



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC No. 40 OF 2013**

**MICHAEL WAWERU.....1<sup>ST</sup> PLAINTIFF**

**PHILISIA NYAMBURA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GRACE NYOKABI KINUTHIA.....DEFENDANT**

**RULING**

1. This ruling is in respect of two applications: the plaintiffs' Notice of Motion dated 24<sup>th</sup> January 2018 and defendant's Notice of Motion dated 14<sup>th</sup> February 2018. In Notice of Motion dated 24 January 2018, the plaintiffs seek an eviction order against the defendant and an order that a caution placed by the defendant against parcels of land known as Naivasha/Mwicingiri Block 2/771 and Naivasha/Mwicingiri Block 2/772 be lifted.
2. Notice of Motion dated 24<sup>th</sup> January 2018 is supported by two affidavits: one sworn by the 1<sup>st</sup> plaintiff and the other by the 2<sup>nd</sup> plaintiff. The plaintiffs contend that judgment having been entered in their favour on 31<sup>st</sup> October 2017, the Orders sought in the application should issue in the interest of justice.
3. The defendant opposed Notice of Motion dated 24<sup>th</sup> January 2018 through Grounds of Opposition dated 14<sup>th</sup> February 2018 in which she stated that she has filed a Notice of Appeal against the judgment and that her appeal will be rendered nugatory if the application is allowed.
4. Notice of Motion dated 14<sup>th</sup> February 2018 is supported by an affidavit sworn by David N. Ikuu, counsel on record for the defendant. It is deposed therein that the defendant has filed a Notice of Appeal against the judgment and that the appeal will be rendered nugatory if stay is not granted.
5. The two applications were heard together. Mr Ikuu submitted on behalf of the defendant that the right of appeal will be curtailed if stay is not granted and that if the appeal fails, the only prejudice that the plaintiffs will have suffered is that they would have remained out of the land for longer. Such loss would be comparable to mesne profits. He invited the court to note that in the witness statement of Phylisia Nyambura Ngugi and that of the 1<sup>st</sup> plaintiff both filed in this matter on 11<sup>th</sup> March 2013, the plaintiffs prayed for mesne profits at the rate of Kshs.80, 000/=per year from the year 2004 to 2007. He urged the court to be guided by those figures while determining security.
6. On his part, Prof. Wangai, counsel for the plaintiffs argued that granting stay of execution would be a negative order and would amount to allowing the appeal and allowing the defendant to perpetuate an illegality contrary to public policy. He added that the plaintiffs would suffer more prejudice than the defendant if stay is granted. He therefore urged the court to dismiss Notice of Motion dated 14<sup>th</sup> February 2018.
7. I have considered the applications as well as the submissions. Pursuant to judgment delivered on 31<sup>st</sup> October 2017, my brother Y. M. Angima J. allowed the plaintiffs' suit as prayed and dismissed the defendant's counterclaim. The plaintiffs' claim as captured at paragraph 2 of the said judgment was a permanent injunction restraining the defendant from trespassing into the suit properties. The plaintiffs also prayed for mesne profits and special damages for some destroyed crops.
8. The principles applicable in determining whether or not to grant stay of execution pending appeal are guided by the provisions of **Order 42 rule 6 (1) and (2)** which provides:

***6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 sub rule*

*(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.*

9. To succeed, the defendant must satisfy the court that substantial loss will result to her if stay is not granted and that the application has been made without unreasonable delay. The defendant must also satisfy the court that security has been furnished by her. The court of Appeal stated in **Butt v Rent Restriction Tribunal [1979] eKLR** as follows:

*If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.*

*It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

*“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”*

*Megarry J, as he then was, followed Wilson (supra) in *Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others 24 QBD (1889) 56 at p 59.***

10. There is no dispute that the defendant is in possession of the suit properties. If the judgment is enforced, which the plaintiffs are already seeking to do through Notice of Motion dated 24<sup>th</sup> January 2018, the result will be that the defendant will be evicted. That will constitute substantial loss.

11. The applicant is also required to file an application for stay pending appeal without unreasonable delay. Judgment herein was delivered on 31<sup>st</sup> October 2017. Notice of appeal was filed on 8<sup>th</sup> November 2017 while the present application for stay was filed on 14<sup>th</sup> February 2018, three and a half months after delivery of judgment. I find that there has been no unreasonable delay.

12. Finally, the applicant is supposed to provide security for the performance of the decree. The defendant has urged the court to be guided by the figures of Kshs.80, 000/= per year which the plaintiffs mentioned in their witness statements filed on 11<sup>th</sup> March 2013. I have perused the said witness statements and I note that therein the plaintiffs had sought mesne profits at the rate of Kshs.80, 000/= per year from the year 2004 to 2007 and Kshs.100, 000/= per year from the year 2008 to the determination of the matter. Using that formula, the defendant ought to pay a total of Kshs.320, 000/= for the period 2004 to 2007 calculated at Kshs.80, 000/= per year for 4 years. For the period 2008 to 2018, the defendant would have to pay Kshs.880, 000/= calculated at Kshs.80, 000/= per year for 11 years. The total mesne profits using the formula proposed by the defendant could be Kshs.1, 200, 000/=. I find this figure reasonable as security.

13. In view of the foregoing discourse, I am persuaded that the application for stay of execution pending appeal should be allowed. It follows therefore that Notice of Motion dated 24<sup>th</sup> January 2018 ought not to be allowed as it would otherwise contradict the stay. I therefore make the following orders:

a) Stay of execution of the judgment and decree herein is granted pending hearing and determination of the defendant’s appeal to the Court of Appeal.

b) The defendant shall deposit security of Kshs.1, 200, 000/= (one million two hundred thousand) in court within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse and Notice of Motion dated 24<sup>th</sup> January 2018 shall in that event stand allowed with costs to the plaintiffs.

c) Costs in the cause.

14. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of July 2018.**

**D. O. OHUNGO**

In the presence of:

No appearance for the plaintiffs

Ms Ngugi holding brief for Mr Ikua for the defendant

Court Assistants: Gichaba & Lotkomoi