



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NO. 29 OF 2012 (B)

BEATRICE WAMBUI KABUI1ST PLAINTIFF/RESPONDENT

JANE MUTHONI NYAMU2ND PLAINTIFF/RESPONDENT

CATHERINE WANGUI KINYUA.....3RD PLAINTIFF/RESPONDENT

ELIZABETH GACAMBI WACHIRA.....4TH PLAINTIFF/RESPONDENT

MERCY WACHUKA KIBUI5TH PLAINTIFF/RESPONDENT

TABITHA NJOKI WACHIRA6TH PLAINTIFF/RESPONDENT

DAMARIS WAMUTIRA KABUI7TH PLAINTIFF/RESPONDENT

ANDREW KABUI8TH PLAINTIFF/RESPONDENT

VERSUS

STEPHEN KIMOTHO KABUIDEFENDANT/APPLICANT

RULING

The dispute between the parties herein revolves around parcel of land No. MUTIRA/KAGUYU/3157 which the respondents claimed was held by the applicant in trust for himself and the respondents. The respondents therefore sought the determination of that trust and an order compelling the applicant to sub-divide the said land into equal portions and to register the sub-divisions and have them transferred in favour of the respondents and the applicant.

After hearing the parties, this Court delivered a judgment on **18TH SEPTEMBER 2015** granting the respondents judgment in those terms.

Aggrieved with that judgment, the applicant filed a notice of appeal against that judgment on **25TH SEPTEMBER 2015** and on **12TH OCTOBER 2015**, filed a Notice of Motion under **Sections 1B and 1A of the Civil Procedure Rules** and **Order 42 Rule 6 (1) of the Civil Procedure Rules** seeking the following orders:-

1. *Spent.*
2. *Spent.*
3. *The Honourable Court be pleased to grant an order for stay of execution of the judgment*

and/or decree delivered on 18TH SEPTEMBER 2015 and all other consequential orders pending the hearing and determination of the applicant's appeal.

4. *The costs of this application be provided for.*

The application is supported by the grounds set out therein and the annexed affidavit of STEPHEN KIMOTHO KABUI the applicant herein and who was the defendant in the suit.

From the supporting affidavit, it is clear that the applicant is dissatisfied with this Court's judgment dated **18TH SEPTEMBER 2015** and intends to appeal. It is his case that this Court ordered the sub-division of land parcel No. MUTIRA/KAGUYU/3157 into eight equal portions to be registered in the names of the 1st to 7th respondents and if that decree is executed, he stands to suffer irreparable loss. Further that his appeal has high chances of success.

In opposing the application, the 1st respondent **BEATRICE WAMBUI KABUI** filed a replying affidavit in which she deponed, inter alia, that she has the authority of the other respondents, who were the plaintiffs in the main suit, and that the statement by the applicant that he stands to "**suffer substantial loss**" is a bare statement, that no prejudice shall be caused to the applicant if the sub-divisions are done and the application should therefore be dismissed with costs.

Counsel for the parties agreed on **29TH OCTOBER 2015** that the application be canvassed by way of written submissions to be filed on or before **2ND DECEMBER 2015** when the matter would be mentioned to confirm compliance. There was no appearance by either of the parties or their counsel and a date was taken by consent in the registry on **27TH JANUARY 2016** that the matter be mentioned on **7TH APRIL 2016** but on that day, only counsel for the applicant appeared and told the Court that he had served and filed his submissions upon counsel for the respondents. As there was no appearance by counsel for the respondents nor any explanation as to why their submissions were not filed, this Court directed that the ruling would be on **3RD JUNE 2016**. This ruling has therefore been drafted without the benefit of submissions by the respondents' counsel.

I have considered the application, the rival affidavits and the submissions by **GATHARA MAHINDA ADVOCATES** for the applicant.

