



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A NO. 14 OF 2018

NJERU NTHIURURO.....APPELLANT

VERSUS

NGIMA NGURUIMWE.....RESPONDENT

RULING

1. By a notice of motion dated 19th July 2018 brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules, section 3A of the Civil Procedure Act (Cap 21)** and **all other enabling provisions of the law**, the Appellant sought an order for stay of execution of the judgement and decree in *Siakago SPMCC No. 41 of 2007* dated 12th July 2018 together with all consequential orders.

2. The said application was based on the various grounds enumerated on the face of the motion. It was stated that the Appellant was aggrieved by the said decree and that he had filed the instant appeal to challenge it. It was contended that the Appellant would suffer irreparable loss and damage unless the stay sought was granted. It was also contended that the appeal might otherwise be rendered nugatory if a stay was declined.

3. The said application was supported by an affidavit sworn by the Appellant on 19th July 2018. The Appellant stated that he had resided on the suit property since 1979 and that he had undertaken all his developments on the suit property where he resided with his family members.

4. The Respondent, who was acting in person, filed a response to the main appeal as opposed to the interlocutory application for stay of execution of the decree. He annexed copies of various documents in relation to previous proceedings between the parties including a copy of this court's ruling in *Embu ELC Case No. 68 of 2017*.

5. The court has considered the Appellant's said application, the Respondent's response as well as the oral submissions of the Appellant's counsel. The main issue for determination is whether or not the Appellant has satisfied the requirements for an order of stay of the decree under **Order 45 Rule 6 of the Civil Procedure Rules**.

6. The provisions of **Order 42 Rule 6 (2)** on stay of execution provide as follows;

6 (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.

7. The court has carefully considered the Appellant's application for stay of execution. The Appellant has not disclosed what substantial loss, if any, he may suffer unless the order of stay is granted. It is not sufficient for the Appellant to simply allege that he would suffer irreparable loss and damage. Such loss and damage must be demonstrated. The court is aware that the two parties are involved in another pending suit being *Embu ELC No. 68 of 2017*. The Appellant in that case is seeking a declaration of adverse possession of the suit property.

8. The Respondent has referred the court to its ruling dated 21st September 2017 by which the court dismissed the Appellant's application for an interlocutory injunction dated 3rd April 2017. In the said ruling, this court held, *inter alia*, that;

“8. The court is also not satisfied that the Applicant might otherwise suffer irreparable loss which cannot be compensated by an award of damages. The Applicant concedes that he has his own parcel of land where some of his family members are residing. He would not be rendered homeless if the order of injunction were denied...”

9. In the case of **Kenya Shell Ltd Vs Kibiru & Another [1986] KLR 410** the Court of Appeal made the following pronouncement on the jurisdiction of the court to grant a stay of execution pending appeal;

“It is usually a good rule to see if Order XL1 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

10. The court is not satisfied that the Appellant would suffer any substantial loss should the order of stay be declined. The court is also not satisfied that the appeal would be rendered nugatory if the stay sought is not granted. The Appellant may still return to the suit property should he succeed on appeal. There is no danger of the suit property being alienated by the Respondent during the pendency of the appeal because the court issued an order for the preservation of the suit property on 21st September 2017.

11. The upshot of the foregoing is that the court finds no merit in the Appellant’s notice of motion dated 19th July 2018. The same is consequently dismissed with costs to the Respondent.

12. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18TH** day of **OCTOBER, 2018**.

In the presence of Ms Maina holding brief for Ms Muthoni for the Appellant and the Respondent in person.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

18.10.18