



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CIVIL APPEAL NO. 12 OF 2015**

**MARGARET WANJIKU MUNYI.....1<sup>ST</sup> APPELLANT**

**MOSES NJOKA MUNYI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MUNYI NJOKA.....1<sup>ST</sup> RESPONDENT**

**LUCIA WAMBUI MUNYI.....2<sup>ND</sup> RESPONDENT**

**RULING**

The applicants herein have moved this Court by their Notice of Motion premised under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules** and dated 19th October 2015. They seek the following substantive orders:-

**1. Spent**

**2. That this Court do stay execution of Court orders made on 16th June 2015 in Principal Magistrate's Court Wanguru Civil Suit No. 53 of 2011 and all proceedings in the matter pending hearing and determination of this appeal.**

**3. That costs be provided for.**

The said application is based on the grounds set out therein and supported by the affidavit of **MOSES NJOKA MUNYI** the 2nd applicant also sworn on behalf of the 1st applicant.

It is the applicants' case that they are in possession of the rice holding No. 3170 and are dissatisfied with the judgment of the Principal Magistrate's Court at Wanguru in **CIVIL CASE NO. 53 of 2011** awarding 1 acre thereof to the respondents and injuncting the applicants from interfering with the said rice holding. They have filed an appeal against that judgment and decree issued on 19th June 2015 and they have been summoned to the office of the Officer Commanding Police Station (OCS) at Wanguru and are therefore afraid that there is any intention of destabilizing them so that they cannot attend to their rice. They will therefore suffer irreparable damage if the judgment of the subordinate Court is not stayed pending the determination of their appeal.

The application is opposed and the 1st respondent **MUNYI NJOKA** has filed a replying affidavit in which he has deponed, inter alia, that following the delivery of judgment in Principal Magistrate's Court Wanguru Civil Case No. 53 of 2011, the applicants filed an application for stay of execution which was dismissed on 26th June 2015. That the applicants who are his second wife and son respectively were

preventing him and the 2nd respondent who is his first wife from cultivating the rice holding No. 3170 which is registered in his names. That the applicants will not suffer any loss or damage since the judgment sought to be appealed against required him to surrender 1 acre to each of the applicants and therefore this application has not met the threshold for the grant of the orders sought.

Submissions have been filed by **ANNE THUNGU & CO. ADVOCATES** for the applicants and **WANGECHE MUNENE & CO. ADVOCATES** for the respondents.

I have considered the application, the rival affidavits and the submissions by counsel.

This application is premised on the provisions of **Order 42 Rule 6 of the Civil Procedure Rules. Sub-rules (1) and (2) of the Rule** provides as follows:-

**(1) “No appeal or second appeal shall operate as a stay of execution or proceeding 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 orders thereof 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”**

**(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 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 to the applicant”.**

Therefore, in an application such as this one, the Court has to be satisfied that:

**1. The applicant may suffer substantial loss unless the order for stay is granted**

**2. That the application has been made without un-reasonable delay, and**

**3. That such security as the Court orders for the due performance of such decree or order as may be ultimately binding on the applicant has been given.**

On the issue of substantial loss, **PLATT Ag. J.A** (as he then was) had the following to say in the case of **KENYA SHELL LTD VS KIBIRU 1986 K.L.R 410 at Page 416:-**

**“It is usually a good rule to see if Order XLI 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 events.**

**Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without that evidence, it is difficult to see why the respondents should be kept out of their money”**

In the same case, **GACHUHI Ag. J.A** (as he then was) addressed the issue in the following terms:-

**“It is not sufficient by merely stating that the sum of Ksh. 20,389.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted”.**

See also the case of ***SILVERSTEIN VS CHESONI 2002 1 K.L.R 867 and MUKUMA VS ABUOGA 1988 K.L.R 645*** where the Court emphasized the centrality of substantial loss by stating that it is the cornerstone of the jurisdiction for stay since that is what has to be prevented. It is therefore not sufficient for a party seeking such an order to merely allege that he will suffer substantial loss without demonstrating what loss it is that he will suffer if the order for stay is not granted.

Looking at the application and the grounds set out therein, the applicants' case is that they are in possession of the rice holding No. 3170 on which they had planted rice in August 2015 which was at maturity stage and was due for harvest soon. Having obtained ex-parte orders on 3rd November 2015, it must be clear that the applicants were able to harvest their crop of rice one year ago. But has substantial loss been demonstrated?

In paragraph eight (8) of the supporting affidavit of **MOSES NJOKA MUNYI**, it is deponed as follows:-

***“That I and my co-applicant shall suffer irreparable damages if judgment of the lower Court is not stayed pending determination of this appeal”.***

That is a bare pleading that does not demonstrate the nature of the loss at least as at the time this application is being considered. To find out if infact the applicants will suffer any substantial loss, I have looked at the decree in Principal Magistrate's Court Wanguru Civil Case No. 53 of 2011 which is dated 16th June 2015 and is annexed to the further affidavit of **MOSES NJOKA MUNYI**. According to that decree, the trial Court made the following substantive orders:-

***1. A permanent injunction restraining the applicants, their servant and/or agents, employees or any one acting through them from interfering with the respondents' quiet possession, occupation, cultivation and enjoyment of 3 acres out of the rice holding No. 3170 Unit W1 Wamumu Section.***

***2. Subject to the approval and consent of the Manager NIB, an order was made for the sub-division of the rice holding No. 3170 Unit W1 Wamumu as follows:-***

***(a) 2 acres in the names of the 1st respondent.***

***(b) 1 acre in the names of the 2nd respondent.***

***(c) 1 acre in the names of the 1st applicant***

***The village plot was to be shared equally between the 2nd respondent and the 1st applicant.***

What the trial magistrate did was share out the rice holding and a village plot between the two wives of the 1st respondent. If that decree is executed, I do not see what substantial loss the applicants will suffer bearing in mind that the rice holding is infact the property of the National Irrigation Board which only issues licenses to the various holders.

A party seeking a stay of execution must also file the application ***“without unreasonable delay”***. The decree in the trial Court was given on 16th June 2015. The respondents have averred in paragraph four (4) of the replying affidavit of the 1st respondent **MUNYI NJOKA** that infact the applicant first made a similar

application before the trial Court on 26th June 2015 which was dismissed. This application was filed on 23rd October 2015 some four (4) months after the judgment sought to be appealed against was delivered and after a similar application had been dismissed by the trial Court. There is no explanation for that delay which I consider unreasonable in the circumstances of this case. This Court exercises a discretion in deciding whether or not to grant a stay but such discretion must be exercised on sound basis. As to whether a delay is unreasonable or not will no doubt depend on the peculiar circumstances of each case. Nonetheless, there is no reasonable explanation as to why the applicants did not move this Court as far

back as 16th June 2015 when judgment was delivered by the trial Court or even 26th June 2015 when that Court dismissed a similar application.

The up-shot of all the above is that not only have the applicants not demonstrated what substantial loss they will suffer if the order of stay is not granted but further, the application has not been made without unreasonable delay. In the circumstances of this case, I find the delay of four (4) months to be unreasonable.

In the circumstances, the applicants' Notice of Motion dated 19th October 2015 and filed herein on 23rd October 2015 is dismissed. As the parties are family, it is ordered that each shall meet their own costs.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> AUGUST, 2016**

Ruling dated, delivered and signed in open Court this 19<sup>th</sup> day of August 2016.

Ms Kiragu for Ms Thungu for Appellants present

Ms Munene for Respondents absent.

**B.N. OLAO**

**JUDGE**

**19<sup>TH</sup> AUGUST, 2016**