



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 1029 OF 1982**

**JOACKIM NGUGI KIARIE..... PLAINTIFF**

**VERSUS**

**G. Z. ULYATE ..... 1<sup>ST</sup> DEFENDANT**

**LOYCE MUGURE MWANGI.....2<sup>ND</sup> DEFENDANT**

**PATRICK GITAU MBUGUA ..... 3<sup>RD</sup> DEFENDANT**

**JOHN NGWIRI..... 4<sup>TH</sup> DEFENDANT**

**MBURU MURUAMA..... 5<sup>TH</sup> DEFENDANT**

**RAHAB WAIRIMU..... 6<sup>TH</sup> DEFENDANT**

**MARY WANJIKU MUTHOGA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

Judgment in the above suit was delivered by the **Hon. Justice Mboghli Msagha** on 2<sup>nd</sup> august 2012 in favour of the Plaintiff **Joakim Ngugi Kiarie** against all the Defendants jointly and severally. The effect of the judgment was that the plaintiff was decreed as owner of **L.R.336/17, Baba Dogo** Nairobi by virtue of adverse possession as against the Defendants. The plaintiff by a Notice of Motion application dated 25<sup>th</sup> April 2013 sought orders that the Land Registrar do dispense with the production of the original title in respect of **L.R.NO.336/17** to enable the process of transfer to proceed and further sought an order that the Registrar do use the court decree as a valid instrument of transfer to effect the necessary entries in the Register. This application was granted by **Lady Justice Gitumbi** on 1<sup>st</sup> August 2013.

The Defendants lodged a Notice of Appeal to appeal the decision of Hon. **Justice Mboghli Msagha** on 13<sup>th</sup> August 2012. The Defendants have filed a Notice of Motion dated 8<sup>th</sup> August 2013 in this court stated to be brought under sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and order 22 Rule 52 and order 51 rule 1 of the Civil Procedure Rules and interlia seeks the following orders.

1. **That pending the hearing and determination of Civil Appeal NO.131 of 2013, this court be pleased to stay execution of the decision of the Honourable Mr. Justice A. Mboghli Msagha dated the 2<sup>nd</sup> day of August 2012, together with the exparte orders granted on 1<sup>st</sup> day of**

**August, 2013.**

- 2. That pending the hearing and determination of the appeal the Honourable court be pleased to stay execution of the decree arising from the Judgment in the High court case number 1029 of 1982.**
- 3. That pending the hearing and determination of this application this Honourable court does stay the execution of the exparte orders granted on 1<sup>st</sup> day of August 2013.**

The application is grounded on the facts and grounds set out on the body of the application and the supporting affidavit sworn by **Patrick Gitau Mbugua** on 8<sup>th</sup> August 2013. The Applicants contend that there exists an appeal **NO. 131 of 2013** which is yet to be set down for hearing. The applicants further contend that their appeal stands good chances of success and the same is not frivolous. The Defendants argue that the ownership of the suit property was in issue at the High Court and still is in issue in the pending appeal and that the appeal would be rendered nugatory if the defendants are evicted from the suit premises and they succeed in the appeal and for that reason they urge the court should grant a stay of execution of the decree.

The Plaintiff/Respondent filed a replying affidavit in opposition to the Defendants application dated 13<sup>th</sup> September 2013 and is contended that the Defendants application is an afterthought triggered by the grant of the plaintiffs application dated 25<sup>th</sup> April 2013 and is only intended to frustrate the plaintiff with a view of preventing the plaintiff from enjoying the fruits of his judgment. The plaintiff further states that following the entry of judgment he made all the necessary payments to the City Council of Nairobi and was issued with a clearance certificate and is now the rateable owner of the City Council of Nairobi in respect of the suit premises and argues that a stay would be prejudicial to him and would occasion injustice to him as the successful party in the suit that has been ongoing for over 30 years and submits there ought to be amend to litigation.

The plaintiff further contends that the Defendants appeal is defective as the same was filed out of time having regard to the certificate of delay annexed and marked as “**JNK2**” and that the appeal was filed with the intention of delaying justice to the plaintiffs. The plaintiff contended that the Defendants application lacked any merit and sought for the dismissal of the same. The parties at the direction of the court filed written submissions the applicants filing their submissions on 27<sup>th</sup> January 2014 and the Respondent filed his submissions on 7<sup>th</sup> February 2014.

