



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 339 OF 2017**

**(Formerly Nairobi ELC No.)**

**JOSEPHINE WAMBUI GITHINJI.....PLAINTIFF**

**VERSUS**

**PETER GACHENGA KIMUHU.....1<sup>ST</sup> DEFENDANT**

**LUCY WANJIRU RUTHARI.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO COUNTY.....3<sup>RD</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 1<sup>st</sup> Defendant's Notice of Motion application dated the 24<sup>th</sup> February, 2020 brought pursuant to section 7 of the Appellate Jurisdiction Act; Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 42 Rule 6 including Order 50 Rule 6 of the Civil Procedure Rules. The 1<sup>st</sup> Defendant seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to grant the Applicant herein leave to file his Notice of Appeal out of time notwithstanding the fact that the same lapsed on the 13<sup>th</sup> February, 2020 or thereabouts.

3. Upon the grant of prayer 2 hereinabove and pending the inter partes hearing and determination of prayers 4 and 8 of this Application, this Honourable Court be pleased to issue a temporary injunction restraining the Plaintiff as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, whether by themselves, their agents, servants, representatives, employees and or any other person claiming under them, from entering into, remaining, occupying, erecting any structures, selling, trespassing into, alienating or in any other way interfering with ALL THAT PARCEL OF LAND known as LR No. KAJIADO/ KITENGELA/ 11081 including any rectification of the registering the 3<sup>rd</sup> Defendant's possession.

4. That pending the inter partes hearing and determination of the 1<sup>st</sup> Defendant's intended appeal, this Honourable Court be pleased to issue a temporary injunction restraining the Plaintiff as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, whether by themselves, their agents, servants, representatives, employees and or any other person claiming under them, from entering into, remaining, occupying, erecting any structures, selling, trespassing into, alienating or in any other way interfering with ALL THAT PARCEL OF LAND known as LR No. KAJIADO/ KITENGELA/ 11081 including any rectification of the registering the 3<sup>rd</sup> Defendant's possession.

5. That this Honourable Court be pleased to grant an Order for Stay of Execution of the entire Judgement delivered by this Honourable Court on the 29<sup>th</sup> January, 2020 and the Status Quo prevailing in respect to ALL THAT PARCEL OF LAND known as LR No. KAJIADO/ KITENGELA/ 11081 prior to the delivery of the said Judgement be maintained pending the hearing and determination of this Application interpartes.

6. That this Honourable Court be pleased to grant an Order for Stay of Execution of the entire Judgement delivered by this Honourable Court on the 29<sup>th</sup> January, 2020 and the Status Quo prevailing in respect to ALL THAT PARCEL OF LAND known as LR No. KAJIADO/ KITENGELA/ 11081 prior to the delivery of the said Judgement be maintained pending the hearing and determination of the intended Appeal.

7. That this Honourable Court be pleased to issue any other orders it may deem just and expedient so as to preserve the substratum of the intended appeal as far as it relates to ALL THAT PARCEL OF LAND known as LR No. KAJIADO/ KITENGELA/ 11081 in its current state so as to prevent the Appeal from being rendered nugatory.

8. That the costs of this Application be provided for.

The application is premised on the ground on the face of it and the supporting affidavit of 1<sup>st</sup> Defendant PETER GACHENGA KIMUHU where he deposes that this suit was determined on 29<sup>th</sup> January, 2020 and judgement entered in favour of the Plaintiff and being aggrieved by the said decision, he sought a stay of execution for thirty (30) days pending the filing of a formal application. He confirms that through his Advocates he applied for copies of the certified typed proceedings and judgement to enable him prepare for the intended appeal. Further, that his Advocate prepared a Notice of Appeal but inadvertently forgot the same in her office, hence it was not filed. He seeks an extension of time to file the Notice of Appeal and contends that no prejudice will be occasioned to the Plaintiff/Decree holder. He reiterates that in October 2008, he entered into an Agreement with the Plaintiff for the sale of the suit land whereof the Plaintiff sold and subsequently transferred the said land to him for approximately Kshs. 1, 100,000/= . Further, on account of sale, the Plaintiff ceased having ownership of the suit land and he acquired its ownership. He insists the 3<sup>rd</sup> Defendant legally registered him as owner of the suit land and issued him with a valid Title Deed. Further, the suit land became legally vested in him and transfer to the 2<sup>nd</sup> Defendant was therefore valid.

The Plaintiff opposed the Application by filing Grounds of Opposition dated 4<sup>th</sup> August, 2020 where she stated that: the application is misconceived, frivolous, vexatious, incompetent and otherwise an abuse of the process of court. Further, the application is bad in law and aimed at wasting the court's judicial time and further delaying the Plaintiff from enjoying the fruits of her lawfully acquired judgement. She insisted that the 1<sup>st</sup> Defendant has not made a case to warrant extension of time to file the Notice of Appeal as no plausible reasons have been given for failure or delay to file the same within the stipulated time. Further, the 1<sup>st</sup> Defendant has not satisfied the conditions for grant of stay of execution of the Decree and proceedings by this Honourable Court pending appeal as provided under Order 42 Rule (6) of the Civil Procedure Rules. She reiterates that the 1<sup>st</sup> Defendant has not satisfied the conditions for grant of orders of interim injunctions as laid down under Order 40 of the Civil Procedure Rules and in the *locus classicus case* of **Giella V Cassman Brown ( 1973) EA 358**.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 24<sup>th</sup> February, 2020 including the supporting affidavit, Grounds of Opposition and rivalling submissions, the following are the issues for determination:

- Whether the 1<sup>st</sup> Defendant should be granted an extension of time to lodge the Notice of Appeal.
- Whether the Court should grant a stay of execution of judgement delivered on the 29<sup>th</sup> January 2020 pending lodging and the determination of the intended Appeal.
- Whether an order of temporary injunction should issue against the Plaintiff as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in respect to land parcel number Kajiado/ Kitengela/ 11801.

