



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 104 OF 2017

(FORMERLY KERUGOYA ELC 133 OF 2013)

(FORMERLY EMBU CC 81 OF 2012)

JAMES KARANO CHRISTOPHER.....1ST PLAINTIFF

JULIUS MURIUKI MUCHINA.....2ND PLAINTIFF

VERSUS

CHRISTOPHER NJAGI KARANO.....1ST DEFENDANT

NICASIOUS WANJOHI NJAGI.....2ND DEFENDANT

ROBERT MBUI NJAGI.....3RD DEFENDANT

JOSEPH MUTUGI NJAGI.....4TH DEFENDANT

MARTIN MUTHII NJAGI.....5TH DEFENDANT

RULING

1. By a notice of motion dated 11th October 2018 brought under the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules, 2010, sections 1, 1A, 1B, 3A Civil Procedure Act Cap 21** and **all enabling provisions of the law**, the 1st Plaintiff sought an order of stay of execution of the judgement and decree of this court dated 27th September 2018 pending the lodging, hearing and determination of an intended appeal to the Court of Appeal.

2. The said application was based on the grounds set out in the said motion. It was essentially contended that the 1st Plaintiff may suffer substantial loss and “disruptions” unless the stay sought is granted. It was further contended that the intended appeal may be rendered nugatory if successful.

3. The said application was supported by an affidavit sworn by the 1st Plaintiff on 11th October 2018 in which he reiterated the grounds set out in the motion. The said affidavit did not, however, explain the kind of disruptions the 1st Plaintiff anticipated or what substantial loss he may suffer. There was also no attempt to demonstrate in what manner the intended appeal might be rendered nugatory unless the stay sought was granted.

4. The Defendants did not file any replying affidavit in response. However, they filed a statement of grounds of opposition dated 8th November 2018 raising the following grounds.

a. There is no appeal filed.

b. According to the High Court’s judgement, the Plaintiff is an equal beneficiary with the Defendants on the suit land.

c. The Plaintiff owns 1.52 acres of the suit land, while the Defendants own the remainder of the land comprising 6.08 acres. The Plaintiff will not therefore suffer any or any perceived injury.

d. The application does not disclose any valid grounds for denying the Respondents the fruits of their judgement.

5. When the said application was listed for hearing on 12th November 2018, the 1st Plaintiff prosecuted the said application in person on the basis of the grounds stated in the motion and the supporting affidavit. The Defendants' counsel, on the other hand, opposed the same on the basis of the grounds of opposition dated 8th November 2018 whereupon the matter was fixed for ruling on 13th December 2018.

6. The court has considered the 1st Plaintiff's said application, the Defendants' grounds of opposition as well as the oral submissions of the parties. The provisions of law relating to stay of execution of a decree are to be found in **Order 42 Rule 6(2)** which states 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.

c) notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit to stay of execution pending the hearing of a formal application.

7. The court is also guided by the following pronouncement by the Court of Appeal in the case of **Kenya Shell Ltd Vs Kibiru & Another [1986] KLR 410;**

“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.”

8. The court has noted that it was not alleged by the 1st Plaintiff that there is any danger of the suit property being alienated before the hearing and determination of the intended appeal. In the opinion of the court, that kind of eventuality may constitute substantial loss. It may also render the intended appeal, if successful, nugatory since the 1st Plaintiff may be unable to recover the suit property. The 1st Plaintiff was, however, more concerned with his coffee stems on the suit property. That is what he wanted to be preserved. The court is not satisfied that destruction of coffee stems would constitute substantial loss or that it would render the intended appeal nugatory.

9. Considering the totality of the circumstances of this case and the nature of the subject matter, the court is not satisfied that the 1st Plaintiff has made out a case for the grant of an order of stay. Accordingly, the prayer for stay of the decree is hereby declined. However, since the litigation amongst the parties had not come to an end, the court shall issue an order for the preservation of the suit property pending the hearing and determination of the intended appeal.

10. The upshot of the foregoing is that the court finds no merit in the 1st Plaintiff's notice of motion dated 11th October 2018 and the same is hereby dismissed. Accordingly, the court makes the following orders;

a. The notice of motion dated 11th October 2018 is hereby dismissed.

b. That upon registration of the decree dated 27th September 2018 against the title, an order of **inhibition** shall immediately be registered against the suit property pending the hearing and determination of the intended appeal to the Court of Appeal.

c. Each party shall bear his own costs of the application.

11. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 20TH day of DECEMBER, 2018.

In the presence of the 1st Plaintiff in person, Mr Wachira holding brief for Mr Morris Njagi for the Defendants and in the absence of the 2nd Plaintiff.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

20.12.18