



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CIVIL APPEAL NO.20 OF 2017

KURIA KIMANI.....APPELLANT/APPLICANT

-VERSUS-

JAMES KARUNGU KIMANI.....1ST RESPONDENT

MARY THITHI KARUNGU.....2ND RESPONDENT

RULING

The matter for determination is the Appellant's/Applicant's *Notice of Motion* application dated **14th December 2017**, brought under Order 42, Rule 6 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of law. The Applicant has sought for the following orders:-

- 1) That this Honourable Court be please to Stay execution of the Order of the Lower Court given on 30th October 2017 in Gatundu SPMCC No.162 of 1994 pending the hearing and final determination of the Appeal herein.**
- 2) That this Honourable Court be pleased to grant such further or other orders as it may deem fit, expedient and just to grant.**
- 3) That the costs of this application be provided for.**

The application is premised upon the following grounds:-

- a) The Appellant has an arquable appeal.**
- b) The Lower Court refused Stay of Execution on 4th November 2017.**
- c) The Appeal will be rendered nugatory if Stay of Execution is not granted, for the reasons inter alia, that:**
 - d) The Respondent can, in reliance upon the Ruling/Order given on 30th October 2017 excise 3 acres out of the Appellant's parcel of land LR.No.Ngenda/Kimunyū/606, which the Appellant has owned, possessed, occupied, worked and developed with coffee trees, other crops and buildings since 1940.**
 - e) The Respondent on 8th November 2017, purported to excise the said 3 acres and to uproot the Appellant's coffee plants, said that this was based on Order purportedly issued on 1st November 2017, but which was invalid for lack of a Seal (Stamp), so that has been no valid execution or attempts thereof.**
 - f) There has been no unreasonable delay in bringing this application.**
 - g) The Appellant will furnish whatever reasonable security that this Honourable Court may deem fit and just to order.**
 - h) It is only fair, equitable and just that a Stay of Execution be granted.**

The application is further supported by the affidavit of **Kuria Kimani**, the Appellant/Applicant herein, who averred that the Lower Court issued a Ruling on **30th October 2017** in regard to the *Notice of Motion* dated **18th March 2015** and ordered among other things that the

Assistant County Commissioner Gatundu South to provide security to the Applicant therein, **Mary Thithi Karungu** for District Surveyor to excise 3 acres out of **LR.No.Ngenda/Kimunya/606**, and that the Executive Officer of Gatundu Chief Magistrate's Court be authorized to sign partition form for **LR.No.Ngenda/Kimunya/606**.

He further averred that he did oppose the said application and was therefore not satisfied with the said Ruling. Further that his advocate filed an application for Stay of Execution of the Order of the court issued on **30th October 2017**, so that he can file an Appeal. However, the said Stay of Execution application was also dismissed on **4th December 2017** together with the status quo order. It was his contention that his Appeal has triable issues and if Stay of Execution is not granted, the Appeal will be rendered nugatory. It was his further contention that the Respondent had attempted to execute an invalid order issued on **10th November 2017**, by taking the surveyor to excise the 3 acres out of the Applicant's land. Therefore unless the Respondent's action is stayed, she will purport to move and occupy the suit property. Further that the Respondent has tried to uproot his coffee trees on the land. He also alleged that he has lived, possessed and occupied the suit property since **1940** and will therefore suffer unreasonable sentimental loss if the Respondent would excise this land, uproots all his coffee plants before the Appeal is heard and determined. Further that if the Appeal succeeds, then it is likely to be rendered nugatory.

The application though served on **Kaingati Kamonjo & Co. Advocates** who represented the Respondent at the Lower Court did not file any response. The application was therefore not opposed.

The applicant filed brief written submissions on **20th February 2018** in support of the instant application. It was submitted that the Lower Court declined to grant the orders of Stay of Execution on **4th December 2017** and thus this application. Further it was reiterated that the Applicant has arguable Appeal as is evident from the Memorandum of Appeal dated **14th November 2017**, and that if the application is not allowed, the Appeal might be rendered nugatory as the Respondent has already tried to execute the order of the Lower Court. The Applicant urged the Court to allow the instant application.

The Court has now carefully considered the instant application and the annexures thereto. The Court has also considered the relevant provisions of law and the Applicant's brief submissions and it renders itself as follows:-

The application for Stay of Execution is governed by **Order 42 Rule 6** which provides as follows:-

“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”.