As to whether the 1<sup>st</sup> Defendant should be granted an extension of time to lodge the Notice of Appeal. The 1<sup>st</sup> Defendant in his submissions reiterated his claim and contended that he inadvertently failed to file the Notice of Appeal on time. He relied on the case of **Edward Njane Nganga & Another V Damaris Wanjiku Kamau & Another (2016) eKLR which cited in approval the case of Loise Chemutai Ngurule & Another V Winfred Leshwari Kimungen** to support his averments. The Plaintiff/ Respondent in her submissions insisted the 1<sup>st</sup> Defendant/ Applicant is blameworthy for not filing the Notice of Appeal within the stipulated period. Further, he has not provided any plausible reason why he did not proffer the Notice of Appeal timeously. She claims she will be prejudiced and suffer an injustice if the prayer is allowed. Rule 75 (1) & (2) of the Appellate Jurisdiction Act provides as follows:’ **(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in**

**duplicate with the registrar of the superior court. (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal. ‘**

The Court of Appeal in the case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi, (1999) 2 EA 231**, laid down the parameters in extending time and stated thus;

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.**

Further, in the case of **Hannah Muthii Kibindu V Stephen Njine Kibindu & Another (2020) eKLR**, it is the Court of Appeal that extended time to lodge a Notice of Appeal out of time.

In the instant case, judgement was entered in favour of the Plaintiff and the Court directed the Certificate of Title held by the 2<sup>nd</sup> Defendant be rectified so as to revert to the Plaintiff. Further, that the 1<sup>st</sup> Defendant to indemnify the 2<sup>nd</sup> Defendant and also pay the costs of the suit. The 1<sup>st</sup> Defendant seeks to appeal against the whole of the judgement claiming the Plaintiff sold him the suit land which he transferred to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant explains that his lawyer inadvertently failed to lodge the Notice of Appeal on time. I note the 1<sup>st</sup> Defendant has relied on the decision cited above from the Environment and Land Court contending that this Court has jurisdiction to grant an extension of time to lodge the Notice of Appeal which I opine is persuasive and not binding on this court. From a reading of Rule 75 cited above while associating myself with the decisions quoted above, I note it is the Court of Appeal that has the jurisdiction to grant leave to the 1<sup>st</sup> Defendant to file his Notice of Appeal out of time as this Court is devoid of the same. In the circumstance, I will decline to grant the prayer sought for extension of time to lodge the Notice of Appeal.

As to whether there should be a stay of execution of the Judgement delivered on the 29<sup>th</sup> January, 2020 pending lodging and determination of the intended Appeal. The 1<sup>st</sup> Defendant has sought for a stay of execution of the Judgment pending the intended appeal, which application is opposed by the Plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not oppose the application. In his submissions he contends that he has an arguable appeal that is highly likely to succeed. Further, in the absence of an order for stay of execution, the suit land will revert to the Plaintiff who will demolish the structures erected by the 2<sup>nd</sup> Defendant on the said land. He claims he shall suffer substantial loss. To buttress his averments, he relied on the decision of **Amal Hauliers Limited V Abdulnadir Abukar Hassan (2017) eKLR**. The Plaintiff in her submissions insists the 1<sup>st</sup> Defendant was granted stay of execution for 30 days and only filed the instant application 5 days before the lapse. Further, the applicant has not provided reasons for the inordinate delay. She avers that an attempt by the Applicant to explain substantial loss likely to be suffered if stay is not granted is legally untenable and farfetched. To support her arguments, she relied on the following decisions: **Antoine Ndiaye Vs African Virtual University (2015) eKLR** and **Bungoma HC Misc Application No. 42 of 2011 Wangalwa & Another Vs Agnes Maliaka Cheseto**. She reiterates that if the Court is inclined to grant orders of stay of execution, then the 1<sup>st</sup> Defendant should be compelled to deposit Kshs. 12 million in an interest earning account, which is the value of the suit land.

Order 42 Rule 6(2) provides that: ‘ **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 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 applicant.**’

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:’

**“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, a 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 appellant had an undoubted right of appeal.'**

**While in Bungoma HC Misc Application No. 42 of 2011 Wangalwa & Another Vs Agnes Maliaka Cheseto the Court of Appeal held that: 'an Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party.**

**Further, Rule 5 (b) of the Appellate Jurisdiction Act provides that' ..... in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.'**

In the current scenario, the 1<sup>st</sup> Defendant is yet to lodge the Notice of Appeal. Further, the suit land is not registered in his name. To my mind, he has not fully demonstrated what prejudice he stands to suffer if the stay of execution sought is not granted as it is the 2<sup>nd</sup> Defendant in occupation of the suit land. Based on the facts as presented while relying on Rule 5 (b) of the Appellate Jurisdiction Act cited above and associating myself with the quoted decisions. I find that the 1<sup>st</sup> Defendant has failed to meet the **threshold set for granting stay of execution and will decline to grant the said orders. Further, based on my findings above, while relying on the principles established in the case of Giella V Cassman Brown (1973) EA 358. I find that the 1<sup>st</sup> Defendant has failed to demonstrate a prima facie case to warrant the granting of orders of injunction pending the outcome of the intended Appeal.**

**It is against the foregoing that I find the 1<sup>st</sup> defendant's Notice of Motion application dated the 24<sup>th</sup> February, 2020 unmerited and will proceed to dismiss it with costs.**

**Dated Signed and Delivered at Kajjado this 7<sup>th</sup> Day of December, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**



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