therefore does not deserve the order for stay of execution. Further, the Plaintiffs contended that the Defendant has not demonstrated that she would be occasioned substantial loss or prejudice by execution of the orders of 18/12/17 or how the intended appeal would be rendered nugatory by execution of the orders. The Plaintiffs added that the parties and their families have used the access road, the subject of the suit, for decades without any threat of wastage and that the Defendant is not deserving of the discretionary power of stay of execution. The Plaintiffs concluded that the Defendant has not demonstrated proof of payment of security.

10. Parties elected to file written submission, which I have reviewed.

11. The Defendant submitted that she has filed an appeal in the Court of Appeal on 3/1/18 and served the Plaintiffs on 9/1/18 and unless the stay is granted, the Defendant stands to suffer irreparable loss & damages. That the Plaintiffs breached the Court orders by their purported unlawful acts in blatant disobedience of the Court order, which they have admitted in their Replying Affidavit on record. That there is need to grant stay of execution to ease the hostility on the ground and restore peace.

12. Relying on the case of **Freight in time Limited vs Image Apparels Limited, 2015 (eKLR)** the Defendant contended that her appeal has high chances of success with triable and arguable issues before Court. In conclusion, the Defendant relied on the case of **Savings and Loan Kenya Ltd vs. Odongo Civil Appeal No. 6 of 1987**, where the Court Appeal held that the Court has inherent power to stay the execution

and make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court.

13. The Plaintiffs and the Defendant have filed written submissions both supporting their positions with legal authorities while reiterating the contents of their respective affidavits.

14. I have considered the applications, the affidavits, the submissions, and the authorities filed by the parties.

15. 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.”

16. 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.

17. Going by the record the order complained of was delivered on the 18/12/17. The application for stay was filed on 3/1/18, which was timeous in that instance. Therefore, there is no delay in bringing this application.

18. Regarding the issue of substantial loss that is likely to be suffered by the Applicant, the Court pronounced itself in the case of **James Wangalwa & Anor. Vs Agnes Naliaka Cheseto 2012 (eKLR)**, thus:-

“No doubt , in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process...The Applicant must establish other factors which show that the essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni [2002] KLR 867** the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

In the case of **Machira T.A Machira & Co. Advocates vs. East African Standard (No.2) (2002) KLR 63** the Court stated:-

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay.”

The case of **Absalom Dora vs. Turbo Transporters 2013 eKLR** the Court hold as follows:-

“The discretionary relief of stay of execution pending Appeal is designed on the basis that no one would be worse off by virtue of an order of the Court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The Court in balancing the two competing right focuses on their reconciliation which is not a question of discrimination.”

From the above cases it is clear that the Applicant must demonstrate substantial loss that she is likely to suffer if no stay is ordered. It is not sufficient to make a hollow statement.

19. In this case, the order was that an access road be opened and water pipes to be restored. If this order is complied, what is the loss that the Defendant would substantially suffer? From the above authorities the Defendant must show that she will suffer loss that will go to the core of the claim. The claim of the Defendant in the main suit is that she is the owner of the suit land. The order of 18/12/17 does not affect the whole land. It was an interlocutory order to re-open the Path Way pending the determination of the suit. It is on record that the said Path Way had been in use for decades with the agreement of the Plaintiff's Fathers and the husband of the Defendant who were said to be friends. The Defendant remains the legal owners of the property. In my view, there is nothing to demonstrate substantial loss that would render the appeal nugatory.

20. Is there an arguable appeal? The Defendant did not attach any proposed memorandum of appeal. The basis of the appeal was set out in the affidavit. The nature of the affidavit is that it constitutes evidence of the party taken an oath. It did not constitute a pleading that binds the party. The proposed pleading in the Court of appeal should be annexed.

In this case, both the substantial loss and proposed appeal are not present for the Court to find with finality that the Defendant will suffer loss because of people passing through land where they have been passing before. If such passage could at any stage would have caused any substantial loss the Defendant could have pleaded it in their proceedings and identified the nature of such loss.

21. As regards security of costs for the due performance of the decree or order as may be binding on the Applicant, the Defendant did not undertake to pay any costs that may arise out of the application or appeal.

22. This Court is alive to the wording of Order 42 rule 6 (2) which states “No order of stay of execution shall be made under sub rule (1) unless..... it denotes a command. The Applicant has not satisfied all the requirements in applying for stay of execution on an appeal.

23. The upshot is that the Chamber Summons dated 3/1/18 has no merit and is accordingly dismissed with costs to the Plaintiffs.

#### **The Notice of Motion dated 8/1/18.**

24. The application springs from the Ruling of this Court delivered on 18/12/17 where the Court made the following orders:-

a) That pending the hearing and determination of this suit, the Defendant is hereby directed to open up the access road passing through land parcel No. Loc.3/Kaganda/73 and restore the water pipes laid along the access road within the next 30 days from the date hereof.

b) In default, the Plaintiffs be at liberty to open it and the O.C.S of the area shall ensure law and order during the Plaintiff's opening of the said access road.

c) Parties be at liberty to set the matter down for pretrial and compliance to order 11 of the Civil Procedure Rules at the earliest instance.

25. On the onset, why punish for contempt? In the case of **Hadkinson vs Hadkinson(1952)ALL E.R. 567** quoted with approval in **C.A. No. 33 of 2012 Shimmers Plaza Limited v National Bank of Kenya Limited Romer, L.J** stated that:-

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in **Chuck vs Cremer (1) (1 Coop.temp.Cott 342):-**

A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular and who might be affected by it was plain. He should apply to the Court that it might be discharged. As long as it exists it must not be disobeyed.”

Contempt of Court is necessary for the maintenance of rule of law and good order that the authority and dignity of the Court is upheld at all times.

26. It is on record and admitted by the Plaintiffs that upon extracting the orders, they served them upon the Defendant requiring compliance and to open up the Path Way. That the Defendant did not open and the Plaintiffs on the 24/12/17 on their own volition entered the suit land and opened the Path Way in the process destroying the fence and crops. The actions of the Plaintiffs were undertaken before the lapse of the 30 days that the Defendant's had been given by the Court. It is the Defendant's case that the action of the Plaintiffs aforesaid amounted to

contempt of Court for which the Court should punish accordingly to protect the authority, dignity and integrity of the Court.

27. The Plaintiffs have not disputed the action of entering the suit land, reopening the Path Way and restoring the water pipes in breach of the orders of the Court. They attributed their action to alleged misadvice by their lawyer on record and to the fact that the Defendant had refused to heed their demand to open the Path Way. They did apologise to the Court through their Advocate on record Mr. Thuku. This in the view of the Court represents a plea of guilty. It is also submitted in their submissions that they took action to purge the contempt by restoring the Path Way on the parcel of land and disconnecting the water pipes laid along the Path Way that had been disconnected. That the purging of the contempt was done in full communication with the Defendant's Advocates. They are now at the mercy of the Court whether they should be punished for contempt.

28. What is remaining for the Court is then the nature of the punishment to be meted out, if any. The Plaintiffs have already pleaded guilty. The Defendants have not denied that the fence and the pipes were restored. The conclusion is that the contempt was sufficiently purged.

29. Going by their own admission I have found them guilty of contempt. Taking to account that they have purged the contempt and apologised to the Court with full knowledge to the applicant, I do not think it will serve any further interest of justice to give them to other punishment that they have acknowledged and purged. However, they stand warned that such further and future conduct may attract a severe penalty.

30. In the end, the application succeeds with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10<sup>TH</sup> OF MAY 2018.**

**J. G. KEMEI**

**JUDGE**