



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.303 2012**

**PETER MBUGUA NJOROGE** (Suing as the administrator and Legal representative  
of the Estate of **GEOFFREY NJOROGE MUTHEE**.....**PLAINTIFF**

**VERSUS**

**CYRUS WAWERU KAGUNYI**.....**DEFENDANT**

**AND**

**BENJAMIN CHEPKWONY RONO**.....**3<sup>RD</sup> PARTY**

**RULING**

***(Application for stay pending appeal; orders that the titles be preserved and applicant to deposit the taxed costs).***

1. The application before me is that dated 12 March 2018 filed by the 3<sup>rd</sup> party in this suit. The application is brought pursuant inter alia to the provisions of Order 42 Rule 6 of the Civil Procedure Rules and seeks orders of stay of execution of the decree pending appeal to the Court of Appeal. The application is opposed and before I go to the gist of it, I feel it best to give a little background on the same.

2. This suit was commenced by way of plaint on 11 November 2008. The plaintiff filed this suit on behalf of the estate of one Geoffrey Njoroge Muthee (deceased) claiming title to the land Nakuru Municipality Block 29/618 (the suit land), which title was registered in the name of the defendant. It was the case of the plaintiff that this land was purchased by the deceased from the previous owner, who had been allotted the land by Kalenjini Enterprises Limited, a land buying company, and thus the defendant did not hold a good title to it. The defendant on the other hand averred that he obtained good title to the land after exchanging his own land parcel Nakuru Municipality Block 3/644 (Barut) with the 3<sup>rd</sup> party, who claimed ownership of the suit land. I heard the matter and held that the deceased was the one entitled to ownership of the suit land and not the 3<sup>rd</sup> party. I proceeded to order the cancellation of the title of the defendant and directed that the land register be rectified to reflect the estate of the deceased as proprietor. I also ordered that the title held by the 3<sup>rd</sup> party to the land parcel Nakuru Municipality Block 3/644 be cancelled and the title be restored back to the defendant.

3. It is this judgment that the Third Party/applicant now wants stayed. The applicant has already lodged a Notice of Appeal.

4. In opposing the motion, the plaintiff has sworn a replying affidavit whereby he has deposed inter alia that the applicant was not involved in the suit against himself and the defendant and that he as the successful plaintiff ought to be allowed to enjoy the fruits of the judgment.

5. I have considered the application. The provisions of Order 42 Rule 6 (2) are operative and the same provide as follows :-

*(2) No order for stay of execution shall be made under subrule (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.*

6. In this application, what the applicant wants is to stay the execution of the judgment as he prosecutes his appeal. I do not think that what

the applicant is asking for is too much. The applicant is entitled to pursue his appeal to its logical conclusion and I really do not see what significant prejudice the plaintiff is going to suffer if I allow a stay of execution of the judgment. If the titles are cancelled as directed in the judgment, the plaintiff and defendant may proceed to deal with the properties to the prejudice of the applicant and the applicant thus stands to suffer substantial loss.

7. I note that all along this litigation, the plaintiff has been in possession of the suit land, and he can continue being in possession, and the only matter that is going to be stayed is the cancellation of the title of the defendant, and the issuance of a rectified title in his favour. In as much as the applicant was not sued as defendant, the case of the plaintiff against the defendant was heard alongside the case of the defendant against the applicant (as Third Party), and the judgment as pronounced not only affects the defendant but has a ripple effect to the applicant, who is meant to surrender title to the land which he obtained after exchanging the suit land with the defendant.

8. In my view, given that the applicant has lodged an appeal, for which he is entitled to be heard, it is best that the registers of the suit land and the land parcel Nakuru Municipality Block 3/644 be preserved as they are until the appeal is finalized.

9. The only issue is security and in the circumstances of this case, security will have to be on costs. There are orders of costs against the defendant in favour of the plaintiff, and in my judgment, I had ordered that the defendant can seek to be indemnified by the Third Party of these costs. If the plaintiff taxes his costs against the defendant, I direct the applicant to deposit this amount in a joint interest account within 30 days of taxation as security, and in default the plaintiff be at liberty to execute for the same against the defendant and the defendant be indemnified by the Third Party.

10. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 24<sup>th</sup> day of October 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Gatonye for the plaintiff.

No appearance for the defendant.

No appearance for the Third Party/applicant.

Court Assistants Nelima/Carton.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**