REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MURANG'A

ELC NO. 98 OF 2018

CHARLES MWANGI KIIRU.....PLAINTIFF/ RESPONDENT

-VERSUS-

BONIFACE MAINA GICHOMO.....1ST DEFENDANT

JOSEPH MWANGI THUO.....2ND DEFENDANT/ APPLICANT

RULING

1. The 2nd Defendant/Applicant brought this **Notice of Motion Application** dated **9th September 2021**, and sought for the following orders;

i. THAT there be a stay of execution of the Judgment and Decree pending the hearing and determination of the intended appeal filed herein.

ii. THAT costs of this application be provided for.

2. The application is premised on five **GROUNDS** stated on the face of the application and the Supporting Affidavit of the 2nd Defendant/Application. He averred that Judgment was entered in favor of the Plaintiff/Respondent on **30th June, 2021,** and the 2nd Defendant/Applicant being dissatisfied, preferred an Appeal. That the Plaintiff/Respondent may execute the judgment as there is no **Stay Order,** actions which will cause the applicant to suffer substantial loss. The Applicant further contends that the Appeal has reasonable chances of success and should stay not be granted, the same will be rendered nugatory. The Applicant deponds that he is ready **and willing** to deposit the title deed for ***LOC.14/GAKURWE/314,*** as security. That the Plaintiffs may also have access and use of the suit property, pending the hearing and determination of the Appeal.

3. In response to the application, the Plaintiff/Respondent filed **Grounds of Opposition** and Replying Affidavit. The Respondent opposes the application on the basis that there was a delay of two months in filing the instant application and which delay has not been explained. That the Applicant only filed the application after the Respondent had instituted a suit against him in ***C.M.E.L.C No. 63 of 2021.*** The Plaintiff/Respondent raised an issue with the Applicant's deposition to offer the title deed as security. That the Plaintiff/Respondent has been in occupation of the suit property and the title deed was extinguished by the judgment of Court.

4. That there is no prejudice that Applicant will suffer since there is no intention to dispose of the land. That the Plaintiff/Respondent should be left to enjoy the fruits of the judgment. That there is no attached evidence to demonstrate that the intended appeal is arguable and the application is brought in bad faith to frustrate the Plaintiff/Respondent herein.

5. The applicant filed a further Affidavit attaching copy of Memorandum of Appeal and further averred that the two month delay was not inordinate. It is the Applicant's disposition that he is ready to abide by any condition the Court may grant.

6. Parties elected to dispense with the application by way of written submissions. The Applicant submitted that he is the registered owner of the suit property, being a bona fide purchaser for value. That at the time of purchase, there was no overriding interest registered on the property. That should execution issue, he will suffer substantial loss. It is further his submissions that the application was brought without undue delay and he is ready to deposit title to the suit property as security. Reliance was placed on the **Charles Kariuki Njuri vs Francis Kimaru Rware** (**suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru(Deceased) [2020] eKLR**.

7. The Plaintiff/Respondent urged this court to consider the conditions for granting stay as laid down in the **Samuel Njehia Gitau** and **Miriam Kubai** cases. Further the Respondent's submitted that the Applicant has not demonstrated how title cannot be cancelled should execution issue and Appeal succeeds. On substantial loss, the Respondent submitted that the Applicant has not demonstrated the loss he will suffer. That the Applicant has not been in occupation of the suit property.

8. Further, that having transferred land during the pendency of the suit, there is no loss that the Applicant will suffer. That having proposed the suit title as security, and offered to have the Plaintiffs occupy the suit property is enough to demonstrate that there is no loss the Applicant will suffer. It is further the Respondent's submissions that the undue delay of two months has not been explained. He urged the Court to dismiss the application.

9. Based on the evidence on record, the Plaintiff/Respondent alongside his two brothers instituted three suits against the 2nd Applicant and the 1st Defendant for adverse possession. The suits were consolidated, heard and determined and Judgment entered in favour of the Plaintiff on **30th June, 2021.**

10. Being dissatisfied with the Judgment, the Applicant preferred an Appeal and lodged a Notice of Appeal on the **1st July, 2021**. The effect of the judgment was that title issued in the name of the 2nd defendant be cancelled. The applicant then sought the instant application to arrest execution of the Decree which has not commenced.

11. Considering the written submissions and authorities cited by parties, the issues for determination are;

i. Whether the application meets the threshold for grant of stay"

ii.Who should pay costs for the application"

12. It is trite that **no** Appeal can operate as stay hence an application for stay shall be made to court by the desiring parties. The principles for grant of stay are well laid down in **Order 42 rule 6(ii**) which provides:

i. 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 has been given by the Applicant.

13. The Supreme Court in **Application No 5 of 2014** ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*** held that the applicant must satisfy court that *(i) the appeal or intended appeal is arguable and not frivolous; and that (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. The principles were also echoed in the* ***Court of Appeal Case of Butt v Rent Restriction Tribunal [1982] KLR 417***

14. The foregoing provision enunciates three conditions for granting of stay to wit, substantial loss on the part of the applicant,

application is made without delay and the applicant to furnish such security as will be directed by the Court. Being an Appeal, the Court ought to also consider the principles laid down in the ***Gatirau Peter Case,*** the Appeal will be rendered nugatory**.**

15. On whether the application is timely and/ or brought without undue delay, the impugned Decree was made on **30th June, 2021** and the instant application was filed on **9th September, 2021**. That is about two and half months after the judgment. The applicant filed a Notice of Appeal on **1st July, 2021**, but did not file any application for stay. As noted above, an Appeal can never operate as stay. What amounts to inordinate delay differs from case to case. Borrowing from **Nairobi HCC No. 32 of 2010**, **Utalii Transport Company Limited & 3 Others v NIC Bank Limited & another [2014] eKLR,** the Court in considering what amounted to inordinate delay had this to say "***Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable*" This Court associates itself fully with the above findings.**

16. Once the Court delivers judgment, there is always an existing uncertainty as to what time execution can issue as a result therefore; an aggrieved party is required to take immediate action to avoid execution by staying the orders of Court. It is trite that Court orders cannot be issued in vain. I agree with the finding of the Court **in Eldoret ELC No. 200 of 2012 Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR** where it was held that a delay even for a day is delay.

