



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 1757 OF 2001**

**STEPHEN WAITHAKA GATUMBI ).....PLAINTIFF**

**As Administrator of the Estate of GATUMBI WAITHAKA (DECEASED)**

**=VERSUS=**

**FRUMENCE KARIUKI MURIU.....DEFENDANT**

**As Administrator of the Estate of MORRIS MAGUTA NGEA (DECEASED)**

**RULING**

1. On 5/12/2017, the plaintiff brought a notice of motion of even date seeking an order of stay pending appeal. The application was premised upon the following verbatim grounds:

**a. The plaintiff was dissatisfied with the Judgment dated 26/7/2017**

**b. The plaintiff lodged a Notice of Appeal dated 2/8/2017**

**c. The plaintiff applied for certified copies of proceedings and judgment on 2/8/2017**

**d. The plaintiff occupies one acre of the disputed 2 Acres of land in L R Kiganjo/Mundoro/460 while I (sic) occupy the other one acre.**

**e. If execution is made before the appeal is heard the plaintiff will suffer irreparable damage as the intended appeal may be rendered nugatory and there is a possibility that would (sic) be evicted from the one acre where I grow food staffs and in which I have built my home for my family.**

2. The application is supported by the applicant's affidavit sworn on 30/11/2017 in which he deposes that on 3/8/2017 he filed a notice of appeal against the judgment herein. He further deposes that if the judgment is executed before the appeal is heard, his appeal will be rendered nugatory and he might be evicted from the suit property. He also deposes that he occupies one out of the two acres that constitute the subject matter of the appeal. He annexed to the affidavit copies of the Notice of Appeal, letter requesting for certified copies of proceedings and judgment, Letter from the defendant's advocate requesting the plaintiff to execute vesting documents and photograph of the vacant suit property.

3. The defendant opposes the application through grounds of opposition dated 26/1/2018, in which he contends that: (i) the plaintiff has no sufficient and urgent reasons entitling him to a stay order; (ii) the application is misconceived, unmerited and an abuse of the court process; (iii) the application is baseless, fatally defective and does not meet the legal threshold for a stay order; and (iv) the application has been overtaken by events.

4. The application was canvassed through written submissions dated 8/2/2018 in which the applicant contended that the appeal is arguable and if stay is not granted, the respondent is likely to dispose the two acres to innocent third parties before the disposal of the appeal and if that were to happen the subject matter of the appeal will be no more. The respondent did not file written submissions.

5. I have considered the application, the affidavit in support thereof, the grounds of opposition and the applicant's written submissions. I have also considered the legal framework and the jurisprudential principles which guide this court's jurisdiction to grant an order of stay pending appeal.

6. In an application for stay pending appeal, the applicant is required to demonstrate that he stands exposed to substantial loss if the stay order is not granted. Secondly, the application for stay is supposed to be made without unreasonable delay. Thirdly, the applicant is required to provide security for the due performance of such decree or order as may ultimately be binding on him.

7. I have carefully scrutinized the materials presented to the court. The suit property does not have any permanent developments on it. The applicant contends that he grows food crops on the two acres. In the judgment dated 18/7/2017, Njoroge J decreed that the applicant surrenders to the respondent 2 out of 11 acres share out of Kiganjo/Mundoro/460. In view of the fact that there are no permanent developments on the suit property and the applicant does not reside on the suit property, it is my view that this is not a proper case that deserves an unqualified stay order. I will allow the decree in this suit to be executed through transfer of 2 acres to the defendant as ordered by the court but preserve the suit property to the extent that there shall be no subsequent transfer of the said two acres from the defendant to any third party within the next twelve months from the date of this ruling. The defendant shall have possession of the suit property in tandem with the judgment of the court. It is hoped that the limited and qualified stay herein will afford the applicant ample time to prosecute the contemplated appeal while the suit property remains preserved for a period of twelve months.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2018.**

**B M EBOSO**

**JUDGE**