



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**LAND CASE NO. 267 OF 2015**

RUTH WANJIRU KAHORO..... PLAINTIFF/APPLICANT

V E R S U S

DR. GEORGE GITONGA GITAHI.....DEFENDANT/RESPONDENT

**RULING**

1. The Plaintiff/Applicant has moved the court under section 6 of the law reform act and Order 42 Rule 6 of the Civil Procedure Rules and sections 13 (7), 14 and 19 of ELC Act. In the application, the Applicant seeks an order of Stay of execution of the orders given on 16<sup>th</sup> December, 2015 pending hearing and determination of his appeal lodged. He also prayed for costs of the application.

2. The application is premised on the grounds on the face of it and the affidavit indicated to be3 sworn by Mercy Njeri Njuguna yet the affidavit is sworn by the Applicant. The applicant submitted that the jist of the suit would be over taken by events if the orders sought are not granted. Secondly that the titles have not been processed hence no prejudice will be suffered by the respondent. That in any event, it is the defendant who failed to follow the law thus inconveniencing the other 75 persons. Lastly that it is in the interest of justice that the matter should proceed only after the appeal filed is determined.

3. The application is opposed by the Defendant/Respondent. He filed a replying affidavit through his done of power of attorney Joyce Nyaguthi Kibetu. The deponent stated that the applicant knew before filing of this suit that the amalgamation and subdivision of the suit properties had been completed as per the letter drawn by the Plaintiff annexed as “JNK 3”. That in compliance with the order of 16.12.2015 appealed against, the defendant has not registered any subdivision which interferes with the portions claimed by the applicant. Further that the Plaintiff has not demonstrated any loss it will suffer instead it is the defendant who will suffer loss as 75 people will not be able to process their titles exposing the defendant to a possible multiple suits.

4. The defendant submitted that the applicant is seeking to extend restriction which he never registered and that the plots referred to are non-existent. The defendant considered the pleadings and submission rendered. Although in reply to the Respondent’s submission, the applicant alluded that her application is not premised on order 42 but under the provisions of the ELC Act. However on the face of it order 42 is quoted. The ELC Act also provides for the application of the Civil procedure Rules. It is only order 42 of the rules which governs the granting or otherwise of stay of execution. The defendant deposed that the amalgamation was already completed and the order seeking to stay the same will be in vain. In support of his submission, the defendant cited the case of **ANTOINE NDIAYE VS AFRICAN VIRTUAL UNIVERSITY (2015 eKLR)**. He also submitted that the application was filed after unreasonable delay and no offer for security has been made. That the Plaintiff did not purchase the entire land. He urged the

court to dismiss the motion.

5. I have read and considered the pleadings and submissions rendered. Although in reply to the Respondent's submission, the applicant alluded that her application is not premised on order 42 but under the provisions of ELC Act. However on the face of it Order 42 is quoted. The application of the Civil Procedure Rules. It is only Order 42 of the rules which governs the granting or otherwise of stay of execution orders. Further it has been held severally that discretion of the court should not be invoked where there are clear provisions of the law (Havelock J in .....). In any event stay of execution is a discretionary remedy.

6. Order 42 Rule 6 lays grounds to be considered while granting stay i.e;

The application is filed without unreasonable delay; the applicant may suffer substantial loss if stay is not granted; an order made for security as court shall determine.

7. The applicant has submitted that she filed her application timeously and the delay if any was occasioned by the High Court vacation. The order appealed against was made on 16.12.2015. This application was filed on 29<sup>th</sup> January 2016 a 1 ½ months time. Taking into account the vacation duration, I am satisfied that the time taken was not unreasonably long.

8. It is also not denied that there is a notice of appeal lodged. The only issue for me to determine is whether the applicant has proved that he will suffer substantial loss if the stay order is not granted. The applicant submitted that since the defendant will obtain titles for the subdivision, the jist of the suit would be overtaken by events. Further that if the appeal succeeds, parties will be made to incur costs of re-survey.

9. The defendant on his part contended that he is the one who will be greatly prejudiced with orders of stay since there are 75 people waiting for their titles. Further that he is not registering the sub-divisions for the plots in the area the applicant is claiming. In making reference to the cases referred to particulars in the Antoine Ndiaye case supra the Higgh Court of Uganda at Kampala restated that

“...substantial loss does not represent any particular mathematical formula, rather it is concept. It refers to any loss, great or small, that is real worth or value as distinguished from a loss without value or loss that is merely nominal.....insistence on security for the entire decretal sum may stifle a possible appeal”

10. In this instant, the applicant contends that the subdivisions are smaller than his plots he purchased. If the subdivisions are registered, it would interfere with his structures and the boundaries of his plot. He continued that in the event he succeeds, he would be put to considerable financial loss should he finally succeed in his appeal and the main suit as a new survey would have to be done and the subdivisions registered.

11. The applicant has thus explained the nature and extent of loss she is likely to incur if the stay of execution is not granted. On this account, I find it necessary to grant the orders of stay of execution pending determination of his appeal.

12. The last issue is provision of security. The defendant fears that if the sub-divisions are not registered he may be sued by the 75 persons whom he has passed the interest on the suit land. In order to protect the defendant from such an eventuality, I direct the applicant to file in court within 14 days of this ruling a letter of undertaking that he undertakes to meet any legal costs of suits that may ensue against the defendant as a result of the delay occasioned by the suit.

13. In conclusion, this motion is allowed in terms of prayer 4 of the application with costs awarded to the Defendant/Respondent.

**DATED and DELIVERED at MOMBASA this 30<sup>th</sup> June 2016**

**A. OMOLLO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent

Court Assistant .....