



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 2357 OF 2007

STEPHEN MWANGI KARIUKI.....1ST PLAINTIFF

CHARLES KAMAU GITHINJI.....2ND PLAINTIFF

=VERSUS=

MWANGI TIRUS.....DEFENDANT

RULING

BACKGROUND

1. The applicants and the Respondent in this case are cousins. The applicants had filed an originating summons in which they sought that they had acquired two properties namely **LR No. Loc.13/Gitugi/1775** and **LR No.13/Gitugi/1796** by adverse possession.
2. The originating summons was fully heard and in a judgement delivered on **25th July 2016**, the applicants originating summons was dismissed. The applicants were given **90 days** within which they were to voluntarily move out of the suit properties or they be evicted therefrom.
3. The applicants being aggrieved with the judgement of the court moved and filed a Notice of appeal to the Court of Appeal. They have now come and filed a Notice of Motion dated **28th July 2016**, in which they seek stay of execution pending appeal.
4. The Respondent was duly served with the Notice of Motion but he did not file any grounds of opposition or any replying affidavit despite being given time to do so on a number of occasions. The Respondent was at one stage represented by an advocate who later withdrew from acting for him. He defended himself without an advocate.

APPLICANTS' CONTENTION

5. The applicants contend that they have been on the suit properties for over 30 years. That they have carried out extensive developments on the same including permanent buildings. That if they are evicted and their properties demolished, they will suffer substantial loss and that their appeal which has high chances of success will be rendered nugatory. That they reside on the suit properties with their families and that it is therefore in the interest of justice that there be stay of execution pending appeal.

ANALYSIS

6. As I said herein above, the Respondent did not file any reply or grounds of opposition to the application. This being an application for stay pending appeal, the court's discretion to grant it is only fettered by three conditions:-

i. The application must be brought without unreasonable delay

ii. There has to be demonstration that the applicant will suffer substantial loss should orders of stay be declined.

iii. There has to be such security given as the court orders for the due performance of the decree as may ultimately be binding upon the applicant.

7. In the instant case, the judgement the subject of the appeal was delivered on 25th July 2016. This application was filed on 29th July 2016. This was a period of slightly over one month. I do not find this to be unreasonable delay in the circumstances.

8. Have the applicants demonstrated that they will suffer substantial loss should stay of execution be declined?. Though there is no evidence attached to the supporting affidavit to show the kind of developments which are there. I have no reason to doubt that this is the case. I have looked at the judgement which shows that indeed the applicants had been on the suit properties for over 30 years. For all that period, they may have carried out substantial developments. This was not controverted as the Respondent did not file any response to the application by the applicants.

9. Even though no evidence has been demonstrated, I find that the applicants will suffer loss if they are evicted from the suit properties, before their appeal is heard. In the case of **Kenjap Motors Ltd Vs Isaac Kuto (2016) eKLR** where the Court cited the case of **Butt Vs the Rent Restriction Tribunal [1982] KLR 417**, it was and held that;-

“If there is no other overwhelming hindrance , a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considered that another , which in his own opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”.

10. In **Rhoda Mukoma Vs John Abuoga Civil Application No.95 of 1987 (1988) KLR**, the Court of Appeal had this to say :-

“Where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard”.

11. Applying the principles in the two cases above and considering that the applicants have been living on the suit properties for over three decades, I find that stay of execution ought to be granted pending hearing and determination of the appeal. As a condition for stay, I order that the applicants do deposit in court a sum of Kshs.100,000 (One hundred thousand) as security within 45 days from the date of this ruling failing which the stay orders shall automatically lapse.

Costs of this application shall abide the outcome of the appeal.

It is so ordered.

Dated, Signed and Delivered this at **Nairobi** this **10th** day of **April 2017**

E.O .OBAGA

JUDGE

In the presence of ;-

Mr. Wanjau for Plaintiff/Applicant

Court Assistant - Hilda

E.O OBAGA

JUDGE