



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
CIVIL CASE NO. 9 OF 2009
IN THE MATTER OF LAND ACQUISITION ACT
CAP 295 LAWS OF KENYA
AND IN THE MATTER OF COMPULSORY ACQUISITION OF
LR AGUTHI/GATITU/3447

BETWEEN

COMMISSIONER OF LANDSPLAINTIFF/APPLICANT

-VERSUS-

THE HEIRS OF THE LATE WAMBUGU MATHANGANI
RESPONDENTS

RULING

1. This ruling is in respect of the applications dated **29th September, 2015, 5th October, 2016** and **16th February, 2016**.

Application dated 29th September, 2016:

2. The application is by **Francis Wachira Mukami**. It seeks an order of stay of execution of the judgment delivered on **23rd September, 2015** in this suit pending the hearing and determination of his intended appeal against the judgment.

3. The applicant who was aggrieved with the judgment herein and who has since filed an appeal against the judgment contends that unless the orders sought are granted his appeal may be rendered nugatory.

4. In support of the application, the applicant vide his supporting affidavit has in addition to reiterating the grounds on the face of the application deposed that his household has been omitted in the judgment. As a result of that omission, the applicant is apprehensive that his siblings and he may be left out in the list of beneficiaries to the estate of Wambugu Mathangani (deceased) which is the subject matter of the suit herein.

5. The application is opposed through the grounds of opposition dated **9th October, 2015**. In those grounds, it is contended that the application is frivolous, vexatious, misconceived, incompetent, bad in

law and a gross abuse of the process of the court.

Submissions by the applicant

6. In the submissions filed on behalf of the applicant, it is contended that the appeal has high chances of success and that substantial loss may occur if stay of execution is not granted (applicant's will be left out in the distribution of the estate of the deceased herein).

7. On security, it is submitted that the amount deposited in court is sufficient.

Law applicable to the application

8. This being an application for stay pending appeal, the law applicable to the application is found in **Order 42 Rule 6(2)** of the Civil Procedure Rules which provides 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. Also see the case of **Sammy Some Kosgei v. Grace Jelel Boit (2013) eKLR** where it was observed:-

“...The relevant provisions in relation to stay pending appeal are contained in order 42 Rule 6(2) of the Civil Procedure Rules, 2010.... The more critical issues herein are whether the applicant stands to suffer substantial loss if the order is not granted and the question of security. In my view I think that if an applicant cannot demonstrate substantial loss, then the application ought to automatically fail and there would be no point in considering the question of security. It is the question of substantial loss which is the epicenter in an application for stay of execution pending appeal...” (emphasis supplied).

10. The legal position canvassed in **Sammy Some Kosgei v. Grace Jelel Boit (supra)** is replicated in many cases. To name but just a few, the position is replicated in the following cases:-

i **Daniel Kihara Murage v. Jacinta Karuana Nyangi & Another (2015)e KLR** where it was stated:-

“To justify the grant of stay, the applicant must show or establish facts to satisfy the court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant's case as the successful party in the appeal...The applicant ought to have placed before the court facts to show to the satisfaction of the court that if no stay is granted, he will suffer a loss that is substantial.... The mere fact that land is concerned does not make any loss substantial.” (emphasis supplied).

ii. **Everlyn Jebitok Keter v. Henry Kiplagat Muge & 2 Others (2011) eKLR** where it was stated:-

“It is usually a good rule to see if O.41 r.4 (present Order 42 Rule 6) 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 corner stone of both jurisdictions for granting a stay...In this case the applicant has not shown how he stands to suffer unless stay is ordered. She has therefore not demonstrated that substantial loss may result to her unless the order of stay is made.”

iii. Robert Ngaruiya Chutha vs. Joseph Chege Ndungu (2014) eKLR where it was stated:-

“The Court of Appeal in the case of Charles Wahome Gethi v. Angela Wairimu Gethi, Civil Application No.302 of 2007 (2008) eKLR held that:-

“...It is not enough for the applicant to say that they live or reside on the suit land and that they will suffer substantial loss. The applicants must go further and show substantial loss that the applicants stand to suffer if the respondent executes the decree in this suit against them”....It is my finding that the defendant has not established that he shall suffer loss if the orders sought are not granted. Further, under Order 42 this court is not required to inquire into the merits of the intended appeal as that is a question that can only be determined by the Court of Appeal. Consequently, the ground that the appeal shall be rendered nugatory does not suffice....Lastly, the rules of procedure require that the applicant must offer security as the court may order. On perusal of the application before court, it is evident that the defendant has not stated that he is willing and ready to give security subject to the directions of the court....I accordingly decline to grant the orders sought.” (emphasis supplied).

iv. In Butt v. Rent Restriction Tribunal (1982) KLR 419 it was held:-

“It is in the discretion of court of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule out to exercise its best discretion in a way not to prevent the appeal if, successful from being nugatory...The court will grant a stay where special circumstances of the case so require...”

