



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU**

**ELCA NO. 5 OF 2020**

**CHARLES KARIUKI NJURI.....APPLICANT/APPELLANT**

**VERSUS**

**FRANCIS KIMARU RWARA** (suing as Administrator

of Estate of **RWARA KIMARU** alias

**BENSON RWARA KIMARU** (Deceased).....**RESPONDENT**

**RULING**

1. Before me for determination is an Application via a the Notice of Motion dated 5<sup>th</sup> June Section 3 & 13 (7) (a) of the Environment and Land Court and Order 42 Rule 6(1) & (2) and Order 51 Rule 1 and 3 of the Civil Procedure Rules and all other enabling provisions of the law where the Applicant seeks for orders of stay of execution of the decree passed on 19<sup>th</sup> February 2020 in Nyahururu CMC ELC No. 262 of 2018 with a view to preserve the suit land No. Mutara/Mutara block II/460, pending the hearing and determination of his Appeal.

2. The Application is supported by the grounds set on its face as well as on the sworn affidavit of Charles Kariuki Njuri the Applicant herein, dated the 5<sup>th</sup> June 2020.

3. The said Application was opposed vide the Respondent's Replying Affidavit dated the 17<sup>th</sup> July 2020 in which the Respondent sought for its dismissal with costs for being fatally defective, inept and an abuse of the Court process because the Applicant had neither met the requisite conditions for stay of the decree pending the hearing and determination of an Appeal nor had he demonstrated in what manner he would suffer substantial loss and/or irreparable damage.

4. The Application was disposed of by way of written submission wherein the Applicant's submission was to the effect that he had been registered as the proprietor of the suit land on 22<sup>nd</sup> May 1998 wherein he had taken possession and had been in occupation of the same for 26 years since 1994 to date, without interruption.

5. That the Respondent had filed suit against him via Nyeri ELC 237 of 2015 wherein the matter was subsequently transferred to Nyahururu Chief Magistrates' Court and was registered with its present number being Nyahururu CMC ELC No. 262 of 2018. The matter proceeded for hearing and determination wherein vide a judgement delivered on the 19<sup>th</sup> February 2020, the trial learned Magistrate ordered for the cancellation of his title as proprietor of the suit land in substitution of the deceased Plaintiff.

6. That unless a stay of execution was granted, the Applicant was apprehensive that he and his family, who had been using the suit land to cultivate seasonal crops, would suffer substantial loss of their livelihood. That the suit land would also be exposed to adverse dealings by the Respondent including sale, transfer, lease or mortgage to third parties which in turn would affect the substratum of

the Appeal thus rendering it nugatory. That it was thus imperative to preserve the subject matter of the Appeal to await its determination.

7. That the Application was filed without delay whereby the Applicant was willing to deposit the title deed for the suit land with the Court as security for due performance of any decree that may be binding on him. That their attempt to seek for stay of execution was denied in the trial Court.

8. The Applicant relied on the decided cases in **Butt vs Rent Restriction Tribunal [1979] eKLR**, **Rhoda Mukuma vs John Abuoga [1988] eKLR** and **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR** to submit that he had complied with all the conditions stipulated therein to secure the orders sought.

9. In response to the Applicant's submission and in opposition of the Application herein, the Respondent's submission was to the effect that the Applicant had not discharged the onus placed on him by virtue of the provisions of Order 42 Rule 6 of the Civil Procedure Rules which are concerned with the stay of execution.

10. That the Applicant had not established that he was likely to suffer any irreparable damage/loss as the subject matter was land which was an immovable asset and would be available to any party who would eventually succeed in the Appeal.

11. That the fact that the Applicant was in occupation of the suit land, which occupation had been found to have been illegal, was not a ground to claim substantial loss. Reference was made to the case of **David Kipkoskei Kimeli vs Titus Barmasai [2019] eKLR**.

12. That secondly it had not been enough for the Applicant to state that he would suffer substantial loss for it was incumbent on him to prove specific details and particulars of the loss. Reference was made to the case in **Machira t/a Machira & Co. Advocates vs East African Standard (No. 2) (2002) KLR 63**. That there had been neither evidence that the Applicant and his family cultivated seasonal crops on the suit land for their subsistence nor had there been evidence of eminent threat to the effect that the Respondent was likely to expose the suit land to adverse dealings.

13. That the Application had been filed after 3 months which was unreasonable delay that had not been explained. That this being an old matter having had been filed in the year 2015, that the Respondent ought to be allowed to enjoy the fruits of his judgment and therefore the application ought to be dismissed.

### **Determination**

14. I have considered the Applicant's Application for stay of execution of the decree in Nyahururu CMC ELC No. 262 of 2018 pending the hearing and determination of his intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.

15. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates 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.*

*(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 1st 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 1st Applicant.*

16. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which :

- i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- ii. The application is brought without undue delay and
- iii. 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.

17. I find issues for determination arising therein namely:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
- ii. What orders this Court should make

18. The purpose of stay of execution is to preserve the substratum of the case. In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that:-

*“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.*

19. What is the status quo on the suit land" The Applicant contends that they would suffer substantial loss if stay is not granted, because he and his family were in and have been in occupation of the said parcel of land for the last 26 years since 1994.

20. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

*“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”*

21. I have considered the submission of both the Applicant and the Respondent. I have also gained sight of the orders issued in the impugned judgment to wit that;

*‘A declaration be and is made that the transaction and the process of registration of the defendant as the owner of parcel of land No. Mutara Mutara Block II/460 was null and void ab initio*

*An order for rectification be and is hereby made of the register in respect of parcel of land No. Mutara Mutara Block II/460 by cancellation of the defendant’s name and substituting the same with the deceased’s names’*

22. I find that indeed in the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

*“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”*

23. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory. and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of his Judgment.

24. It was stated by Kuloba, J in **Machira T/A Machira & Co Advocates** (supra)

*“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”.*

25. In an application of this nature, the Applicant should show the damages he would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see (see **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410;**)

26. On the second condition, I find that it was not in dispute that the impugned judgment was delivered on the 19<sup>th</sup> February 2020 respectively, wherein the Applicant had applied for stay of execution in the trial court which application had been denied thus resulting into the filing of the present Application on the 9<sup>th</sup> June 2020 which was after a period of about 4 months. In the present times of the Covid-19 Pandemic, I find that the said application is brought without undue delay.

27. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has pledged his willingness to deposit the title deed for the suit land with the Court as security for due performance of any decree that may be binding on him. In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** the court held that:

*“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”*

28. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.

29. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how discretion should be exercised as follows:

1. *“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

2. *The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

3. *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.*

*4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellants had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."*

30. So as not to prevent an appeal, I shall allow the said application on the following terms;

i. Stay of the execution of the judgment/decree herein is granted pending hearing and determination of the Applicants' intended Appeal.

ii. The Applicant shall deposit security of Kshs.1,500,000/= (one million, five hundred thousand shillings) in court within 21 (twenty one) days from the date of delivery of this ruling. In default, the stay orders shall automatically lapse.

iii. The Appellant/Applicant shall lodge his Appeal against the decree of the lower Court within 30 days from this date.

iv. That upon filing of the Memorandum of Appeal in (iii) above, the Applicant shall prepare, file and serve his record of appeal within 45 days.

v. Costs in the cause.

It is so ordered.

**Dated and delivered at Nyahururu this 6<sup>th</sup> day of October 2020**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**



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