



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO. 664 OF 2009

EUNICE NYAMBURA IRUNGU.....PLAINTIFF

-VERSUS-

LIBERY NJOKI MUNENE.....1ST DEFENDANT

JAMES CHEGE MUNENE.....2ND DEFENDANT

FACKSON WAINAINA KAGWE.....3RD DEFENDANT

(Sued as the executors of the estate of JAMES FLAVIAN CHEGE MUNENE Deceased)

BALWANT SINGH.....4TH DEFENDANT

EIGHTY FOUR INVESTMENTS LIMITED.....5TH DEFENDANT

AS HEARD TOGETHER WITH NAIROBI ELC CASE NO.197 OF 2010

BALWANT SINGH.....PLAINTIFF

=VERSUS=

LIBERTY NJOKI MUNENE & 3 OTHERS.....4TH DEFENDANT

RULING

1. By an amended Notice of Motion dated 1st August 2018, the applicant applied for stay of execution of a decree arising out of a judgement delivered on 21st May 2018 pending hearing and determination of an appeal against the judgement. The applicant contends that the intended appeal will be rendered nugatory if the stay of execution is not granted.

2. The respondent opposed the application through a replying affidavit sworn on 18th July 2018. The respondent contends that the applicant has no locus standi in this matter in that its director has admitted that the land in issue has already been sold to third parties. The third parties have not sworn any affidavit and therefore the applicant cannot litigate on behalf of third parties.

3. The respondent also argues that the applicant has not come to court with clean hands; that it did not disclose during the hearing of the case that it had sold the suit property to third parties. The respondent therefore contends that since the applicant had sold the suit property it has no interest in the same and therefore there is no substantial loss which it will suffer.

4. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the oral submissions and the authorities cited. I have now to decide whether the applicant has met the threshold for grant of stay of execution pending appeal.

5. The conditions for grant of stay pending appeal are now settled. First the application must be brought without unreasonable delay. Second, there must be demonstration of substantial loss. Third, there has to be security for the due performance of the decree given as may ultimately be binding upon the applicant.

6. In the instant case, the impugned judgement was delivered on 21st May 2018 on behalf of justice Njoroge who is based in Kitale. The applicant manifested its intention to appeal by filing a notice of Appeal on 31st May 2018. I point out that the notice erroneously indicated that it is against my judgement. It was not my judgement. I delivered the judgement on behalf of justice Njoroge. The initial application for stay was filed on 19th June 2018. It was later amended on 1st August 2018 to reflect the correct name of the judge who wrote the judgement. I therefore find that there was no delay in bringing the application.

7. On the issue of substantial loss, the applicant has stated that it subdivided and sold all the suit property. The suit property is now held by third parties who have taken possession. If there was to be no stay of execution, the third parties will be affected and they will in turn demand from him refunds which will be colossal. The value of the suit property is now about Kshs.450,000,000/=.

8. I have looked at the decree which has been extracted. One of the prayers is that all the titles from the subdivision be cancelled and the contract between the respondent and James Flavian Chege (deceased) be carried through by the deceased's administrators. The applicant has annexed copies of certificate of leases and official searches which show that third parties have purchased the suit property.

9. The decree of the court was for specific performance. The agreement between the deceased and the respondent was entered into in 2004. Judgement was delivered in 2018 after third parties had taken possession of the suit property. I am aware that whereas a successful litigant is entitled to enjoy fruits of a judgement, the unsuccessful litigant has equally an undoubted right of appeal. The right to enjoyment of the fruits of judgement have to be weighed against the right of appeal.

10. In the instant case, the respondent was to purchase the suit property for Kshs.11, 000,000/= . She paid a deposit of Kshs.1000,000/= and the balance was not paid as at the completion date. The property has now been sold to third parties who have taken possession. The applicant is unhappy about the decree and would like to be heard by a higher court. The property is now valued at over 450,000,000/=. If stay was to be declined, there is likelihood that execution might go on and this will have serious consequences not only on the part of the applicant but also on the third parties.

11. Considering all the circumstances, I find that the applicant has satisfied the first two conditions. This being the case, I will allow the application for stay in terms of prayers (4) and (5) of the amended notice of motion dated 1st August 2018 on condition that the applicant deposits Kshs.2,000,000 (Two Million) in Court within 14 days failing which the stay order shall automatically lapse.

It is so ordered.

Dated, signed and delivered at **Nairobi** on this **1st** day of **November 2018**.

E.OBAGA

JUDGE

In the presence of :

Mrs Oduor for Mr Ochieng Oduor for applicant

Mr Kinyua for Mr Aboge for 2nd defendant

Mr Mugo for Mrs Wambugu for 1st defendant

Hilda : Court Assistant

E.OBAGA

JUDGE