Analysis and determination:

11. From the cases cited above, it is clear that this court has discretionary powers to grant stay pending appeal. That power is, however, exercised on the basis of settled principles or conditions namely:

(i) the application must have been brought without undue delay;

(ii) the applicant must furnish security for satisfaction of such decree as may ultimately issue against him/her; and that

(iii) the applicant must, by way of evidence, demonstrate that unless stay pending appeal is granted, he/she will suffer substantial loss.

12. The current application was brought barely one week from the date the judgment appealed from was delivered hence without undue delay.

13. With regard to the issue of security, the applicant has averred that the money deposited in court, which is the subject matter of the appeal is sufficient security.

14. As to whether the applicant will suffer substantial loss unless stay is granted, the applicant has deposed that unless stay is granted his siblings and he may be left out in the distribution of the money deposited in court in respect of the suit property.

15. The sole issue for determination is whether the applicant has made up a case for exercise of the court's discretion in his favour?

16. Concerning this issue, I note that the applicant has not provided security for due performance of such decree or order as may ultimately be binding on him. Although the applicant may suffer loss if the money deposited in court is distributed to the beneficiaries without his name or his household being included, I am not convinced that the applicant has made up a case for staying distribution of the whole amount of money deposited in court. I say that because, he does not have interest in the entire amount but only such

portion as his family or he would be entitled to if he won the case.

17. In view of the foregoing, I allow the application to the extent that the stay of execution would, subject to the applicant providing security for due performance of such decree or order as may ultimately be binding on him, be limited to such portion of the amount deposited in court as may devolve to his family.

18. The applicant to deposit in court security equivalent to his claim to the amount deposited in court, within thirty days from the date hereof, failing which his application shall stand dismissed with costs to the respondents.

19. **The Application dated 5th October, 2015**, is brought under **Order 9 Rule 9** of the Civil Procedure Rules, seeking to replace the firm of **Wahinya & Company Advocates**, which was acting for the interested parties/applicants, with the firm of **Charles Maina Wamahiu & Humprey Mwangi Gachie** after judgment.

20. The application is premised on the grounds that leave of the court is required to effect change of advocates or to act in person after judgment; that the interested parties/applicants are interested in changing their previous advocate on grounds that he no longer adequately represents them.

21. The application is supported by the affidavits of **Charles Maina Wamahiu**, who has described himself as one of the applicants, and that of Muhoho Gichimu, advocate.

22. Charles Maina Wamahiu has in his affidavit deposed that his attempts to reach his previous advocate for advice after the judgment in this suit was delivered, have been in vain. For that reason, the applicants feel inadequately represented.

23. In the affidavit of Muhoho Gichimu, advocate, it is deposed that the applicants have been unable to serve the application herein. It is contended that attempts to serve the application have been unsuccessful because the firm has since closed its offices situated at Kang'aru House, Kimathi Way P.O Box 710-10100.

24. The deponent has also carried out a search at the Law Society's website which shows that the advocate's status is inactive.

25. It is further contended that the advocate's cell phone number to wit 07xxxxxxxxx goes unanswered.

26. For those reasons, Mr. Gichimu, urges the court to allow the application the none service notwithstanding.

Analysis and determination

27. It is not in dispute that the applicants were represented by the firm of Wahinya & Co. Advocates when the judgment in this matter was delivered. That being the case, before the applicants can act in person or change the said advocate they must satisfy the requirements of **Order 9 Rule 9** which provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an applicaiton with notice to all the parties; or

(b) upon a consent filed between theoutgoing advocate and the propsoed incoming advocate or party intending to act in person as the case may be”

28. It is pointed out in the affidavit of Mr. Gichimu, that the application herein was not served on the

outgoing advocate. The reason given for that is that attempts to reach that firm for service have been unsuccessful.