This is an application for stay of execution pending appeal founded under **Order 42 Rule 6 (1) of the Civil Procedure Rules** which provide 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"

Sub-rule (2) then provides the following:-

(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".

Therefore, the three pre-requisites that an applicant seeking an order for stay pending appeal has to satisfy are:-

- a. *That the application is filed without undue delay.*
- b. *That the Court is satisfied that substantial loss may result unless the stay of execution is granted; and*
- c. *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 has been held that substantial loss is the cornerstone of the Court's jurisdiction in granting an order for stay of execution. In **KENYA SHELL LIMITED VS KARUGA (1982 – 1988) I K.A.R 1018**, the Court of Appeal stated as follows:-

“It is usually a good rule to see if Order 41 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”

And in **MACHIRA t/a MACHIRA & CO. ADVOCATES VS EAST AFRICAN STANDARD (NO. 2) 2002 K.L.R 63**, the Court said:-

“In this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars.... Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay”

In an application of this nature, the Court must bear in mind that both parties have rights which must be considered. While the successful party has a judgment which he is entitled to execute while the other party has the right to appeal against that decision and such appeal should not be rendered nugatory. In exercising this discretion therefore, there is need for the Court to carefully do a balancing act but bearing in mind that the duty of the Court is to do justice to the parties which is always the overriding objective.

Has this application been brought without un-reasonable delay? The judgment sought to be appealed was delivered on **18TH SEPTEMBER 2015** and this application was filed on **30TH SEPTEMBER 2015**. There was no un-reasonable delay.

Is the Court satisfied that substantial loss has been may result to the applicant unless the order is made? Substantial loss must refer to such loss or damage that will irreparably destroy the substratum of the dispute in such a way that if the applicant succeeds in the appeal, the subject of the dispute may well be beyond his reach thus rendering the appeal nugatory. That is particularly true in monetary decrees where it can be demonstrated that the respondent may not be in a position to refund the sum paid to him. In paragraph 11 of his supporting affidavit, the applicant has deponed as follows:-

“That I am apprehensive that the (sic) if the decree is executed and transfer effected in favour of the plaintiffs, the plaintiffs will sell the land and it will be difficult and expensive exercise to revert the land to me if my appeal succeeds and more so especially if in (sic) the hands of a third party”.

In my view, if the land subject of this suit is transferred to the respondents and they sell it to third parties, then the applicant's loss will be substantial and he will be prejudiced. I am therefore satisfied that for that reason, it is only fair and just that the order of stay of execution is allowed.

The applicant has also deponed in paragraph 14 of his supporting affidavit that he is ***“ready and willing to abide by any condition this Honourable Court may find fit to grant”***. Just as the applicant fears that the respondents may transfer the land to third parties, this Court is also mindful that the applicant, as the registered proprietor of the suit land, may deal with it in a manner that is detrimental to the respondents' interest pending the hearing and determination of the appeal. This Court must therefore strike a balance between those two competing interests by ensuring that none has any undue advantage over the other.

Ultimately therefore, and upon considering the arguments by both sides, this Court makes the following orders with respect to the applicant's Notice of Motion dated **12TH OCTOBER 2015**:-

1. *The execution of the entire judgment delivered on 25TH SEPTEMBER 2015 and all subsequent orders are, subject to paragraph (2) hereof, stayed pending the hearing and determination of the appeal filed against the said judgment.*
2. *The applicant shall deposit in this Court the document of title to the land parcel No. MUTIRA/KAGUYU/3157 within 30 days from the date of this ruling failure to which execution of the judgment shall proceed.*
3. *Each party shall meet their own costs.*

B.N. OLAO

JUDGE

3RD JUNE, 2016

Ruling delivered, dated and signed in open Court this 3rd day of June 2016.

Mr. Rurige for Mr. Ngigi for 1st Plaintiff present

Ms Nafula for Mr. Gathara Mahinda for Defendants present.

B.N. OLAO

JUDGE

3RD JUNE, 2016