



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 7 OF 2017

PETER NDEKEI MUHIA.....APPELLANT/RESPONDENT

VERSUS

CHARLES NJOROGE KIMANI....1ST RESPONDENT/APPLICANT

NANCY WANGARI WAWERU2ND RESPONDENT/APPLICANT

RULING

The Respondents herein have filed this *Notice of Motion* dated **1st September 2016**, and are seeking for orders that:-

- i. The order of Stay of Execution pending determination of this Appeal issued by the learned Resident Magistrate B. J. Bartoo in Thika CMCC No.1013 of 2010 on 19th August 2016 be set aside.***
- ii. That costs of this application be in the cause.***

The application is supported by the grounds on the face of the application and the *Supporting Affidavit* of **Charles Njoroge Kimani**. These grounds are:-

- a. That order for stay pending the determination of this appeal was issued without the Appellant having met the prerequisites for the issuance of such orders.***
- b. That no reasons were given by the trial court in allowing the Appellant's application.***
- c. That there was no basis in law to allow the said application.***
- d. That the Applicants are aggrieved by the said order.***

In his *Supporting Affidavit*, the **Charles Njoroge Kimani** averred that a Decree was issued in his favor by the lower court on **28th July 2015**. He further averred that the Appellant lodged an Appeal and filed an application for stay of execution pending the determination of this Appeal. It was his contention that the said application was opposed through the **grounds of opposition** dated **3rd November 2015**. The parties subsequently filed their written submissions but on **2nd June 2016**, the trial Magistrate delivered her Ruling allowing the Appellant's application for stay of execution. It was his contention that he was aggrieved by the said Order of stay of execution as he has been unfairly denied the fruits of justice. He urged the Court to set aside the said Order of stay of execution.

The instant application is contested and the Appellant/Respondent filed his **grounds of opposition** dated **29th May 2017**, and averred that:-

- 1. The application dated 1st September 2016 is totally defective for want of procedure and the same is not supported by any special circumstances.**
- 2. That an Applicant in the subordinate court seeking stay is only required demonstrating sufficient cause therefore when the application was canvassed interparties found meritorious after sufficient cause had been shown.**
- 3. The Respondent/Applicant has failed to annex the actual ruling by the court granting stay of execution for this Honourable court to see for itself the record and reasons persuasive to the court to grant stay of execution orders under challenge.**
- 4. The Respondent/Applicant upon failure to appeal pursuant to leave granted on 2nd June 2016 is using unorthodox way to pursue the remedy he could have had if he had appealed against orders for stay of execution.**

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the pleadings in totality and the annexures thereto.

There is no doubt that the Subordinate Court entered **Judgement** on **17th July 2015**, wherein the Court found in favour of the Respondents/Applicants herein. The orders issued in favour of the Respondents were:-

- a. A permanent injunction restraining the Defendant, his servants, agents and/or employees or anybody else claiming under him from entering, interfering with the quiet possession, occupation or use of the Plaintiff's land parcel No.Ruiru/Ruiru East Block 2/4332.**
- b. An order of possession and ownership of the above stated parcel of land by the Plaintiff (Respondent herein).**

It is evident that the Appellant who was the Defendant in the subordinate Court's case was aggrieved by the said Order or Decree of the court which was issued on **28th July 2016**. He subsequently filed the instant Appeal wherein he alleged that he uses and occupies the suit property since **2004** and that the Respondents have never utilized the land but acquired title deed in the **year 2011**. It is also evident that subsequent to the issuance of the Decree herein, the Respondents, who were the successful litigants in **Thika CMC 1013 of 2010**, filed a **Notice of Motion** dated **11th November 2015**, seeking for an eviction order against the Appellant herein who was the aggrieved Defendant in **Thika CMCC No.1013 of 2010**. The said eviction application was filed during the subsistence of this Appeal which was filed on **6th August 2015**, prior to the **Notice of Motion** dated **11th November 2015** for eviction. The Appellant had also filed a **Notice of Motion** dated **6th October 2015**, seeking for stay of execution of the Decree of the court issued on **28th July 2015** pending the final determination of the **Civil Appeal No.381 of 2015 (instant Appeal)**. After interparties hearing of the said **Notice of Motion** dated **6th October 2015**, the court allowed the said application and issued an order of stay of execution pending the final determination of the **Civil Appeal No.381 of 2015**.

