



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 278 OF 2014

PRISHAR WAMBUI KAGUURA.....PLAINTIFF

VERSUS

PETER WAITHAKA KAGUURA.....1ST DEFENDANT

ELIZABETH WANJIRU WAITHAKA.....2ND DEFENDANT

SAMUEL MWANGI GACHUNGA.....3RD DEFENDANT

FLORAH NJOKI MWANGI.....4TH DEFENDANT

DISTRICT LAND REGISTRAR, MURANG'A.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

On **31ST MAY 2017**, this Court delivered its judgment in this case and made several orders against the 1st, 2nd, 3rd, 4th and 5th defendants including a permanent injunction restraining them from disposing, wasting, transferring, alienating or charging land parcel No. LOC 2/KANDERENDU/640, an order for the revocation and cancellation of titles to land parcels No. LOC 2/KANDERENDU/1511 and 1512 and vacation by the 3rd and 4th defendants from the suit land within six (6) months or their eviction therefrom in default.

On 11th July 2017, the 3rd and 4th defendants filed a Notice of Motion citing **Order 42 Rule 6 of the Civil Procedure Rules** and **Section 63 (c) of the Civil Procedure Act** seeking the following orders:

- 1. That there be a stay of execution of the orders made on 31ST MAY 2017 until the hearing and determination of the intended appeal.***
- 2. Costs be provided for.***

The application is founded on the grounds set out therein and is also supported by the joint affidavit sworn by **SAMUEL MWANGI GACHUNGA** (3rd defendant) and **FLORA NJOKI MWANGI** (4th defendant). The gravamen of the said application is that they have good grounds of appeal with high chances of success and that it would be fair and just that the execution of the orders made on **31ST MAY 2017** be stayed as the execution thereof would render their appeal nugatory. Further, that no irreparable damage will be caused to the plaintiff as there is no intention on the part of the defendants to dispose or transfer the suit properties. It is therefore in the interest of justice that the execution of the orders made

on **31ST MAY 2017** be stayed.

In opposing the application, the plaintiff **PRISHAR WAMBUI KAGUURA** has filed a replying affidavit in which she has deponed, inter alia, that the same is devoid of merit, frivolous and incompetent since some of the orders revoking the titles to the two sub-divisions has been done and a title for parcel No. LOC 2/KANDERENDU/640 has been issued in her names (annexture **PWK-1**). That the defendants have a weak appeal and the circumstances herein do not warrant the granting of the orders sought as to do so would allow the 3rd and 4th defendants to continue occupying her land. That no security of costs has been provided and no prejudice will be caused to the 3rd and 4th defendants if the orders sought are not granted.

The application was orally canvassed by **MR. NJOROGE** for the 3rd and 4th defendants and **MR. MAINA** for the plaintiff who also provided a list of authorities.

In his submissions, **MR. NJOROGE** stated that the 3rd and 4th defendants are still on the suit land and if the orders made on **31ST MAY 2017** are executed, the status quo will be affected while the plaintiff will not suffer any irreparable damage.

MR. MAINA relied on the replying affidavit of the plaintiff and stated that there is no arguable appeal and infact no appeal has been filed except a notice of appeal. Counsel added that even the general damages ordered by this Court have not been paid and neither has any security of costs been given. In any case, execution has already commenced and a new title issued in the names of the plaintiff.

In reply, **MR. NJOROGE** conceded that although there is no memorandum of appeal, a notice of appeal has been annexed and the appeal is arguable.

I have considered the application, the rival affidavits, the cases listed and the submissions by counsel.

This application is premised on **Order 42 Rule 6 of the Civil Procedure Rules. Section 63 (c) of the Civil Procedure Act** which has also been cited is not applicable as it refers to the Court's power to grant a temporary injunction which is not the remedy sought.

Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides as follows:

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 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".

It is clear from the wording of Order **42 Rule 6 (1) and (2) of the Civil Procedure Rules** that a party seeking an order for stay of execution must satisfy the following conditions:

1. Demonstrate that unless the order for stay is granted, he might suffer substantial loss

2. He must make the application without undue delay; and

3. Security as the Court may order for the due performance of such decree or order as may be ultimately binding on him must be given.

The Court will of course consider whether “**sufficient cause**” has been made by the applicant in order to exercise its discretion in his favour.

This application was filed on 11th July 2017 almost a month and a half after the Court made the orders sought to be stayed. I am prepared to hold that there has been no un-reasonable delay in filing it. Regarding the issue of security, this is to be complied with once the Court has granted the order of stay. However, a party seeking such an order would be expected to confirm that he is ready and willing to provide such security as the Court may order. No such undertaking has been made by the applicant herein.

The above notwithstanding, the cornerstone of an application for stay pending appeal is “**substantial loss**”. As was stated by **PLATT Ag J.A** (as he then was) in **KENYA SHELL VS BENJAMIN KARUGA KIBIRU & ANOTHER 1986 K.L.R 410:**

“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 event.

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

In the same case, **GACHUHI Ag. J.A** (as he then was) stated as follows:

“In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted”

See also **SILVERSTEIN VS CHESONI 2002 (K.L.R 567** and **MUKUMA VS ABUOGA 1988 K.L.R 645** where the Court emphasized on the centrality of substantial loss since that is what has to be prevented. I have looked at the 3rd and 4th defendant’s supporting affidavit in support of this application and there is no mention of what substantial loss they will suffer if an order of stay of execution pending appeal is not granted. The 3rd and 4th defendants are content in arguing that they have a good appeal (paragraph five), that it is just and fair that execution be stayed (paragraph six) and that no irreparable damage will be occasioned to the plaintiff by an order of stay (paragraph seven). Whether an appeal has good chances of appeal is not a consideration under **Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules** and in any event, even if it was, no appeal has been filed yet as conceded by counsel for the 3rd and 4th defendants. It is also not the law that an order for stay of execution be granted if the respondent will not suffer irreparable damages. Rather, it is for the applicants to demonstrate what substantial loss they will suffer if stay of execution is not granted. There is no reference to that vital requirement both in the application and supporting affidavit or in the submissions by counsel. On the other hand, there is clear evidence that infact a substantial part of the orders of this Court dated **31ST MAY 2017** have already been executed and land parcels No. LOC 2/KANDERENDU/1511 and 1512 which were purchased by the 3rd and 4th defendants no longer exist those titles having been cancelled and the land parcel No. LOC 2/KANDERENDU/640 having reverted to the plaintiff and her son **PETER WAITHAKA KAGUURA** who was the 1st defendant. The 3rd and 4th defendants argue that it would be just and fair if the orders issued on **31ST MAY 2017** are stayed pending appeal. On the contrary, it would be unjust and unfair to make such an order when the land parcels No. LOC 2/KANDERENDU/1511 and 1512 which they claimed are no longer in existence their titles having been cancelled. In short, no sufficient cause has been shown to warrant the grant of the orders sought.

The up-shot of the above is that the 3rd and 4th defendants’ Notice of Motion dated 4th July 2017 and

filed herein on 11th July 2017 lacks merit. It is hereby dismissed with costs to the plaintiff.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017

Ruling delivered, dated and signed in open Court at Kerugoya this 6th day of October 2017

Ms Waweru for Mr. Maina for Respondent present

Mr. Munene for Ms Wangari for 3rd and 4th Applicants present.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017