



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 220 OF 2013**

**NDEGE KABIBI KIMANGA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**AGNES WANGECHI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**KARINGA GACIANI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**BEATRICE MUTHONI KARINGA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**EUNICE WAGATWE KARINGA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**MWANGI KARINGA.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**DENIS MURIMI KARINGA.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**MARY MUTHONI KARINGA.....6<sup>TH</sup> DEFENDANT /APPLICANT**

**SARAH WANJIRU NJOGU.....7<sup>TH</sup> DEFENDANT/APPLICANT**

**JOHN WAWERU KARINGA.....8<sup>TH</sup> DEFENDANT/APPLICANT**

**SAMUEL WACHIRA KARINGA.....9<sup>TH</sup> DEFENDANT/APPLICANT**

**FRANCIS GITHINJI KARINGA.....10<sup>TH</sup> DEFENDANT /APPLICANT**

**FREDRICK KAVATIA KARINGA.....11<sup>TH</sup> DEFENDANT/APPLICANT**

**JACKSON MACHARIA KARINGA.....12<sup>TH</sup> DEFENDANT /APPLICANT**

**BEATRICE MUTHONI KARINGA.....13<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

On 11th November 2016 this Court delivered judgment in this case in which it made a finding that Defendants/Applicants hold land parcel No. MUTIRA/KAGUYU/737 (the suit land) in trust for the Plaintiffs/Respondents. It then proceeded to determine the trust and order the Defendants/Applicants to transfer to each of the Plaintiffs/Respondents one (1) acre. The parties were to meet their own costs of

the suit.

The Defendants/Applicants were aggrieved with that judgment and promptly filed a Notice of Appeal and on 25th November 2016 filed an application citing **Sections 1A 1B, 3A, of the Civil Procedure Rules and Orders 42 Rule 6 (1) and 51 of the Civil Procedure Rules** seeking the following orders:

**1. Spent.**

**2. Spent.**

**3. That the Honourable Court be pleased to stay execution of its decree dated 11th November 2016 and any further proceedings herein pending the hearing and determination of the Defendants intended appeal at the Court of Appeal Kenya or until further orders of this Court.**

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

That application which is the subject of this ruling is premised on the grounds set out therein and also supported by the affidavit of **KARINGA GACIANI** the 1st Defendant/Applicant herein.

The gravamen of the application is that the Defendants/Applicants are aggrieved with the said judgment and have already filed notice of appeal and applied for copies of proceedings to enable them file an appeal. That the intended appeal is not frivolous and will be rendered nugatory if the decree is executed and therefore further proceedings should be stayed.

In opposing the application **NDEGE KABIBI KIMANGA** the 1st Plaintiff/Respondent herein has sworn a replying affidavit in which he has deponed, inter alia, that there is no statement by the Defendants/Applicants that they stand to suffer substantial loss if the judgment/decree is executed and therefore the Court has no material on which to gauge if indeed any loss will ensue. Further, that the Plaintiffs/Respondents should be allowed to enjoy the fruits of the judgment as the Defendants/Applicants will suffer no prejudice. The Plaintiffs/Respondents therefore urged the Court to dismiss the application with costs.

The application was canvassed by way of written submissions which have been filed by **KAGURU KAHIGA** advocate for the Defendants/Applicants and **NGIGI GICHOYA** advocate for the Plaintiffs/Respondents.

I have considered the application, the rival affidavits and the submissions filed.

The law governing the jurisdiction of this Court to grant a stay of execution pending appeal is found in **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules** which provides that:

**6 (1) “No appeal or second appeal shall operate as a stay of execution or proceedings 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”**

**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 clear from the above that this Court's jurisdiction to grant a stay of execution pending appeal is fettered by the following conditions:

- 1. The applicant must establish sufficient cause.**
- 2. The applicant must satisfy the Court that substantial loss may result if stay is not granted.**
- 3. The applicant must give such security as the Court may order for the due performance of such decree or order as may be binding on him.**
- 4. The application must be made without unreasonable delay.**

The judgment appealed from was delivered on 11th November 2016 and the Defendants/Applicants promptly filed this application two weeks later on 25th November 2016. There has therefore been no unreasonable delay in filing this application.

However, the cornerstone of such an application is that the applicant must show what substantial loss he will suffer if the order of stay is not granted. In **KENYA SHELL LTD VS KIBIRU & ANOTHER 1986 K.L.R 410, PLATT Ag. J.A** (as he then was) addressed the issue of substantial loss as follows:

*"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 even. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this 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) added the following:

*"It is not sufficient by merely stating that the sum of Ksh. 20,380.00 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 cases of **MUKUMA VS ABUOGA 1988 K.L.R 645** and **SILVERSTEIN VS CHESONI 2002 1 K.L.R 867.**

I have perused the ten (10) paragraph supporting affidavit by **KARINGA GACIANI** the 1st Defendant/Applicant herein and nowhere is there any mention of what substantial loss the Defendants/Applicants will suffer if the stay is not granted. The Defendants/Applicants appear to be content in arguing that their appeal is not frivolous, that it will be rendered nugatory if the decree herein is executed before the appeal is heard and that the Plaintiffs/Respondents will suffer no prejudice if the orders sought are granted. It must be remembered that in an application such as this, the Court must balance between ensuring that the applicant's appeal is not rendered nugatory and also allowing a successful party to enjoy the fruits of his judgment. In this case, this Court made the substantive order that the Defendants/Applicants hold the suit land in trust for the Plaintiffs/Respondents and should transfer to them one (1) acre each. There is even no evidence that any execution process has commenced and even then, that alone would not be sufficient for this Court to grant an order of stay because such process is the natural step that a party takes in order to harvest the fruits of a judgment. The onus was on the Defendants/Applicants to satisfy the requirements of **Order 42 Rule 6 (2) of the Civil Procedure Rules** by demonstrating what substantial loss they will suffer if the order of stay of execution is not granted. The Defendants/Applicants have not discharged that burden.

The up-shot of the above is that the Defendants/Applicants Notice of Motion dated 25th November 2016

is wholly lacking in merit. It is hereby dismissed. As the parties are family, each shall meet their own costs.

**B. N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**

Ruling dated, delivered and signed in open Court this 14<sup>th</sup> day of July 2017

Mr. Ngigi for Plaintiffs present

Ms Nyangati for Kahiga for Defendants present.

**B. N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**