REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 1833 OF 2007

ATHANAS BONAVENTURES WANYAMA ……..….1ST PLAINTIFF

PRISCILLA OMBITO WANYAMA…….……..…...2ND PLAINTIFF

VERSUS

THE LAND REGISTRAR-KIAMBU DISTRICT …..…..…...1st DEFENDANT

REUBEN MUNA KANGETHE ……...……..…….2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 30th July 2014 in which the 2nd Defendant/Applicant seeks for the following orders:

1. Spent.

2. Spent.

3. There be a stay of execution of the decree herein pending the hearing and determination of the 2nd Defendant/Applicant's application number NAI 186 of 2014 (UR 145/2014) in the Court of Appeal.

4. Any other/further orders this Honorable Court may deem fit to grant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 2nd Defendant/Applicant, Reuben Muna Kangethe, sworn on 30th July 2014 in which he averred that Judgment herein was delivered on 1st July 2014 after which his Advocates applied for and obtained a stay of execution for 30 days in order for them to file an appeal. He further averred that after obtaining the typed proceedings, he filed a Notice of Appeal as well as an Application seeking stay of execution in the Court of Appeal which was given a hearing date of 12th November 2014. He further averred that he was advised by the Deputy Registrar of the Court of Appeal to seek an extension of the stay orders from this court in the meantime awaiting the hearing and determination of his Application by the Court of Appeal. He further stated that he stands to suffer irreparable loss and damage if the stay orders are not granted in the event that the Court of Appeal allows his Application.

In order to place the present Application, a background to it should be given. The Judgment appealed against was delivered by Honorable Lady Justice Ougo on 1st July 2014 and the net effect of the Judgment is that the Applicant's title shall be cancelled and he will be forcefully evicted from the suit premises by 30th July 2014 when the temporary stay of execution granted by this Court expires. Upon filing the present Application in this Court, the stay orders granted earlier were extended for 14 days pending inter-partes hearing before the Vacation Judge on 13th August 2014. On 13th August 2014, the Vacation Judge extended the stay orders to 9th October 2014 and then to 17th October 2014 which is the date when this Ruling was to be delivered. This means that the present Application has been allowed in terms of prayer number 1 and 2 and the only substantive prayer remaining for my determination is whether to grant the 2nd Defendant/Applicant a stay of execution of the decree herein pending the hearing and determination of the 2nd Defendant/Applicant's application number NAI 186 of 2014 (UR 145/2014) in the Court of Appeal.

The Application is contested. The Respondents filed their Grounds of Opposition dated 11th August 2014 in which the relied on the following grounds:

1. That the Application is misconceived, bad in law and an abuse of court process.

2. That the Honourable Court having rendered final orders and judgment in the matter was thereby *functus officio*, it has no jurisdiction to entertain the present application.

3. That the Honourable Court having already made orders of stay in accordance with order 42 rule 6 of the Civil Procedure Rules, this court cannot revisit the same issue as sought in the present application as this will be tantamount to asking this Court to sit on appeal over its own decision.

4. That the Applicant has presented an application for stay pending appeal before the court of Appeal. As such the Court of Appeal has assumed exclusive jurisdiction over the said matter and this Court lacks authority to issue orders concerning a matter pending before the Court of Appeal.

5. That the Honourable Court cannot exercise its inherent powers under Section 3A of the Civil Procedure Act as there is a specific statutory provision which covers the relief sought being Order 42 rule 6 of the Civil Procedure Rules.

6. That the inherent jurisdiction of this Honourable Court cannot be invoked where the Court lacks the requisite jurisdiction to grant the relief sought.

7. That without prejudice to the foregoing, in opposition to extension of stay orders, the Application does not meet the threshold and/or principles set out by the law for this Honourable Court to exercise its discretion in favour of the Applicant.

8. That the Application is made with a view of denying the successful Plaintiff access to the fruits of judgment obtained in their favour.

9. That the present application is incompetent and fatally defective and should be dismissed with costs.

The opposition to this present Application that has been raised by the 1st and 2nd Respondents in their Grounds of Opposition mainly revolve around the issue of the jurisdiction of this Court to grant the prayer sought by the 2nd Defendant/Applicant. The Respondents have said that this Court lacks jurisdiction to entertain the present Application for the reason that it is *functus officio,* having rendered final orders herein, that this Court already made orders of stay and cannot revisit the same issue again, that the Court of Appeal has assumed exclusive jurisdiction over the matter therefore this Court lacks authority to issue the orders sought and that this Court cannot invoke its inherent powers under Section 3A of the Civil Procedure Act as there is a specific statutory provision which covers the relief sought. Further, the Respondents state that in any event, the Applicant has not met the principles set out for granting the prayer sought.

Let us look at what the law says. The Applicant has come under **Order 22 rule 22(1)** of the **Civil Procedure Rules** which states as follows:

> **"The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution , or for any other order relating to the decree or execution which might have been made by the court of first instance or appellate court if execution has been issued thereby or if application for execution has been made thereto."**

A plain reading of the above cited rule indicates a clear response to the grounds of opposition raised by the 1st and 2nd Respondent. Firstly, going by this rule, the judgment-debtor has a choice as to which court to apply for stay of execution. He may apply to court by which the decree was passed or to any court having appellate jurisdiction. That goes to answer that this Court is not *functus officio* after rendering Judgment to entertain the present application and further that the Court of Appeal does not have exclusive jurisdiction to hear the application for stay. In the instant case, the Applicant has filed an application for stay both before this court as well as before the Court of Appeal. As far as I can tell, the application before this court is different from the application before the Court of Appeal. In this application, the Applicant seeks for a stay of execution of the decree herein pending the hearing and determination of the 2nd Defendant/Applicant's application number NAI 186 of 2014 (UR 145/2014) in the Court of Appeal while in the application before the Court of Appeal, he seeks for a stay of execution of the decree pending the hearing and determination of the intended appeal therein. Those are two separate and distinct prayers and must be treated as such.

The Respondents have contended that the proper legal provision which should be relied on in determining the present application is **Order 42 rule 6(1)** of the **Civil Procedure Rules**. I will reproduce the said rule here below:

> **"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."**

Again, this rule clearly stipulates that both the court appealed from and the court to which such appeal is preferred have jurisdiction to entertain an application for stay of execution and that even if the court appealed from refused to grant the stay, the appellate court is at liberty to grant the stay of execution. This directly negates the grounds of opposition raised by the Respondents that this court has no jurisdiction to hear this present application because a similar application is pending before the Court of Appeal. I therefore find that this Court has jurisdiction to hear and determine the present application.

Both rules cited above all allow this court to grant a stay of execution where the Applicant has shown "sufficient cause" for making the application for stay. This term has not been defined and I am therefore at liberty to consider whether the argument presented by the Applicant amounts to sufficient cause for my purposes. The 2nd Defendant/Applicant contends that the net effect of the Judgment entered by this court is that the Applicant's title shall be cancelled and he will be forcefully evicted from the suit premises unless a stay of execution is granted to him. If this is not sufficient cause, I don't know what is. Clearly, the Applicant is in a dire situation that can only be salvaged by granting the orders sought by him. I am satisfied that he has demonstrated sufficient cause and proceed to allow this present Application. Costs shall be in the cause.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE