REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 78 OF 2014

WANIOHI MWAI……..……...1ST PLAINTIFF/RESPONDENT

TERESIA WARUGURU GITHAE…..…..2ND PLAINTIFF/RESPONDENT

LUCY WAMBUI GITHAE……..…...3RD PLAINTIFF/RESPONDENT

VESUS

ISAAC RURIGA GITHAE.....DEFENDANT/APPLICANT

RULING

The application before me is the Notice of Motion dated 18th July 2018 brought under ***Order 42 Rule 6 C.P.R*** seeking stay pending appeal. The application is based on seven (7) grounds shown on the face of that application supported by the affidavit of the defendant/applicant sworn on the same date. In his supporting affidavit, the applicant deponed that in its judgment delivered on 27th June 2018, the Honourable Court declared that he holds 2.40 Hectares out of land registration number MUTITHI/STRIP/688, 690 and 691 in trust of the plaintiffs/respondents. The applicant further stated that he was aggrieved by that decision and has exercised his undoubted right of appeal to the superior Court which from reliable sources will be heard expeditiously. He deponed that the 1st respondent has started bringing prospective purchasers to purchase the suit land. The applicant also contends that in its judgment, the Court ordered the Deputy Registrar of the Court to sign any relevant document on his behalf to effect the sub-division and registration and that the respondent is therefore likely to execute the judgment and decree of the Court any time without any reference to him. The applicant is apprehensive that if the judgment of this Honourable Court is executed, he will suffer substantial loss and the appeal if successful will be rendered nugatory. The applicant also stated that he has brought the application expeditiously and that he is willing and ready to offer such security as the Honourable Court may direct.

That application is opposed with a replying affidavit sworn by lee Maina Mugo Advocates on 20th September 2018. In his affidavit, the learned counsel stated that the Court ought to weigh the applicant's application against the success of the respondents who should not be deprived of the fruits of their hard earned judgment especially the 2nd defendant/respondent who is now of an advanced age and/or poor health and if the stay is granted, she might not live to see the fruits of her judgment.

The respondents also contend that the applicant has not provided evidence on the allegation that the respondents have started bringing prospective purchasers and neither has he provided any evidence of what substantial loss he will suffer. The respondents also stated that the applicant has not demonstrated how the appeal will be rendered nugatory if the stay is not granted and neither has he stated that the respondents are incapable of compensating him in the unlikely event that the appeal is successful. The respondents also stated that the application has not been brought timeously and that the applicant does not deserve to be granted the orders sought.

When the matter came up for hearing, the parties through their legal representatives agreed to canvass the application by affidavit evidence already filed both in support and in opposition to the application. The parties also agreed by consent to file written submissions in addition to the affidavit evidence.

I have considered the affidavit evidence and the submissions by the parties. An application for stay is premised on ***Order 42 Rule 6 (2)*** which provide as follows:

> ***"6 (2) No order for stay of execution shall be made under Sub-rule (1) unless:***
>
> ***(a) The Court is satisfied that substantial loss may result on 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 due performance of such decree or order as may ultimately be binding in him***

has been given by the applicant"

The Superior Court has rendered itself in numerous decisions on the interpretation of substantial loss that an applicant must demonstrate before a grant of stay pending appeal is granted. In the case of ***James Wangalina & Another Vs Agnes Wathiaka Cheseto (2012) e K.L.R*** **Gikonyo J**. held as follows:

> "***No doubt in law the fact that the process of execution has been part in wisdom, or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 CPR. This is so because execution is a lawful process.***
>
> ***The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or regate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs Chesoni (2002) 1 K.L.R 867. …..... the issue of substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory".***

The subject matter of this appeal is a portion of land which was ordered to be sub-divided and transferred to the respondents. From his supporting affidavit, the applicant has stated that the transfer forms may be executed by the Court's Deputy Registrar without any reference to him. The applicant also stated that the 1st plaintiff/respondent has started bringing prospective purchasers to purchase the suit land. The applicant has not shown when the 1st plaintiff/respondent brought prospective purchasers to purchase the suit land. He has not attached any sale agreement or an affidavit of any person who has been invited to buy the suit property. The applicant in my view has failed to demonstrate how he will suffer substantial loss if the order for stay is not granted. The reasons which have been given by the applicant in my opinion are fears that are not substantiated in law. I am afraid that the applicant has not satisfied the conditions set out under ***Order 42 Rule 6 (2) CPR*** for the grant of stay pending appeal. In the upshot, the application dated 13th July 2018 is hereby dismissed. I make no order as to costs.

READ and SIGNED at Kerugoya in open Court this 14th day of December 2018.

E.C. CHERONO

ELC JUDGE

14TH DECEMBER, 2018

In the presence of:

Mr. Magee for Applicant

Juma Court clerk