REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. APPEAL CASE NO. 13 OF 2014

STEPHEN GICHUHI WACHIRA…….....…….....1ST APPELLANT

GEORGE WACHIRA GICHUHI.……...…….....2ND APPELLANT

ROSE WANGUI WACHIRA…….…….…….....3RD APPELLANT

DAVID WACHIRA GITHINJI…….…….....…….....4TH APPELLANT

VERSUS

MICHAEL MURIUKI NGIBUINI…...……...……...……RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 5th November 2015 in which the Appellants/Applicants seek an order of temporary injunction restraining the Defendant/Respondent from trespassing, carrying on any construction, selling, transferring, alienating and otherwise dealing with Plot Nos. 414, 415, 416, 445, 446 and 447 Umoja III Settlement Scheme (hereinafter referred to as the "suit plots") pending the hearing and determination of this Appeal.

The Application in premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Appellant/Applicant, Stephen Gichuhi Wachira, sworn on 5th November 2015 in which he averred that he filed suit against the Defendant/Respondent vide **Nairobi Milimani CMCC No. 3651 of 2009** where he claimed the suit plots and in turn the Defendant/Respondent sued him in **Nairobi CMCC No. 3943 of 2009** also claiming the suit plots. He averred that the said two suits were consolidated and heard together and judgment was delivered on 15th April 2014 whereby the Defendant/Respondent was declared the rightful and legal owner of the suit plots. He further averred that being dissatisfied with the Judgment of the trial Magistrate he lodged this Appeal. He further averred that the Defendant/Respondent has started construction on the suit plots despite this pending Appeal and is also looking for buyers for some of the suit plots in an effort to raise funds to develop the other suit plots. He added that instituting an Appeal does not serve as a stay of execution of the Judgment of the trial magistrate and that if the Respondent is not restrained from further construction and disposing the suit plots, the entire object of the Appeal will be rendered nugatory. He added that the Appeal raises triable issues and he believed that it has overwhelming chances of success.

The Application is contested. The Respondent, Michael Muriuki Ngibuini, filed his Replying Affidavit

sworn on 25th November 2016 in which he averred that it is true that the Judgment of the lower court declared him the rightful and legal owner of the suit plots. He further averred that though the Memorandum of Appeal was filed on 14th May 2014, it has never been served upon his advocates and further that the Record of Appeal having been filed on 29th October 2014, was only served upon his advocates close to four months later on 20th February 2015. He added that from the foregoing inordinate delay between the filing of the Record of Appeal and service, he rightly assumed that the Appellants/Applicants were not pursuing the claim further and commenced development on the suit plots there being no stay orders served upon his advocates. He added that filing an appeal does not operate as a stay of the judgment and it is incumbent upon the Appellants to move the court for a stay order but they chose to slumber. He further stated that one of the cardinal principles which an applicant must satisfy to the court in an application for stay is that it must be brought without any undue delay to enable a court exercise its discretion in favour of a party. He stated that in the present case, the Appellants filed their Memorandum of Appeal on 14th May 2014 and have now come for stay one and a half years later. He added that in the circumstances, this delay is inordinate and the court ought not to exercise its discretion in favour of the Appellants/Applicants. He further stated that this Application has been overtaken by events as he has already developed the suit plots. He annexed photos of the same in support of that assertion. He denied the assertion that he was intent on disposing off the suit plots as alleged by the Appellants/Applicants. He further averred that the Appeal does not raise any pertinent triable issues and is an afterthought. He added that the Appellants/Applicants have not demonstrated even remotely how they stand to suffer irreparable loss bearing in mind that he is the one in occupation of the suit plots and has already developed them. He urged the court to dismiss this Application in the circumstances.

Both the Appellants/Applicants and the Respondent filed their written submissions. While this Application was couched as an injunction application, being at the appeal stage, the same was addressed as an application for stay of execution pending the hearing and determination of this Appeal. This appears to be the understanding of both parties and this is how they addressed the Application in their response and their written submissions. This court shall accordingly treat this Application as one for an order of stay of execution.

The issue I am called upon to determine is whether or not to grant the Appellants/Applicants stay of the Judgment of the trial court pending the hearing and determination of this appeal. The applicable law is found in **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

> **"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."**

Order 42 Rule 6(2) provides as follows:

> **"No order for stay of execution shall be made under subrule (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."**

Have the Appellants/Applicants demonstrated that they stand to suffer substantial loss should the order not be granted? On that issue I rely on the position taken by the court in **Machira t/a Machira & Co vs.**

East African Standard No.2 (2002) 2 KLR 63 where it was 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)"***

In this Application, the Appellant/Applicant has claimed that the Respondent is keen on constructing on the suit plots and even to dispose off some of them in a bid to raise funds to develop the other suit plots. However, this assertion has been denied by the Respondent who swore under oath that in fact he has already completed development on the suit plots, is in possession of the same and has no intentions whatsoever to dispose off any of the suit plots. This position espoused by the Respondent has not been challenged by the Appellants/Applicants. In the circumstances, I find that the Appellants/Applicants have not demonstrated the substantial loss that they will suffer should an order of stay not be issued.

On whether the Application has been brought without unreasonable delay, this Application was filed on 5th November 2015 while the Memorandum of Appeal was filed on 14th May 2014. Effectively, this Application was filed about one and a half years after the Memorandum of Appeal was filed. The Respondent has challenged the Appellants/Applicants stating that this was an inordinate delay which is not supported by any good reason or excuse. In the court's view, there clearly was inordinate delay in bringing this Application with the result that the Respondent proceeded to develop the suit plots with the assurance that the Appellants/Applicants were no longer interested in pursuing this matter any further. My finding is that there was inordinate delay in filing this Application on the part of the Appellants/Applicants.

On the security to be given, the Plaintiff/Applicant has not stated what security he will furnish. **Order 42 rule 6 (2)(b)** of the Civil Procedure Rules, 2010 requires the applicant to provide such security as may ultimately be binding upon him. The Appellants/Applicants have not, therefore, met the requirement for the provision of a security.

In light of the foregoing, I stand unconvinced that the Appellants/Applicants have made a sufficient case to warrant being granted the order of stay of execution sought after and proceed to dismiss this Application with costs to the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 22ND DAY OF JULY 2016.

MARY M. GITUMBI

JUDGE