In the above stated case, the applicant filed an application for stay pending an Appeal and the Court considered that a delay of **four days** was inordinate.

17. The Applicant submitted that a delay for **two and half months** is **not** unreasonable. No reason has been advanced for the said delay. From the Court records, save for filing of a **Notice of Appeal,** immediately, it was not until **12th July, 2021,** that the applicant requested for copies of certified proceedings and Judgment. **Invariably** such request is inevitable when preparing records of Appeal. Thus the request could not hinder the filing of the instant application. Time begun running when the Judgment was entered and nothing stopped it, time only stops running *within the provisions of* ***Order 50 Rule 4,*** *or as directed by court, this was not the case.*

18. The **Court of Appeal in Nakuru Civil Appeal No. 1/2007;- William K. Too v Simion K. Langat [2007] Eklr,** refused to interfere with the ruling of the High Court, where the learned judge found that an unexplained delay of **forty two days** was inordinate. Even if this Court was to invoke the provisions of **Article 159(2) (d**), of the Constitution, such disregard on the rules of procedure cannot be ignored. The provision is not a panacea for the abuse of court process. Land is an emotive issue in Kenya and litigating parties ought to judicially and expeditiously adjudicate on them.

19. On the second limb of substantial loss, **Plat GA J** as he then was in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** held "Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money"

20. Further in **James Wangalwa & Another vs Agnes Naliaka Cheseto{2012},** the court found that substantial loss is what has to be prevented by preserving the status quo because such loss would render an appeal nugatory. It is therefore not enough to suggest that the Applicant will suffer loss. This Court has not been furnished with evidence as to the loss that will be suffered and the injury that will occasion the Applicant.

21. The Applicant submits that he was a **bona fide purchaser** for value without notice and at the point of purchase, there was no beneficial interest registered to the land. These are issues which were dealt with by the court in paragraphs 63 & 64 of its Judgment and cannot now form the basis upon which this court will draw substantial loss. This court does not see what it ought to prevent. The mere assertion of substantial loss without substantiating cannot be the reason this court will infer substantial loss. If the subject matter of the suit was at risk, this court would have been otherwise persuaded. (**See Nairobi Civ No. 612 of 1996 Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR)**

22. Preserving the subject matter of the intended Appeal is important as not to render an Appeal nugatory. The onus is on the Applicant to demonstrate that the Appeal will be rendered nugatory. The Court of Appeal in Nairobi **Civil 211 of 2016 Shah**

Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others [2018] eKLR when considering whether to allow an application for injunction and stay pending appeal looked at the definition of "nugatory" as was defined in Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232 The court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence

23. As to whether the Appeal will be rendered nugatory this varies from case to case and it depends on what is to be stayed. In the instant case, the issue at hand is land. There is no evidence as to who is currently occupying the land to determine whose right will likely suffer. The Applicant is by law mandated to demonstrate how the Appeal will be rendered nugatory. There is an attached Memorandum of Appeal and this Court cannot determine whether the Appeal will be a success or not, as doing so will amount to sitting on its Appeal. That being the case, the Applicant has failed to demonstrate how his Appeal will be rendered nugatory should it succeed. (**see Nairobi CoA Appeal No. 189 of 2001 David Morton Silverstein v Atsango Chesoni [2002] eKLR)**

24. Having found that the Applicant has not demonstrated any substantial loss or that the Appeal will be rendered nugatory, an order for Security for cost cannot issue. The Applicant invited this court to be guided by the **Charles Kariuki Njuri Case;** In the said case, the applicant was in occupation and use of the property. In the present case, a perusal of the judgment intimates that the suit property was utilized by the Respondents, but the Applicant gained illegal ingress culminating to the reasoning of Court in paragraphs 63 and 64 of the judgment.

25. Justice Kuloba R as he then was in ***Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63*** when dismissing an application for stay had this to say This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness.

26. This Court concurs with the above holding of the Court. The Applicant's conduct towards the process of doing justice is against the spirit of overriding objectives on the just and expeditious disposal of matters. To this end, the Applicant has not met the requisite principles for grant of Stay Order and as such the application is unmerited.

27. On who should pay costs, section 27 of the Civil Procedure Act gives this Court discretion to award costs. Also costs follow the events. While that is the case, the court will be guided by *inter-alia* the conduct of the parties towards the suit and the subject matter of the suit ***(See Nyeri Civil No. 17 of 2014 Cecilia Karuru Ngayu v Barclays Bank of Kenya & another.***

For the above reasons, the Respondent is entitled to costs.

28. Having carefully considered the **Notice of Motion Application** dated **9th September 2021**, the Court finds it **not** merited and the same is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 16TH DAY OF DECEMBER, 2021

L. GACHERU

JUDGE

In the presence of;

Kuiyaki & Alex - Court Assistants

Mr Gichuki Waiganjo for the Plaintiff/Respondent

N/A for the 1st Defendant

M/s Kimani for the 2nd Defendant/Applicant

L. GACHERU

JUDGE