



REPUBLIC OF KENYA

IN THE Environment And Land Court Of Kenya

At Nakuru

HCC NO.42 OF 2013

DANIEL KAMAU MWANGI, HANNAH WANJIRU MWANGI (SUING AS THE ADMINISTRATORS OF

**THE ESTATE OF THE LATE PAUL MWANGI KAMAU).....
.....PLAINITFF**

VERSUS

**JOSEPH CHRISTOPHER NJIRIRI.....1ST
DEFENDANT**

**BARCLAYS BANK OF KENYA LIMITED..... 2ND
DEFENDANT**

RULING

(Application for stay pending appeal; principles to be considered; judgment requiring applicant to transfer suit property to the respondents; applicant filing a notice of appeal; order that there be no transactions over the suit land and no registration of any disposition until the appeal is determined; possession of the suit land to be with the respondent; stay orders subject to the applicant depositing taxed costs in a joint interest earning account)

1. The application before me is that dated 10 May 2017 filed by the defendant brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules. In essence, it is an application for stay of the judgment delivered on 21 March 2017 pending an appeal to the Court of Appeal. A little background will shed light on the context within which this application is brought.

2. Through a plaint filed on 23 May 2013, the plaintiffs/respondents commenced this suit against two persons, that is Joseph Christopher Njiriri (the applicant) and Barclays Bank of Kenya Limited. It was the case of the plaintiff that their father, Paul Mwangi Kamau (deceased) on 25 February 1993, entered into an exchange and purchase agreement with the applicant vide which he gave out land that he owned in Naivasha, and received the land parcel Njoro/Ngata Block 1/103 (hereinafter the suit land) plus the sum of Kshs. 400,000/=. The deceased delivered his land in Naivasha to the applicant and the applicant became its registered proprietor. The applicant also delivered possession of the suit land to the deceased but the deceased could not be registered as its proprietor because the suit land had been charged to Barclays Bank of Kenya Limited. In this suit, the plaintiffs wished to have the Bank discharge the title since the loan had been paid and have the suit land transferred to the estate of the deceased. In the course of the case, Barclays Bank did deliver a duly executed discharge of charge and was discharged from the

suit, but the applicant contested the case on the grounds inter alia, that he was never given the Naivasha land, that the plaintiff's case was time barred, and that the agreement of 25 February 1993 was null and void for want of consent of the Land Control Board since the suit land was agricultural land.

3. I heard the suit, and delivered judgment on 21 March 2017. I was not persuaded that the plaintiff's case was time barred. I also found for a fact that the applicant had been granted the land in Naivasha, which is LR No. 1144/1299 by the deceased, and had it transferred to himself. He later sold it. On whether or not the agreement was null and void for want of consent of the Land Control Board, I did find that consent of the Land Control Board was required since the suit land was agricultural land. However the consideration entailed both land and money (the Naivasha land and the sum of Kshs. 400,000/=) and I held that since the contract was null and void, the parties had to be brought back to the position that they were prior to the agreement. I therefore ordered the applicant to have retransferred back to the respondents the land in Naivasha and refund the sum of Kshs. 400,000/=, in which event, he could then have back the suit land. I gave 30 days to the applicant to undertake this exercise failure to which the applicant will have to be permanently restrained from the suit land and the suit land would vest upon the estate of the deceased. It is this judgment which the applicant is not happy with and he has filed a Notice of Appeal.

4. In this application, the applicant wishes to have the above orders stayed as he pursues his appeal. He has averred in his supporting affidavit, that the application has been filed without any delay and that if the stay is not granted, his appeal will be rendered a mere academic exercise.

5. The respondents have opposed the motion through the replying affidavit of the first plaintiff. He has more or less justified the judgment delivered and is of the view that no prejudice will be suffered by the applicant if stay is not granted for the reason that decree has not yet been issued nor costs taxed. He has averred that no loss will be occasioned to the applicant since they (the respondents) have been residing on the suit land since the year 1993. He has averred that the applicant should be compelled to deposit the original title deed together with a duly executed transfer.

6. In his submissions, Mr. Karanja Mbugua inter alia submitted that the plaintiffs can continue being in possession of the suit land but stated that the original title deed was misplaced by an advocate. He submitted that an order of stay can be granted with a rider that once a new title deed is issued, the same can be deposited in court together with signed transfer forms. He referred me to the cases of **Butt vs Rent Restriction Tribunal (1982) KLR 417** and **Nelson Ngethe vs Koinange Investments & Development Limited, Nairobi HCCC No. 3164 of 1995 (unreported)** to support his client's application.

7. On his part, Mr. Matiri for the respondents, referred me to Order 42 Rule 6 (2) of the Civil Procedure Rules, as the applicable law and the case of **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another (1986) eKLR**. He submitted that the respondents have been on the suit land since the year 1993 and therefore the applicant stands to suffer no loss if stay is not granted. He submitted that the respondents have a right to enjoy the fruits of their judgment and referred me to the case of **Wilberforce Muthinga Nguru & Another vs Hezron Maina Titus Nguru (2017) eKLR** and my own decision in the case of **Stephen Kibowen vs Agricultural Finance Corporation (2015) eKLR**.

8. I have considered the application the submissions of counsels and the cases that they have relied upon. Order 42 Rule 6 does apply to applications such as these, specifically subrules 1 and 2, which are drawn as follows :-

6. Stay in case of appeal [Order 42, rule 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.

(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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. The essence of granting a stay pending appeal is so that the appeal, if successful, is not rendered nugatory as explained in the case of **Butt vs Rent Restriction Tribunal (supra)**. The applicant has conceded that the respondents have been in possession of the suit property and he does not wish to have that disturbed. I presume therefore, that what the applicant wishes to have stayed is the order that he transfers the suit land to the respondents. In essence, the applicant wants the suit property, in so far as its registration is concerned, to remain in the state that it is pending the hearing of the appeal.

10. On my part, I see no great prejudice that will be suffered by the respondents if the said request is allowed. The respondents will keep possession of the property and utilize it as they have been doing so while the appeal is pending. The registration of the property can be safeguarded if I issue an order of inhibition, inhibiting the registration of any disposition on the suit property until the appeal is determined and if I issue an order stopping all parties from entering into any disposition over the suit property. I see no prejudice that the respondents stand to suffer by these orders.

11. There is an order of costs which is in favour of the respondents. I direct that taxation proceeds and the costs be deposited in a joint interest earning account in the name of the counsels for the applicant and respondents within 30 days of taxation. If the said costs are not deposited as directed above, then the order of stay will lapse and the respondent will be at liberty to execute the judgment in full.

12. Having considered the application, I now make the following final orders :-

(i) That I grant a stay of execution of the judgment delivered on 21 March 2017 subject to the condition that the applicant deposits within 30 days of taxation the taxed costs in a joint interest earning account to be opened in the names of counsel for the applicant and counsel for the respondents.

(ii) There is hereby issued an order of inhibition, inhibiting the registration of any disposition in the register of the land parcel Njoro / Ngata Block 1/103 until the intended appeal is determined or further orders of this court in the event that the applicant fails to abide by the order to deposit costs as directed in (i) above.

(iii) That all parties herein are barred from entering into any form of disposition until the appeal is heard and determined or until further orders of this court in the event that the applicant fails to abide by order (i) above.

(iv) That pending the determination of the intended appeal the respondents to continue being in possession of the land parcel Njoro/Ngata Block 1/103 to the exclusion of the applicant.

(v) The costs of this application will abide the outcome of the appeal.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Simiyu holding brief for Mr. Karanja Mbugua for the applicant.

Mr. Matiri for the respondents.

Court Assistant: Toroitich

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU