



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 832 OF 2013

WILBERFORCE MUTHINGA NGURU.....1ST PLAINTIFF

RODAH WAMAITHA NGURU.....2ND PLAINTIFF

VERSUS

HEZRON MAINA TITUS NGURU.....DEFENDANT

RULING

On 22nd April 2016, this Court delivered its judgment in this case declaring that the defendant holds land parcel No. KIINE/KIBINGOTI/NGUGUINE/71 in trust for the plaintiff and himself and ordering him to transfer 2/3 thereof to the plaintiffs as their share. At the time that the said judgment was being delivered, the defendant was represented by the firm of **KINYUA KIAMA & CO.** Advocate and the plaintiffs by the firm of **MAINA KAGIO & CO.** Advocate. A decree followed and on 5th May 2016, the plaintiffs filed an application seeking orders to compel the defendant to sign transfer forms and all relevant documents to facilitate the transfer to the plaintiffs of their 2/3 share of land parcel No. KIINE/KIBINGOTI/NGUGUINE/71 and provide copies of his Identity Card, PIN Certificate and coloured passport size photographs to facilitate that transfer and in default, the Land Registrar Kirinyaga be ordered to dispense with production of those documents and the Officer in Charge Baricho Police Station to provide security during the survey exercise. That application was premised on the grounds set out therein and is supported by the affidavit of the 1st plaintiff **WILBERFORCE MUTHINGA NGURU.**

The defendant being aggrieved by this Court's judgment filed Civil Appeal No. 53 of 2016 at the Court of Appeal in **NYERI** through the firm of **WANJIRU WAMBUGU** Advocate on 6th September 2016 and on 6th October, the said firm filed an application citing **Order 45 of the Civil Procedure Rules** seeking stay of execution of the judgment delivered on 22nd April 2016. That application is based on the grounds set out therein and supported by the affidavit of the defendant **HEZRON MAINA TITUS NGURU.** I shall revert to the contents of the two rival affidavits later in this ruling.

It is clear from the record that by a consent order dated 10th January 2017 and filed in Court on the same day, the firm of **WANJIRU WAMBUGU** Advocate come on record in place of the firm of **KINYUA KIAMA & CO.** Advocate. That order was adopted by the Court on 27th March 2017.

On 8th November 2016, it was agreed that both the plaintiffs' application dated 5th May 2016 and the defendant's application dated 6th October 2016 be heard simultaneously by way of written submissions which have now been filed.

I will first consider the defendant's application dated 6th October 2016 because if it is up-held, then there

will be no need to consider the plaintiffs' application dated 5th May 2016.

The defendant's application dated 6th October 2016 seeks the substantive order that there be a stay of execution of this Court's judgment delivered on 22nd April 2016 and although it is premised on the wrong provision of the law as pointed out by **MR. KAGIO** advocate for the plaintiffs, I will nonetheless consider it on its merits in view of the provisions of **Article 159 (2) (d) of the Constitution** which enjoins this Court to administer justice without undue regard to procedural technicalities.

Applications for stay of execution pending appeal are governed by **Order 42 Rule 6 of the Civil Procedure Rules. Sub Rules 1 and 2** thereof provide as follows:

6 (1) "No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside". Emphasis added

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 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". Emphasis added

It is common ground that Civil Appeal No. 53 of 2016 has been filed at the Court of Appeal in Nyeri from this Court's judgment dated 22nd April 2016.

MR. KAGIO advocate for the plaintiffs has submitted that the firm of **WANJIRU WAMBUGU** Advocate are not properly on record for the defendant and therefore the defendant's application dated 6th October 2016, the Notice of Appeal and the Appeal itself are incompetent and should be struck off with costs. That submission is not without merit. **Order 9 Rule 9 of the Civil Procedure Rules** is couched in the following terms:

"Where 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 application with notice to all the parties; or

(b) upon a consent filed between the out-going advocate and the proposed incoming advocate or party intending to act in person as the case may be".

It is clear from the record that although the firm of **WANIRU WAMBUGU & CO.** Advocate came on record via a consent filed in this Court on 10th January 2017 and later confirmed by this Court on 27th March 2017, the application dated 6th October 2016 preceded that consent and was clearly in breach of the provisions of **Order 9 Rule 9 of the Civil Procedure Rules**. The defendant should have withdrawn the application dated 6th October 2016 to await compliance with **Order 9 Rule 9 of the Civil Procedure Rules** then file a fresh application. Counsel for the defendant tried to cure that by filing another application dated 3rd February 2017 which was not prosecuted. The defendant's Notice of Motion dated 6th October 2016 is clearly incompetent and can only be for striking out.

I shall nonetheless consider the merits or otherwise of that Notice of Motion notwithstanding my views

that it ought to be struck out for non compliance with the provisions of **Order 9 Rule 9 of the Civil Procedure Rules.**

It is clear from the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** that in an application for stay pending appeal, the applicant must satisfy the Court that:

- (1) He may suffer substantial loss unless the order for stay is granted.***
- (2) He has made the application without unreasonable delay; and***
- (3) Security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given.***

There must also be sufficient cause for the grant of such an order. On the issue of substantial loss, **PLATT Ag. J.A** (as he then was) said the following in the case of **KENYA SHELL LTD VS KIBIRU 1986 K.L.R 410 at Page 416:**

“It is usually a good rule to see if Order XLI 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 events.

Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay. That is what has to be prevented. Therefore without that evidence, it is difficult to see why the respondents should be kept out of their money”.

