REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC APPEAL NO. 17 OF 2016

JAMES NDONYU NJOGU.....APPELLANT/APPLICANT

-VERSUS-

MURIUKI MACHARIA.....RESPONDENT/RESPONDENT

RULING

Introduction

1. The appellant, James Ndonyu Njogu, filed the instant motion dated **7th December, 2016** seeking various orders, among them: that this court be pleased to set aside the ruling of the Hon FW Macharia, Principal Magistrate delivered in Karatina PMCC No 109 of 2004 on 19th October, 2016 pending the hearing and determination of this appeal; that the court issues a restriction/ prohibitory order restraining the respondent, his servants, agents or family from transferring, leasing or in any way alienating land parcel **Iriaini/Gatundu/899** ("the suit property").

2. The application is premised on the grounds that the respondent obtained adverse orders in Karatina PMCC No 109 of 2004 and is now in the process of alienating the suit property; that the applicant is in the process of appealing against the said decision, which was made in excess of jurisdiction and in disregard to the court order issued in Malindi High Court Constitutional Petition No 3 of 2016 (reported as Malindi Law Society v Attorney General & 4 others [2016] eKLR); that if execution is carried out, the applicant's appeal will be rendered nugatory; that the application has been brought without delay; that the appeal is arguable with high chances of success and finally that the respondent will not suffer any prejudice if the application was allowed.

3. In his affidavit sworn in support of his application on **7th December, 2016** the applicant deposes that he and the respondent were engaged in out of court negotiations aimed at settling Karatina PMCC No 109 of 2004, only to be surprised that while the negotiations were ongoing the respondent filed an application to dismiss the suit for want of prosecution, which application was allowed.

4. The application is opposed vide the replying affidavit by the respondent, sworn on **13th December, 2016.** He deposes that the suit in Karatina PMCC No 109 of 2004 was filed by the applicant who never bothered to transfer the same to a court of competent jurisdiction; that the lower court was duly empowered to dismiss the suit for want of prosecution; that the prayer to set aside the lower court's decision should be canvassed during the hearing of the appeal and that there is no threat of the respondent selling the suit property as he has been the owner since 1996 and lives therein. He urges the court to dismiss the application.

5. The matter was heard on 16th December 2016, with **Mr Machira** appearing for the applicant and **Mr Mahan** for the respondent.

6. Mr Machira urged the court to grant the applicant a prohibitory order pending appeal. He submitted that although the learned magistrate was aware of the stay order issued in the Malindi case (supra), she proceeded to dismiss the suit nontheless. The applicant further submits that he has satisfied the three conditions to be granted an order for stay. He explained that the delay in filing the memorandum of appeal was occasioned by the registry which did not release the proceedings to him on time.

7. Mr Mahan submitted that the suit was dismissed for want of prosecution for the reason that it took the applicant more than 2 years to file the replying affidavit; that the order referred to by the applicant (from the Malindi case) has not been as attached. He further submits that under **Order 42 Rule 6** of the Civil Procedure Rules, there must be something to be stayed pending appeal. He submits that there is no order being stayed in this matter as the lower court simply dismissed the suit. It is also his contention that the Land Registrar is not a party in this suit yet the order of prohibition sought will be effected by the Land Registrar. He prays for the dismissal of the application and urges the court to be guided by the case of **Michael Muriuki Ngibuini v East Africa Building Society (Nyeri High Court Civil Appeal No 292 of 1999)**.

8. In reply, Mr Machira stated that there is an appeal pending and he does not see what prejudice will be suffered by the respondent if the application was allowed.

Analysis and determination

9. The law on whether to grant an order of stay of execution pending appeal is found in **Order 42 Rule 6(2)** of the Civil Procedure Rules 2010 as follows;

> **"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 hat 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."**

10. These principles were further set out in **Butt v. Rent Restriction Tribunal (1982) KLR 419**, as follows:-

> **"It is in the discretion 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..."**

11. The intended appeal is against the decision of Hon F.W. Macharia dismissing the appellant's suit for want of prosecution. The effect of this dismissal was not to effect the transfer of title but rather, to extinguish the appellant's case. The lower court never ordered the parties to do anything or refrain from doing anything. So is there anything to be stayed? In my view the orders sought are not obtainable as there is no order in the instant case capable of being executed other than the order on costs. In making this decision I am guided by the following cases;

The Hon. Peter Anyang' Nyong'o & 2 Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007, where the Court of Appeal expressed itself as follows:

"It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil

proceedings pending appeal is circumscribed by rule 5(2)(b). It is apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. That rule has been construed to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgement for the Court of Appeal in an application for stay, to enforce or to restrain by injunction. A temporary injunction asked for is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and the Court of Appeal has no jurisdiction to entertain it...Where the superior court merely upheld the preliminary objection and as a consequence stuck out the application for judicial review with costs, the order striking out the application is not capable of execution against the applicant save for costs. Moreover since the order of stay is neither an order of stay of execution or stay of proceedings nor an order of injunction of the species envisaged by Rule 5(2)(b), the Court has no jurisdiction to grant such an order since the orders sought do not relate to what the superior court decided."

Similarly, in Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, Makhandia, J (as he then was) held:

"The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."

12. Regarding the ground that there is a stay order issued in the Malindi case (supra), my view is that the outcome of the Malindi decision will not effect any land matter filed before 2012 when the Environment and Land Court (ELC) Act came into operation removing jurisdiction from the lower courts in regard to Land matters. The matter before the Karatina court was filed in 2004, long before the ELC Act came into operation. Therefore, whatever the outcome of the Malindi case, the Magistrates courts will still have jurisdiction to deal with land matters filed before the ELC Act came into operation so long as those cases were filed in accordance with the relevant statutes in force at that time. I think I have said enough to show that this application must fail.

13. Consequently, I dismiss the application dated 7th December, 2016 with costs.

Dated, signed and delivered in open court at Nyeri this 14th day of March, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Ms Mwai h/b for Mr. Mahan for the respondent

N/A for the applicant

Court clerk - Esther