



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO.1103 OF 2004**

**GEORGE NJENGA KAGAI..... PLAINTIFF**

**VERSUS**

**SAMUEL KABI NJOROGE..... DEFENDANT**

**1. REV. PIUS TEMBO MANGOLI**

**2. REV. PETER NUTHU MWANGI**

**(SUING AS THE TRUSTEES OF THE KENYA ASSEMBLIES**

**OF GOD NAIROBI.).....INTERESTED PARTIES**

**RULING**

Coming up before me for determination is the Notice of Motion dated 28<sup>th</sup> January 2015 brought under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** and **Section 3A** of the **Civil Procedure Act** seeking for orders that the Court be pleased to issue a stay of execution of the Judgment and orders issued on 23<sup>rd</sup> January 2015 pending the hearing and determination of the intended appeal at the Court of Appeal and in the alternative and without prejudice to the aforesaid prayers, the court be pleased to issue an interim injunction against the Interested Parties restraining them by themselves, their agents, servants and/or employees from constructing, building, developing and/or erecting any permanent and/or temporary structures of any kind and/or dealing in any manner whatsoever with all that parcel of land known as Dagoretti/Riruta/4170 (hereinafter referred to as the “suit property”) pending the hearing and determination of the intended appeal at the Court of Appeal.

This Application is premised on the grounds stated on the face of it together with the Supporting Affidavit of George Njenga Kagai, sworn on 28<sup>th</sup> January 2015, wherein he stated that this suit was heard and judgment was delivered on 26<sup>th</sup> January 2015 and being dissatisfied with the same he filed an appeal. He also stated that he has applied for certified copies of the proceedings and judgment. He stated that the subject matter of the suit and the intended appeal is land and there is a likelihood that the Respondents will deal with the same in a manner adverse to his interest in the suit property. He stated that he will stand to suffer irreparable harm as the suit property may change hands, may be developed, charged, mortgaged and/or transferred to third parties and it will be impossible for him to recover the same if at all he succeeds in his appeal. He further stated that he has a strong case at the Court of Appeal on the grounds

that:-

1. The trial court erred in law and in fact to consider the effect of payment made and received by the Defendant outside the completion period.
2. That the trial court erred in law and fact by failing to hold that the Defendant by accepting late payment, waived his right to insist on completion period.
3. That the trial court erred in law and in fact by failing to hold that the Defendant was obliged to make time of essence in the contract by issuing notice to that effect.
4. That the trial court erred in law by validating the contract entered between the Defendant and the Interested Parties when the same had not received the consent of the land control board and while the said agreement between the two parties was null and void.

He stated that in the interest of justice he prays that the orders prayed be granted to preserve the subject matter of the intended appeal.

This Application is contested. The Defendant, Samuel Kabi Njoroge filed his Replying Affidavit sworn on 20<sup>th</sup> March 2015 wherein he stated that when the Plaintiff/Applicant filed this suit in the year 2004, he obtained orders restraining him from the suit property and he suffered irreparable harm and would stand to suffer prejudice should the orders sought be granted. He added that the Interested Parties are in occupation of the suit property and prolonging this matter will cause him untold suffering. He contended that the Plaintiff/Applicant had not demonstrated irreparable loss and damage to enable the court grant the orders prayed and further that there is no undertaking as to damages and costs which the Plaintiff/Applicant has given to enable the court exercise its discretion in his favour.

The Interested Parties filed the Replying Affidavit of Reverend Peter Nuthu Mwangi sworn on 16<sup>th</sup> February 2015 in which he averred that the Interested Parties have been in occupation of the suit property since the year 2004 therefore the balance of convenience favours the Interested Parties and that the Plaintiff/Applicant had not demonstrated irreparable loss or damages to warrant the granting of the prayers sought. They further averred that the Plaintiff/Applicant's false and unfounded allegations that they may dispose, alienate or sell the suit property has not been supported by any evidence therefore the court should reject the same.

Parties filed their written submissions where they reiterated the contents of their pleadings.

I have read and considered the Application, the affidavits, the written submissions made by Counsel for both parties as well as the authorities cited. The Plaintiff/Applicant has sought for orders of stay of execution pending the hearing and determination of the intended appeal and orders of injunction pending the determination of the intended 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. I must hasten to add here that the conditions set out in **Rule 6(2)** only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case. The Plaintiff/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 Plaintiff/Applicant stands 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)”***

Has the Plaintiff/Applicant shown to the satisfaction of the court that he 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 Plaintiff/Applicant has stated that the suit property may change hands to third parties or become charged or mortgaged and by the time the appeal is determined the subject matter may not be available to the Plaintiff/Applicant if he succeeds in appeal. I have considered the affidavits filed by the parties and note that the dispute between the parties is that the Plaintiff/Applicant failed to pay the full purchase price to the Defendant with the result that the Defendant proceeded to sell the suit property to the Interested Parties who are now in occupation of the suit property. The Plaintiff/Applicant is therefore not in occupation of the suit property and neither is he the holder of the title deed. The title deed is still in the custody of the Defendant who claimed to have sold the suit property to the Interested Parties. Though the Interested Parties are in occupation of the suit property, they have no capacity to deal with the same since they do not have title deed to the suit property. The Plaintiff/Applicant has nevertheless not demonstrated how the suit property would be dealt with to his detriment other than his apprehension that the Respondents could deal with the suit property to his disadvantage. It is therefore my opinion that the Plaintiff/Applicant has not demonstrated that he will suffer substantially should stay be denied.

On whether the Application has been brought without unreasonable delay, Judgment was delivered on 23<sup>rd</sup> January 2015 and this Application was filed on 28<sup>th</sup> January 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 Plaintiff/Applicant has not stated what security he will furnish. He only stated in his submissions that he is willing to abide by the terms of the court. **Order 42 rule 6 (2) (b)** requires the applicant to provide such security as may ultimately be binding upon him. The Plaintiff/Applicant has not, therefore, met the requirement for the provision of a security.

In light of the foregoing, I stand unconvinced that the Plaintiff/Applicant has made a sufficient case to warrant being granted the order of stay of execution that he seeks.

The Plaintiff/Applicant also sought an order of injunction against the Interested Parties restraining them from constructing, building, developing and/or erecting any permanent and/or temporary structures or dealing with the suit property in any manner pending the determination of the intended appeal. In doing so, the court bears in mind the guiding principles which are that the intended appeal is arguable and that the appeal would be rendered nugatory should the orders sought not be granted. These were the guiding principles set down by the Court in ***Royal Media Services Ltd & 2 others v Attorney General & 8 others [2013] eKLR*** where it was held as follows,

***“In giving due consideration to the matter, we understand that at this stage our role is to grant an injunction, when (i) there are grounds for an arguable appeal, and (ii) where not granting such orders would render an arguable appeal nugatory.”***

An arguable appeal is not necessarily one that would be succeed but one that is deserving of full ventilation before the Court of Appeal. The Court in ***Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR*** held that,

***“On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised...; An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...;”***

Is this appeal arguable? The Plaintiff/Applicant has stated the grounds of his appeal at paragraph 13 of his supporting affidavit. His prayer for an order of injunction has been directed to the Interested Parties who

are in occupation of the suit property. No transfer of title from the Defendant to the Interested Parties has been effected. I believe the Interested Parties have no basis of dealing with the suit property in the manner contemplated by the Plaintiff/Applicant. The Interested Parties are in occupation of the structures built on the suit property. The court cannot grant orders in vain. The actions the applicant is seeking to prevent have already taken place. The prayer for injunction therefore fails.

In light of the foregoing, this Application is hereby dismissed. Costs in the cause.

**DELIVERED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup>**

**DAY OF OCTOBER 2015.**

**MARY M. GITUMBI**

**JUDGE**