REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO194 OF 2017(O.S)

PETER WAWERU NJUGUNA &

SAMUEL GATHUKA NJUGUNA

(suing as personal representatives of the estate of

EPHANTUS NJUGUNA GATHOO)........................PLAINTIFFS

VS

BENSON NJUGUNA GATHOO..............................DEFENDANT

RULING

1. By way of a Notice of Motion dated the 23rd February 2018 and filed on the 26th February 2018, the Applicant moved the Court under certificate of urgency seeking the following orders;

a. That this honourable Court be pleased to grant orders for stay of execution of the judgment made on the 8/2/18 pending the hearing and determination of the appeal.

b. That this honourable Court be pleased to grant orders for stay of execution of the judgment made on the 8/2/18 pending the filing of the appeal.

c. That the cost of this application be in the cause.

2. The application is brought under Order 10 rule 11, Order 40 rule 1 & 2, Order 51 Rule 1 of the CPR, Sections 1A, 1B and 3A of the CPA and all other enabling provisions of the law. It is also supported by the Applicants affidavit sworn on the 23/2/18 and anchored on the grounds stated below ;

a. That judgment in the suit was entered on the 8/2/18 and that I have been aggrieved by the said judgment.

b. That the appellant has lodged/filed a notice of appeal in the instant Court as he intends to file and/or lodge an appeal in the Court of appeal within 60 days.

c. That the appellant stands to suffer irreparable damage and/or harm if the Plaintiffs are not stayed from executing the judgment on record, as he utilizes the subject matter of this suit LR LOC 4/GAKARARA/2166 in sustaining his livelihood.

d. That the appellant/Applicant is an old man in his twilight years and the subject matter of this suit is his lifeline, which is now slipping out of his life.

e. That I believe that my appeal has a probability of success, or so my advocate has advised me which advise I take to be true and correct.

3. The Respondent through a Replying affidavit filed on the 9/3/18 stated that the application is bad in law, gross abuse of the Court process, brought in bad faith and is unmeritorious. That the Applicant ought to have lodged a Notice of Appeal within 14 days of the delivery of the judgment. Thereafter serve upon the advocates for the Respondent within 7 days in compliance with section 74 and 76 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya. That the Applicant has not served the said notice of appeal. That the purported notice of

appeal has not been signed by the Deputy Registrar of the Court and therefore there is no appeal on record.

4. Further the Respondent raised other issues; that the Applicant has not demonstrated any urgency in the matter in view of the fact that there is no immediate threat of execution; not attached a letter requesting the Court to furnish him with typed copies of the proceedings; no grounds of appeal have been annexed to demonstrate if there is an arguable appeal with a chance of success. In addition, the Respondent faulted the Applicants Counsel on record for not complying with the mandatory provisions of Order 9 rule 9 of Civil Procedure Rules in the manner in which he came on record to represent the applicant.

5. The Respondent contended that he is entitled to the fruits of his judgment and stands to be prejudiced by the further delay and denial of his entitlement. He states that should the Court be minded in granting the stay, the same should be conditional and limited in time.

6. On the 16/4/18 Parties appeared before me through Counsel and elected to file written submission, which I have read and considered.

7. 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—
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> (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
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> (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.
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> (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.
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> (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."

8. 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
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> c) Security for the due performance of the order or decree has been provided.

9. Going by the record the judgment complained of was delivered on the 8/2/18. The application for stay was filed on 26/2/18. The Respondent has contested this to be inordinate delay because it was filed over 2 weeks later after the delivery of judgment. The application was filed 16 days after the judgment. The Court finds and holds that there is no delay in bringing this application.

10. 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 CPR. This is so because execution is a lawful process…The Applicant must establish other factors which show that the essential core of the Application 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 he is likely to suffer if no stay is ordered. It is not sufficient to make a hollow statement.

9. In this case, the Applicant has stated in his application that he stands to suffer irreparable damage and /or harm if the Respondents are not stayed from executing the judgment as he is utilising the suit land to sustain his livelihood. It is the Courts finding that the Applicant has not demonstrated what substantial loss he stands to suffer if stay is not granted.

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

11. Before concluding I wish to make comments on an issue raised by the Respondents Counsel that the applicant's Counsel has not come on record in conformity with Order 9 Rule 9. The correct position on record is that on 16/2/18 the applicants by Notice of Motion moved the Court for leave to permit the firm of Mugo Moses and Co advocates to act for the Applicant. The application was accompanied by the consent duly entered and filed of the former firm of advocates for the Applicant Messrs. Jessee Kariuki & Co. Leave was duly granted by the Court on the 16.2.18. They are therefore duly and properly on record.

12. The upshot is that the Notice of Motion dated 23/2/18 has no merit and is accordingly dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 31ST JULY 2018.

J. G. KEMEI

JUDGE

Ruling read in open Court in the presence of;

Mr Gichohi HB for Mr Mugo for the Plaintiffs.

Mr Kinuthia HB for Mr Mugo Moses for the Defendant.

Ms.Irene and Ms Njeri, Court Assistants.