Further, the Applicant has anchored his application under Section 3A of the Civil Procedure Act which donates inherent power to this Court to make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.

The applicant has sought for Stay of Execution of the Court Order that was issued by the court on **30th October 2017**, wherein it was ordered that the Assistant County Commissioner, Gatundu South do provide security to the (Respondent herein) when the District Surveyor shall excise 3 acres of the suit property and Executive Officer of the court was authorized to sign, the partition form on behalf of the Defendant (Applicant herein). The Applicant has alleged that indeed the Respondent has attempted to have the 3 acres excised from the suit property though the Applicant had already lodged an Appeal through filing a Memorandum of Appeal which was indeed filed on **15th November 2017**. The Applicant is apprehensive that if the said Order of Stay of Execution is not granted then if his Appeal succeeds, it might be rendered nugatory.

From the provision of Order 42 Rule 6(2) the principles to be considered while determining an application of this nature are:-

- i. Substantial loss may result unless the order is made.***
- ii. Application is made without unreasonable delay.***
- iii. Such security as the court may order for due performance of such decree.***

See the case of **Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991**, where 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”.***

Has the Applicant herein satisfied the above stated principles?

It is apparent that the bone of contention is the 3 acres which is supposed to be excised from the suit property *Ngenda/Kimunyu/606* which the Applicant alleged was obtained by the Respondent fraudulently. The Applicant has further alleged that he has lived on the suit property for the last 40 years and that excising of the 3 acres from the suit property would subject him to substantial loss before the Appeal is heard and determined. Indeed the Applicant has alleged that the Respondent attempted to enforce the Court Order on him but only that the said Court Order did not have a Court Seal. The Court has seen a letter dated **7th November 2017**, wherein the District Surveyor had alluded to the fact that he would visit the suit land on **8th November 2017** at 10.00am to excise 3 acres out of the suit land as per the Court Order of **1st November 2017**.

Indeed if the said Court Order was enforced then the Applicant would lose 3 acres from his parcel of land which 3 acres he has utilized for long. That would be before the Appeal is heard and determined. If the 3 acres are excised and registered in the name of the Respondent, then she will be at liberty to deal with it as she so wishes. She may even be at liberty to dispose it off. In the event the Applicant's Appeal succeeds, then the same would be rendered nugatory and the Applicant will indeed suffer substantial loss.

Therefore the Applicant herein has established that he will suffer substantial loss in case the orders sought are not granted. See the case of *Machira T/A Machira & Co. Advocates...Vs...East African Standard (No.2) (2002) KLR 63*, where the court held that:-

“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...”

On the second principle of unreasonable delay, it is apparent the orders sought to be stayed were issued on **30th October 2017**. The Applicant filed an application for Stay of Execution at the Lower Court on **13th November 2017**, which application was dismissed on **4th December 2017**. The instant application was filed on **14th December 2017**, which is about 10 days after the Applicant's earlier application for Stay of Execution was dismissed by the Lower Court. Therefore the Applicant herein filed his application within a reasonable time and there is no evidence of any unreasonable delay on his part. See the case of *Jaber Mohsen Ali & Another...Vs...Priscillah Boit & Another, ELC No.200 of 2012 (2014) eKLR*, where the Court held that:-

“The question that arises is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after the Judgement could be unreasonable depending on the Judgement of the court and any order given thereafter...”

On such security for the due performance of the decree, the Court finds that the decree herein is for excision of 3 acres from the suit property. From the available evidence, these 3 acres had not been in control of the Respondent but the Applicant herein. The Respondent will not suffer any loss if the orders are stayed until the Appeal is heard and determined. In the event the Appeal is dismissed, then the District Surveyor will carry on and excise the 3 acres from the suit property. The Court finds that there is no need of ordering deposit of such security by the Applicant herein.

Having now carefully considered the instant Notice of Motion dated **14th December 2017**, the Court finds it merited and consequently, the same is allowed entirely in terms of prayers No.2 with costs being in the cause.

Further, the Court directs the Appellant/Applicant to comply with the provision of law by filing the records of Appeal and referring the Appeal to the Judge for Directions within a period of 45 days from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of June 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Appellant/Applicant

No appearance for Respondents

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the absence of the parties.

L. GACHERU

JUDGE