



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 492 OF 2009

ALICE NJAMBI WAITIKI.....1ST PLAINTIFF

LOISE NJERI KINUTHIA2ND PLAINTIFF

(Both suing as the Administrators of the Estate of the Late Robinson Kinuthia Muriakiara)

VERSUS

JOHN KAMAU MUCHAI.....1ST DEFENDANT

PATRICK GITHAE.....2ND DEFENDANT

JACINTA W. NDIRANGU.....3RD DEFENDANT

BENJAMIN WAMAGATA MBUTHIA.....4TH DEFENDANT

(Sued as Trustees of Kinoo Water Trust)

RULING

Coming up before me for determination is the Notice of Motion dated 20th July 2015 in which the Defendants/Applicants are seeking for an order of stay of execution pending the hearing and determination of the Appeal.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Jacinta W. Ndirangu, the 3rd Defendant and one of the trustees of Kinoo Water Trust, sworn on 20th July 2015 in which she averred that when they learnt of the Judgment in this suit, they immediately instructed their advocates to lodge an appeal. She further averred that the letter applying for proceedings was duly written and a deposit paid for the same. She further stated that their advocate also issued and served a Notice of Appeal and that although this court granted them 90 days stay of execution, that period is soon to elapse and it cannot suffice to enable them to prefer the appeal. She further stated that they supply over 3000 households with water and they depend entirely on them for sustenance and if they are evicted, the families will suffer irreparable hardship.

The Application is contested. The 1st Plaintiff, Alice Njambi Waitiki, filed her Replying Affidavit sworn

on 28th July 2015 in which she averred that the Defendant has come to court with unclean hands by lying to the court that it supplies water to 3000 households yet it supplies to only 533 people who are its members. She further stated that the Defendants have no chance of succeeding in their appeal and are instead abusing the court process. She prayed for the Application to be dismissed with costs.

In response thereto, the 3rd Defendant, Jacinta W. Ndirangu, filed her Further Affidavit sworn on 24th August 2015 in which she averred that at this point, all they are asking the court to do is to preserve the status quo until we can be heard on appeal. She further stated that they are actually supplying 3000 people with water. She further stated that it was not property for the Plaintiffs to arrogate themselves the judicial role of determining whether the appeal can succeed or not.

The issue I am called upon to determine in this Application is whether or not to grant the Defendants/Applicants an order of stay of execution pending the hearing and determination of their Appeal. The Application is brought under **Order 42 rule 6** of the **Civil Procedure Rules, 2010** which specifies the circumstances under which either the trial court or an appellate court may order stay of execution of a decree or order pending an appeal. **Rule 6(2)** lays down the conditions which an applicant must satisfy in order to be awarded an order of stay of execution pending appeal. The Applicant must satisfy the court that he stands to suffer substantial loss if stay is not granted and that this Application was filed without unreasonable delay. The Plaintiff/Applicant must also show that he is willing to offer such security as may be ordered by the court.

What the court needs to determine is whether the Defendants/Applicants stand to suffer substantial loss if the order of stay is not granted. The Court in **Machira t/a Machira & Co vs. East African Standard No.2 (2002) 2 KLR 63**, held that,

“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (eg appeal or intended appeal)”

Have the Defendants/Applicants shown to the satisfaction of the court that they will suffer substantially if stay is not granted? The essence of stay of execution pending appeal is to preserve the subject matter of litigation. The Defendants/Applicants have stated that they supply water to over 3000 households from water derived from the suit property and that if they are evicted therefrom, these households will suffer irreparably for lack of an alternative source of water. The Plaintiffs/Respondents have disputed this claim, asserting that the Defendants only supply water to about 533 households who are their members. Whether we are talking of 533 or 3000 households, I am satisfied that indeed, substantial loss shall be suffered by the Defendants/Applicants should the stay not be granted as many households shall suffer from water shortage before the Appeal is fully heard and determined.

On whether the Application has been brought without unreasonable delay, Judgment was delivered on 19th June 2015 and this Application was filed on 21st July 2015. In the court's view, there was no delay in bringing this Application as it was brought within the required time.

On the security to be given, the Defendants/Applicants have not stated what security they will furnish. **Order 42 rule 6 (2) (b)** requires the applicant to provide such security as may ultimately be binding upon him. Accordingly, as a condition to allowing this Application, which I hereby do, I direct the Defendants/Respondents to deposit in court the sum of Kshs. 2,000,000/- as security for their performance of the Judgment delivered herein should their Appeal fail.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2016.

MARY M. GITUMBI

JUDGE