29. The sole issue for determination is whether the applicants have made up a case for being granted the order sought.

30. In answering this question, I begin by pointing out that whereas the applicants contend that attempts to effect service on the outgoing advocate have been unsuccessful, apart from averring that their attempt to reach the advocate through his cell phone and reach him vide his physical address have failed, I note that there was no attempt to effect service on the outgoing advocate through substituted service as required by the civil Procedure Rules. In this regard see **Order 5 Rule 17** which provides as follows:

“(1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.”

31. Although **Order 5 Rule 17** aforementioned is about service of summons, in my view it offers a guide of what the applicant should have done to demonstrate that their attempt to serve the outgoing advocate was in vain.

32. Being of the view that the applicants’ could have done more to get their application served on the outgoing advocate and cognizant of the orders issued in the judgment hereto, which have direct bearing on that advocate, I decline to issue the orders sought.

33. **The Application dated 16th February, 2016**, brought under **Sections 3 , 3A** and **Order 9 Rule 13** of the Civil Procedure Rules respectively, seeks an order for payment of Kshs.3,000,000/= to the applicant, Elishiba Njoki Gathaka, out of the money deposited in court in this matter for her up keep and medical expenses.

34. The application is premised on grounds that the applicant is a beneficiary of the money deposited in court in this matter; that the applicant who is very old (96 years old) and without a source of income requires money for her upkeep and payment of medical bills.

35. The application is supported by the affidavit of the applicant in which the grounds on the face of the application are reiterated.

36. In support of the averments in the affidavit, the applicant has annexed a bundle of medical bills to her affidavit.

37. The application is opposed through the grounds of opposition dated 4th March, 2016; the replying affidavit of Cyrus Murage Kariuki sworn on 14th March, 2016 and the replying affidavit of Francis Wachira Mukami sworn on 15th March, 2016.

38. Vide the grounds of opposition herein, it is contended that the application is misconceived, incompetent and bad in law.

39. In his affidavit, Cyrus Murage Kariuki contends that the application is premature, the same having been brought before the direction issued in the judgment for ascertained of the beneficiaries of the money deposited in court is made. Mr. Kariuki contends that other beneficiaries will be prejudiced if the

application is allowed.

40. Like Mr. Kariuki, Francis Wachira Mukami, contends that the orders sought cannot issue before the list of beneficiaries contemplated in the judgment hereto is complied. He further contends that the applicant is not one of the beneficiaries listed in the judgment.

Submissions by respondents

41. In the submissions filed on behalf of the respondents, it is contended that granting the orders sought will only serve to bring confusion as entitlement of the beneficiaries of the money deposited in court is unknown.

42. The applicant is said to have failed to lay a basis for the plea for **Kshs.3, 000,000/=**.

Analysis and determination

43. This being an application for advance payment of a portion of the monies deposited in court for the benefit of the heirs of Wambugu Mathangani (deceased), besides demonstrating that she is one of the beneficiaries contemplated in the judgment, the applicant must demonstrate that their entitlement is ascertainable and capable of being paid to her under the judgment in question.

44. On whether the applicant has satisfied the above requirements, from the judgment hereto, I note that the court directed the defendants to compile another list of interested identified persons. The list was to be filed with the commissioner of Lands awaiting the outcome of their appeal on adequacy of compensation.

45. From the judgment, I also note that the judge had addressed the question of distribution of the amount deposited in court before the appeal is heard and determined thus:

“I find that it’s not time yet to distribute the above stated amount....but distribution will be stayed pending the outcome of the defendant’s appeal No.1 of 2008, when the issue will be settled once and for all.”

46. One of the reasons given by the court for the above observation/finding is that:

“...if the amount is paid out, it will not pass title to the acquiring party, since the condition precedent to vesting title is acceptance of payment released in respect thereof...payment is dispatched after adequacy of compensation case has been determined”.

47. From the above cited portions of the judgment hereto I find and hold that the orders sought in favour of the applicant cannot issue in her favour because the case on adequacy of the compensation is yet to be conclusively heard and determined. The list of the beneficiaries of the amount deposited in court and their respective entitlements is also yet to be prepared as ordered by the court.

48. In view of the foregoing, I find and hold that the application dated 16th February, 2016 lacks in merits and dismiss it with costs to the respondents.

Dated, signed and delivered in Nyeri on this 19th day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Muthoni for 99th & 100th respondent & h/b for Mr. Muhoho for Mr.Muguku for respondents no. 80

Mr. Nderi for interested party

N/A for Attorney General

N/A for respondents 1-72

N/A for 5 family trustees

N/A for Muchiri wa Gathoni

Court clerk - Esther