



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

E.L.C. APPEAL NO. E001 OF 2020

LUCY NYAGUTHII GITHINJI.....APPELLANT

VERSUS

JACOB GITHINJI MACHARIA.RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion dated 28th September, 2020 brought under **Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21), Order 42 Rule 6 (1) of the Civil Procedure Rules 2010 (the Rules) and any other provisions of the law**, the Appellant sought a stay of execution of the judgment and decree dated 23rd September, 2020 in *Nyahururu CM ELC No. 346 of 2018 – Lucy Nyaguthi Githinji -vrs- Jacob Githinji Macharia* and all consequential orders pending the hearing and determination of the pending appeal.

B. THE APPELLANT'S CASE

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on 28th September, 2020 together with the annexures thereto. The Appellant contended that he was aggrieved by the said decree hence the instant appeal. It was contended that he would suffer substantial loss and that the pending appeal might be rendered nugatory unless stay of execution was granted pending the hearing and determination of the appeal.

C. THE RESPONDENT'S RESPONSE

3. The Respondent filed a replying affidavit sworn by himself on 9th October, 2020 in opposition to the said application. He contended that the application was bad in law, incompetent and an abuse of the court process. He further contended that the Appellant had failed to satisfy the requirements for the grant of an order for stay as required by law.

4. The Respondent denied that there was any danger of the suit property being wasted, damaged or alienated and that the Appellant was residing on a portion of the suit property long before he gifted her the same. He further stated that he still intended to gift the Appellant a portion of the suit property upon provision being made for the children of his late daughter *Jane Wamuyu* hence the Appellant shall not suffer any substantial loss. He, therefore, urged the court to dismiss the application with costs.

D. DIRECTIONS ON SUBMISSIONS

5. It would appear from the material on record that the parties consented to canvass the said application through written

submissions. The record further shows that the Appellant filed her written submissions on 2nd November, 2020 whereas the Respondent filed his on 16th November, 2020.

E. THE ISSUE FOR DETERMINATION

6. The court has considered the Appellant's said application, the Respondent's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the main question for determination is whether the Appellant has made out a case for the grant of an order for stay of execution pending appeal.

F. ANALYSIS AND DETERMINATION

7. The legal requirements for the grant of an order for stay of execution are set out in **Order 42 Rule 6(2) of the Rules** as follows:

“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 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 as has been given by the Applicant.”

8. There is no doubt from the material on record that the application for stay was filed expeditiously and without unreasonable delay. The judgment sought to be stayed was passed on 23rd September, 2020 whereas the instant application was filed on 30th September, 2020. As such, the application was filed within 7 days from the day of delivery of the judgment.

9. The main question for consideration is whether or not the Appellant has demonstrated the element of substantial loss within the meaning of **Order 42 Rule 6 of the Rules**. The court has noted from the record that the Appellant is a daughter of the Respondent. The record further indicates that the Appellant was gifted the suit property by the Respondent without payment of any consideration. However, the parties were not agreed on whether the Appellant was to keep the entire suit property absolutely or whether she was to hold one half in trust for the children of her late sister, *Jane Wamuyu*.

10. It would further appear that the Appellant caused the entire suit property to be registered in her name as absolute proprietor to the exclusion of the children of her late sister. It would further appear that upon such registration she sought to evict her own father who was the donor of the property in consequence whereof the Respondent filed Nyahururu CM's ELC No. 346 of 2018. The court is thus of the opinion that as a beneficiary of a gratuitous gift from the Respondent, the Appellant has failed to demonstrate that she shall suffer substantial loss unless a stay of execution of the decree is granted.

11. The Respondent has averred in his replying affidavit that his desire is merely to ensure an equitable distribution of the suit property between his two daughters. He has deponed that the Appellant shall still be gifted a portion of the suit property upon re-distribution. The Appellant did not dispute these averments in any way. The court is further of the opinion that the Respondent has not demonstrated that the suit property shall not be available in the event that the appeal is decided in her favour. Accordingly, the court finds and holds that the Appellant has failed to satisfy the requirements for a stay of execution of the decree.

G. CONCLUSION AND DISPOSAL ORDER

12. The upshot of the foregoing is that the court finds no merit in the Appellant's notice of motion dated 28th September, 2020. Consequently, the same is hereby dismissed. Costs of the application shall be costs on the appeal.

It is so ordered.

RULING DATED and SIGNED NYAHURURU and DELIVERED via Microsoft Teams Platform this **8th** of **December, 2020**.

In the presence of:

Ms. Wanjiru Muriithi for the Appellant

Ms. Kariuki Mwangi for the Respondent

Court Assistant: Carol

Y.M. ANGIMA

JUDGE

08/12/2020



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