The Respondents/Applicants were allegedly aggrieved by the said stay of execution order. They have thus asked the Court to set aside the said order of stay of execution issued by the subordinate court.

It is evident that the Respondents were aggrieved by the stay of execution order issued by the Magistrate's Court. The deponent has alleged that the Appellant did not satisfy the grounds for stay of execution as enumerated in Order 42 Rule 6(1) which provides that the Applicants must satisfy the court that:-

i. He will suffer substantial loss unless the order is granted.

ii. Application was brought without unreasonable delay and;

iii. Such security as the court orders.

It is not in doubt that Order 42 Rule 6 allows a party who is aggrieved by an Order or Decree of the court to apply for stay of execution of such Order or Decree in the same court that issued the said Order or Decree. The Appellant herein was aggrieved by the Decree of the Lower Court **in Thika CMCC No.1013 of 2010**, and subsequently he applied for stay of execution of the said Decree. After the interparties hearing, the learned Magistrate allowed the stay of execution. It is trite that grant of stay of execution is a discretionary order and in granting or refusing to grant the said order, the Court is exercising its discretionary power. It is also trite that appellate courts do not ordinarily interfere with the exercise of discretion of inferior courts unless it is satisfied that such discretion was not exercised judicially. The Respondents have urged the Court to set aside the stay of execution order issued on **19th August 2016**, because the Appellant did not satisfy the principles set out in Order 42 Rule 6(1) of the Civil Procedure Rules. However, if the Respondents/Applicants were dissatisfied with the said Ruling, then the remedy available to them was to appeal against the said Ruling or Order but not to seek the setting aside of the said Order of the lower court.

The Order of setting aside can only be available when an appeal is lodged, argued and if it is successful, then the Court can set aside such order. However, in the instant application, the Respondents/Applicants alleged that they are aggrieved by the Order of the Lower Court but instead of filing an Appeal, they only filed this application for setting aside, which application is not tenable. Even if this application was to act like an Appeal, the Court finds that stay of execution is issued upon sufficient cause being shown.

It is trite that stay of execution is issued to balance claims in the long run. See the case **Consolidated Marine..Vs...Nampijja & Another, Civil Application No.93 of 1989**, the Court held that:-

“The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of appeal are safeguarded and the Appeal if successful is not rendered nugatory”.

It is evident that the Appellant did lodge an appeal against the Judgement of the lower court. It is also evident that the lower court had ordered that the Appellant do give possession and ownership to the Respondents herein. It is also evident that the Respondents had filed an application for eviction of the Appellant dated **11th November 2015**, in an attempt to execute the Decree of the lower court issued on **28th July 2015**, and which is the subject of the instant appeal. If the said application is allowed and the Decree of the lower court is executed, then the Appellant would be evicted from the suit property before the Appeal is heard and determined. The said eviction would render his Appeal nugatory. In the case of **The Director of Pensions...Vs...Abdul Majid Cockar, Civil Appl. No.66 of 1999**, the Court of Appeal held that:-

“In an application for stay of execution pending appeal, it must be shown that both the appeal is arguable and that if successful, the appeal will be rendered nugatory unless there is a stay of execution”.

Equally in this matter, the Appellant has filed an Appeal which is arguable and if the execution of the Decree of the Lower Court is not stayed and the appellant is successful in the Appeal, then the said Appeal would be rendered nugatory as he would have been evicted from the suit property and maybe the suit property would even have been alienated and/or disposed off by the Respondent.

The Court finds that the **learned Magistrate** in granting the Order of stay of execution of the decree of the **Lower Court did exercise her discretion judicially** and I find no reason to interfere with the said discretion by setting aside the order issued on **19th August 2016**.

For the above reasons, the Court finds that the *Notice of Motion* dated *1st September 2016, is not merited*. The said *application is dismissed entirely with costs to the Appellant/Respondent* herein.

Further, the Court directs the parties to prepare the Appeal for hearing within the next 45 days and set it for hearing expeditiously. The parties should desist from filing unnecessary interlocutory applications which would only serve the purpose of delaying the instant Appeal.

It is so ordered.

Dated, Signed and Delivered at Thika this 3rd day of November 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Kinyanjui holding brief for Mr. Muturi for Appellant/Respondent

Mr. Njoroge holding brief for Mr. Mboha for Respondents/Applicants

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

3/11/2017