Quite clearly order 22 Rule 52 cited by the applicants pursuant to which the application is based is inapplicable in the present circumstances of this matter as that provision relates to situations where a valid notice and application of objection to attachment has been made under order 22 Rule 51 and the court orders stay of execution under Rule 52. As I understand it, the applicants are seeking stay of execution pending the hearing and determination of an appeal that they have filed which is provided for under order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 (1) provides thus:-

**(1)“No appeal or second appeal shall operate as a stay of execution of 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.**

**(2) 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 undue 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.**

Thus an applicant for stay of execution under order 42 Rule 6 of the Civil Procedure Rules must:-

- i. Satisfy the court that substantial loss may result unless the order is made
- ii. The application must have been made without unreasonable delay.
- iii. The Applicant has to be prepared to offer security for the due performance of the decree.

The parties in the filed submissions articulating their respective positions. The applicants reiterate that they have a pending appeal and that if the plaintiff executes the decree they will be prejudiced. The applicants contend that the plaintiff cannot found his claim on a judgment or decree that has been appealed since the judgment/decreedoes not become final until the appeal is determined. The plaintiff repeats in his submissions that the Applicants appeal is defective and has no chances of success. Further the plaintiff contends that the Applicants have not brought their application without unreasonable delay and would not be deserving of the discretion of the court.

I have reviewed the application by the applicants and the Affidavits in support and in opposition and the submissions by the parties. The issue for determination is whether the Applicants have demonstrated they will suffer substantial loss unless the order is granted and whether the applicants have brought their application without unreasonable delay and further whether in the circumstances they would be deserving of the court's discretion.

Order 42 Rule 6 (1) is clear that no appeal or second appeal operates as a stay of execution and/or proceedings and that for one to obtain an order of stay of execution he/she must satisfy other conditions notably the conditions under subrule (2) of Rule 6. The plaintiff and the Applicants were all contesting ownership of the suit land on the basis of adverse possession. The plaintiff triumphed over the Defendant/Applicants and the court directed that he be registered owner. In furtherance of his pursuit for a title over the suit land the plaintiff filed the application dated 25<sup>th</sup> April 2013 and obtained the necessary rates clearance from the City Council.

In the meantime even though the Defendants had filed a Notice of Appeal and had received the proceedings on 29<sup>th</sup> January 2013 they did not file their appeal until sometime in June 2013 and the instant application in August 2013 over one year after the judgment was delivered. The plaintiff states he had a valid judgment and is entitled to enjoy the fruits of the judgment in realization of justice to him and cites the often cited maxim that "**justice delayed is justice denied**" to urge the court that he is also entitled to have justice meted to him as a consumer of justice.

The plaintiff forcibly argues that the applicants appeal is defective and has no chances of success and that the same was merely brought as a delay tactic. While it is not within the mandate of this court to rule on the competency of the appeal pending before the court of appeal and/or its chances of success, the court cannot fail to notice that even though the High Court proceedings were furnished to the Defendants on 29/1/2013 they did not file the record of Appeal until late June 2013 nearly 5 months later which illustrates laxity on the part of the Defendants and puts to question the competency of the appeal. The Defendants may have had reasons for such delay but that would be for the court of Appeal to interrogate and determine whether the appeal was filed within time or not. Whether or not the appeal has good chances of success is also for the court of appeal to determine.

This court is concerned with the instant application and my view is that the applicants have not demonstrated that they brought this application without unreasonable delay. By the time they filed the application the plaintiff had changed his position and was at the tail end of having the judgment implemented. I see no basis why the plaintiff should be held back from reaping the benefits of his judgment. I am not satisfied that the Defendants have demonstrated the substantial loss they would suffer. They are not registered owners of the suit property and their claim for adverse possession was dismissed by the court while the plaintiff's claim was upheld and therefore until the judgment of the plaintiff is reversed he is entitled to the benefits that it bestows on him unless it occurs to the court that

the judgment was patently wrong on the basis of the record I cannot say so about the judgment rendered by Hon. Justice Mbogholi Msagha.

In the premises I find and hold that the Defendants Notice of Motion dated 8<sup>th</sup> August 2013 lacks merit and order that the same be dismissed with costs to the Plaintiff.

Orders Accordingly.

Ruling dated, Signed and delivered at Nairobi this 23rd day of...May...2014.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

..... For the Plaintiff

..... For the Defendants