In the same case **GACHUHI Ag. J.A** (as he then was) also addressed the same issue in the following terms:

“It is not sufficient by merely stating that the sum of Ksh. 20,389.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted”

See also the case of **SILVERSTEIN VS CHESONI 2002 1 K.L.R 867 and MUKUMA VS ABUOGA 1988 K.L.R 645** where the Court emphasized on the centrality of substantial loss by stating that it is the cornerstone of the jurisdiction for stay pending appeal since that is what has to be prevented. I have perused the defendant’s affidavit in support of the application dated 6th October 2016. It raises the following issues:

- That judgment was entered on 22nd April 2016 and he filed Appeal No. 53 of 2016 in the Court of Appeal at Nyeri***
- That the appeal has high chances of success since the Court took in declaration of trust***
- That the matter touches on land and it is fair that the plaintiffs await the appeal since they are on the land and are not likely to suffer any loss***
- That if the orders are not granted, he will suffer loss and his appeal will be rendered nugatory.***

There is no mention of what substantial loss he will suffer. The only loss he alludes to is in paragraph ten (10) of that affidavit where he depones as follows:

“That if the orders sought are not granted, I shall suffer loss”.

He does not demonstrate what substantial loss if any, he will suffer if an order for stay is not granted. The law does not anticipate mere loss. It anticipates **“substantial loss”**. In the absence of evidence of such

substantial loss that the defendant will suffer if an order of stay is not granted, there can be no basis for the grant of the order of stay sought. The defendant has also pleaded that his appeal touches on land and has very high chances of success. That is not a consideration in an application of this nature as is now clear from the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** and the guiding precedents which I have referred to above.

An application for stay of execution pending appeal must also be “***made without unreasonable delay***”. The judgment sought to be appealed was delivered on 22nd April 2016 and the decree issued on 28th April 2016. This application was filed on 6th October 2016 some six (6) months later. There is evidence that the defendant had filed a Notice of Appeal on 6th May 2016. Under **Order 42 Rule 6 (4) of the Civil Procedure Rules**, it is provided as follows:

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”

So even if time is computed from 6th May 2016, there is still an unexplained delay of five months which in my view is unreasonable particularly in the circumstances of this case when the judgment was delivered in the presence of counsel. There is really no sufficient cause why the defendant should be granted the orders sought and it appears to me that his application for stay was only prompted by the plaintiffs application dated 5th May 2016 seeking orders that he signs the necessary documents to facilitate the transfer of 2/3 out of land parcel No. KIINE/KIBINGOTI/NGUGUINE/71 to the plaintiffs. The defendant’s application dated 6th October 2016 is clearly devoid of any merit and must therefore be dismissed with costs which I hereby do.

I shall now consider the plaintiffs’ application dated 5th May 2016. It seeks the following orders:

1. That this Honourable Court be pleased to order the defendant herein to sign the transfer forms and all other relevant documents necessary to facilitate transfer of 2/3 share of land parcel KIINE/KIBINGOTI/NGUGUINE/71 to the plaintiffs and in default the Executive officer of this Court be authorized to sign the said documents.

2. That this Honourable Court be pleased to order the defendant herein to produce the original title for land parcel No. KIINE/KIBINGOTI/NGUGUINE/71, copies of his Identity Card and Kenya Revenue Authority PIN Certificate and coloured passport size photographs to facilitate the transfer of 2/3 share of land parcel number KIINE/KIBINGOTI/NGUGUINE/71 to the plaintiffs and in default, the Land Registrar Kirinyaga be ordered to dispense with the production of the aforesaid documents.

3. That the Officer in Charge Baricho Police Station to provide security during the survey process.

4. That the costs of this application be provided for.

The application is premised on the grounds set out therein and supported by the affidavit of **WILBERFORCE MUTHINGA NGURU** the 1st plaintiff herein. The plaintiff’s case is basically that following this Court’s judgment dated 22nd April 2016 declaring that the defendant holds land parcel No. KIINE/KIBINGOTI/NGUGUINE/71 in trust for them and ordering him to transfer 2/3 thereof to them, it is not possible to get the defendant to co-operate as there is a lot of hostility between the parties.

In opposing that application, the defendant has referred to his appeal No. 53 of 2016 filed at the Court of Appeal in Nyeri, that it has high chances of success and that it is fair that the plaintiffs who are on the land in dispute wait until the appeal is determined and that he may suffer loss and his appeal will be rendered nugatory. In considering this application, I bear in mind that both parties herein have rights. The defendant has his right to appeal and the plaintiffs their right to the fruits of their judgment. My duty is to balance those two competing interests. Having already found that the defendant is not entitled to any orders of stay of execution pending appeal, there would be no basis upon which this Court would

reject the plaintiffs' application. The plaintiffs are entitled to the enjoyment of the fruits of their judgment which cannot be realized until the decree in their favour is executed as sought. The plaintiffs' application is therefore merited and is hereby allowed.

Ultimately therefore and upon considering both the plaintiffs' application dated 5th May 2016 and the defendant's application dated 6th October 2016, I make the following orders:

1. The defendant's application dated 6th October 2016 is dismissed.

2. The plaintiffs' application dated 5th May 2016 is allowed as prayed save that the Deputy Registrar, not the Executive Officer, shall sign the necessary transfer documents should there be a default on the part of the defendant to do so.

3. The defendant shall meet the plaintiffs' costs for both applications.

B.N. OLAO

JUDGE

21ST APRIL, 2017

Ruling delivered, dated and signed in open Court this 21st day of April 2017.

Ms Muthike for Mr. Kagio for Plaintiffs present

No appearance for the Defendant.

B.N. OLAO

21ST APRIL, 2017