



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

THIKA ELC APPEAL NO.5 OF 2017

(FORMERLY NYERI ELC NO.19 OF 2015)

GEORGE KAMANDE GITAU.....APPELLANT/APPLICANT

VERSUS

ENPHANTUS KAMANDE MACHARIA.....RESPONDENT

RULING

The matter for determination is the Appellant's/Applicant's *Notice of Motion* application dated **2nd March 2018** brought under **Order 42 Rule 6** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act* and all other enabling provisions of law. The orders sought are:-

- 1) That this Honourable Court be pleased to grant orders for Stay of Execution of the Judgement made on 23rd day of February 2018, pending the hearing and determination of the Appeal***
- 2) That this Honourable court be pleased to grant orders for Stay of Execution of the Judgement made on 23rd February 2018, pending the filing of the Appeal.***
- 3) That costs of this application be in this cause.***

The application is premised on the following grounds:-

- a) That Judgement in this Appeal was entered on the 23rd February 2018 and that the Appellant has been aggrieved by the said Judgement.***
- b) That the appellant has lodged and/or filed a Notice of appeal, in the instant court as he intends to file and/or lodge an Appeal in the Court of Appeal, soonest but within the limit of 60 days provided in law.***
- c) That the Appellant stands to suffer irreparable damage and/or harm if the Respondent is not stayed and/or stopped from executing the Judgement on record, as he utilizes the subject matter of this suit, Plot No.3011, vide Methi and Swani Co-operative Society.***
- d) That the Appellant intended Appeal in the Court of Appeal shall be rendered nugatory, should the Respondent go ahead with the execution of the Judgement on record.***
- e) That the Appellant's Appeal has a probability of success, on a point of law.***

The application is also supported by the *Supporting Affidavit* of **George Kamande Gitau**, the Applicant herein who averred that he is the Appellant herein and was aggrieved by the **Judgement** of the court issued on **23rd February 2018**. That he intends to appeal against the said **Judgement** and that he stands to suffer irreparable loss or damage as he utilizes the subject property **No.3011** vide **Methi and Swani Co-operative Society** to sustain his livelihood.

Further that he is a senior citizen and in his old age, the subject matter herein being **Plot No.3011**, vide **Methi and Swani Co-operative Society** is his lifeline as that is where he draws his livelihood through cultivation. That he will suffer prejudice if the orders for Stay of

Execution of the **Judgement** on record are not granted. He urged the Court to allow the instant application.

This application is opposed by the Respondent who filed **Grounds of Opposition** on **19th March 2018** and averred that:-

- 1) That the Notice of Appeal filed on 27th February 2018 is fatally defective and therefore the Applicant has not commenced any competent Appeal against the Judgement delivered on 23rd February 2019 as asserted.**
- 2) That the Judgement delivered on 23rd February 2018 merely dismissed the Appeal filed by the Applicant and consequently there is no Decree arising from the said Judgement which is capable of being executed.**
- 3) That the Applicant has not sufficiently demonstrated that it has a competent and arguable Appeal and therefore an Order for Stay of Execution cannot be granted as prayed.**
- 4) That the Applicant has not sufficiently demonstrated that it stands to suffer irreparable loss and damage if a Stay is not granted.**
- 5) That having in mind that the respondent has been denied the use and possession of the suit properties since the year 2001 to date, the Respondent stands to be seriously prejudiced if an Order for Stay of Execution is granted hence prolonging the litigation herein for several more years.**
- 6) That the application is otherwise frivolous and without any merit and should be dismissed with costs.**

The Respondent also filed a **Replying Affidavit** and averred that the **Judgement** delivered on **23rd February 2018** merely dismissed the Appeal filed by the applicant/Appellant and consequently there is no Decree arising from the said **Judgement** which is capable of being executed against the Applicant herein.

Further that the Applicant has not demonstrated that he stands to suffer irreparable loss and damage if a Stay is not granted and no concrete evidence has been produced in that regard. Further he has contended that the Applicant has not sufficiently demonstrated that it has a competent and arguable Appeal in the manner prescribed by the law and therefore an Order for Stay of Execution cannot be granted as prayed.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the **Judgement** intended to be appeal against.

The application herein is anchored under **Order 42 Rule 6** which provides that 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. Further **Subrule 2** provides the conditions to be considered while granting Stay of Execution. These are:-

- 1) Applicant will suffer substantial loss unless the orders are made.**
- 2) The application should be made without unreasonable delay.**
- 3) Sufficient cause must be shown.**
- 4) Such security as the court may order be provided.**

Further the Application is premised under **Section 3A** of the **Civil Procedure Act**, which donates power or inherent power to court to issue or make such orders that are necessary for the end of justice to be met and to prevent abuse of the court process.

Further as the Court embarks on deciding whether to grant the orders sought or not, it will take into account that grant of Stay of Execution pending Appeal is a matter of **judicial discretion** which discretion must be exercised judicially and in the interests of justice and depending on the facts of each case. See the case of **"In the matter of Global Tours & Travel Ltd, Winding Up Cause No.43 of 2000**, where the Court held that:-

"In deciding whether to order a Stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of cases, the prima-facie merits of the intended Appeal, in the sense of whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of Judicial time and whether the application has been brought expeditiously"

Further in the case of **Musa Nyaga Njeru & Another..Vs....John Niru Kinani, Embu ELCA No.11 of 2014**, the Court held that:-

"The power to grant or refuse an application for Stay of Execution is a discretionary power which should be exercised in such a way as not to prevent an appeal"

Taking into account all the above and the relevant provisions of law, the Court now proceeds to consider whether the Applicant's application is merited. **Order 42 Rule 6** provides for Stay of Execution of **Decree** of **Order** that is being appealed against. However, the

Applicant herein has sought for Stay of the **Judgement** delivered on **23rd February 2018**. In the said application the Applicant has attached the said **Judgement**. A perusal of the mentioned **Judgement** shows that the court dismissed the Appellant's entire Appeal. The court did not issue any positive orders capable of being executed by the Respondent herein and therefore the dismissal of the Appeal cannot be Stayed.

The Applicant has sought for Stay of **Judgement**. There is no Decree or Order that is intended to be appealed against attached to the Applicant's application. As submitted by the Respondent, a **Judgement** cannot be executed but a **Decree** or an **Order** can be executed. That is the reason why **Order 42 Rule 6(1)** provides for Stay of a **Decree** or **Order** but not a **Judgement** or a **Ruling**.

The Court finds that the prayers sought by the Applicant are not capable of being issued as the Applicant has not sought for Stay of a Decree or Order. Further the court in its **Judgement of 23rd February 2018** dismissed the entire Appeal and thus the court did not issue any orders capable of being executed against the Applicant.

Having found that there are no orders issued by the court on **23rd February 2018**, the Court finds this instant application not merited. For the above reason, the Court will not even delve into the principles to be considered in an application for Stay of Execution as provided by **Order 42 Rule 6(2)**.

Consequently, the Court finds the **Notice of Motion** dated **2nd March 2018** is not merited and the said application is dismissed entirely with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at Thika this **26th** day of **October 2018**.

L. GACHERU

JUDGE

In the presence of

No appearance for the Appellant/Applicant

Mr. Kurauka holding brief for Mr. Kangethe for Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocate and absence of the Applicant.

L. GACHERU

JUDGE

26/10/2018