



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

#### ELC CASE NO 1890 OF 2007

LOISE WANJIRU IRUNGU.....1ST PLAINTIFF

CHARITY NJOKI NJUGUNA.....2ND PLAINTIFF

JANROSE KIMANI.....3RD PLAINTIFF

PURITY WANJOHI.....4TH PLAINTIFF

FLORENCE MUCEMI.....5TH PLAINTIFF

=VERSUS=

JOEL NTHEI MWANZIA.....1ST DEFENDANT

AGNES W. GATIMU.....2ND DEFENDANT

JEREMIA NGIGI WAMAE.....3RD DEFENDANT

CATHERINE NGINA KITHENDU...4TH DEFENDANT

HELLEN CYRIC MAUFI.....5TH DEFENDANT

PETER MUINDI MUNYAO.....6TH DEFENDANT

CHARLES TUTI NDUMA.....7TH DEFENDANT

#### **RULING**

1. In a judgment rendered on 3/11/2017 Lady Justice L N Mbugua decreed as follows:

*a) Plaintiff's claim is hereby dismissed*

*b) Defendant's counterclaim is allowed*

*c) It is hereby declared that defendant are the lawful owners of land parcel No. Nairobi/Block 118/58*

*d) An order is hereby issued for the cancellation of the certificate of lease dated 07.07.05 in parcel No. Nairobi/Block 118/58 issued in the names of plaintiffs.*

*e) An order of permanent injunction is hereby issued barring plaintiffs from interfering in land parcel No. Nairobi/Block 118/58*

*f) As to costs, it would be rather harsh to condemn plaintiffs to pay costs now that they have lost the land. I therefore order that each party do bear their own costs of the suit.*

2. Subsequent to that, on 17/11/2017, the plaintiffs (applicants) brought a notice of motion dated 16/11/2017 seeking stay of execution pending appeal. The application is supported by the affidavit of Purity Wanjohi, (the **4th plaintiff**) sworn on 16/11/2017 and a further affidavit sworn by the same deponent on 7/3/2018. The defendants oppose the application through a replying affidavit sworn on 4/1/2018 by

Jeremia Ngigi Wamae. That application is the subject of this ruling.

3. The applicants contend that they have lodged an appeal against the said judgment and that unless a stay is granted, the appeal will be rendered nugatory. Annexed to the further affidavit is a copy of the Memorandum of Appeal filed in the Court of Appeal on 17/01/2018.

4. In opposing the application, the respondents contend that the sole purpose of the intended appeal is to prolong a matter which has been in court since 2007. They add that the stay order sought will disrupt the quiet possession which they have enjoyed for the last 20 years.

5. The law and jurisprudential principles upon which jurisdiction to grant an order of stay pending appeal is exercised are well settled. The statutory framework is set out in Order 42 rule 6 (1) and (2). A party seeking stay is obligated to satisfy the court that substantial loss may result to him if the stay order is not granted. Secondly, the application seeking stay should be made without unreasonable delay. Thirdly, security for the due performance of the decree is to be provided by the applicant. Besides the above mandatory legal requirements, the applicant is required to satisfy the court that the intended appeal is arguable and that unless the stay order is granted, the appeal, if successful, would be rendered nugatory.

6. In addition to satisfying the above criteria, the applicant is required to demonstrate that all the mandatory formal requirements relating to a tenable appeal have been met. These include, among others, filing and service of notice of appeal within the prescribed time lines; filing and service of the record of appeal within the stipulated time lines. Evidence of satisfaction of the above formal mandatory requirements is necessary because no viable appeal would lie in the absence of satisfaction of those requirements.

7. The application under consideration was filed 14 days after delivery of the impugned judgment. The further affidavit in support of the application was filed on 8/3/2018. Both the supporting affidavit and the further affidavit do not make any reference to any duly filed and duly served notice of appeal. Filing and service of a notice of appeal within the time-frame prescribed by the Court of Appeal Rules is a mandatory formal requirement. Non-compliance means there is no appeal. It is for this reason that evidence of a duly filed and duly served notice of appeal is necessary. Regrettably, in the present suit, none has been exhibited.

8. I would have considered whether or not the application satisfies the requirements of Order 42 rule 6(2) of the Civil Procedure Rules if evidence of a duly filed and served notice of appeal had been exhibited. In the absence of evidence of a filed and served notice of appeal, it would be moot to consider the requirements of Order 42 rule 6(2).

9. The upshot of the foregoing is that, the notice of motion dated 16/11/2017 is dismissed for lack of merit. The defendants shall have costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Nganga Advocate for the Plaintiff/Applicants

Ms Chepkoech holding brief for Mr Wangila Advocate for the Defendant

June Nafula - Court Clerk