



Kinuthia & 2 others v Anyanga & 4 others (Environment & Land Case 160 of 2011) [2023] KEELC 16327 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 160 OF 2011**

**J OMANGE, J
MARCH 16, 2023**

BETWEEN

**HIRAM BERE KINUTHIA 1ST PLAINTIFF
ELIZABETH WANJIRU NGIGI 2ND PLAINTIFF
ROBERT MATATHIA NGIGI 3RD PLAINTIFF**

AND

**EDICK OMONDI ANYANGA 1ST DEFENDANT
ANNE ANYANGA 2ND DEFENDANT
THE REGISTRAR OF TITLES 3RD DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT
COMMISSIONER OF LANDS 5TH DEFENDANT**

RULING

1. In this case, the Plaintiffs challenged the 1st and Defendants' title in LR No 25763 (formerly LR Number 28/14). The 1st and 2nd Defendants on their part filed a Counterclaim to restrain the Plaintiffs from interfering with their said property, general damages and mesne profits.
2. *Vide* a Judgement delivered on the July 28, 2022 the court rendered a decision as follows;
 - a) That a declaration is hereby issued that the title issued on November 26, 2001 in respect of the suit property in favour of the 1st and 2nd Defendants being Grant Number (IR 87523) under LR No 25763 (formerly LR No 28/14) under deed plan No 238203 is lawful and valid.



- b) That a permanent injunction be issued restraining the Plaintiffs by themselves, agents, employees, servants, workers, hirelings and or any other person acting on their behalf from interfering in any way whatsoever with the 1st and 2nd Defendants rights and or benefits in any way over the suit property.
 - c) General damages Kshs 500,000/-.
 - d) Costs of the suit and interest.
3. Following this determination, the Plaintiff/ Applicant by way of Notice of Motion dated September 6, 2022, 1st Plaintiff seeks the following reliefs:
 - a) Spent
 - b) Spent
 - c) Spent
 - d) Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to grant or issue a preservatory order of injunction and stay of execution of the Judgment delivered by the Court on July 28, 2022 restraining, barring and/ or stopping the 1st, 2nd and 3rd Defendants by themselves or through their agents and servants from selling, transferring, occupying, charging or in any other way parting with the ownership of or offering as security in any manner, the property known as LR No 25763 (formerly LR No 28/14) or in any other way implementing or executing the said judgment and restraining, stopping or barring the 3rd Defendant from facilitating the above process.
 - e) Costs of this Application abide by the outcome of the intended Appeal.
4. The Application is based on the grounds set out in the face of the Application and the Applicant's Supporting Affidavit that 45 days stay of execution had been granted on July 28, 2022; the suit property was registered in the joint names of the 1st and 2nd Defendants; the 1st Plaintiff challenged the decision of this Court by filing Notices of Appeal and requesting for typed proceedings; and that in order to defeat the intended appeal the Defendants may place the property out of reach; as the Plaintiffs have a good arguable appeal with high chances of success, which would be rendered nugatory.
5. The 2nd and 3rd Plaintiffs on the other hand assert that the intended appeal raises fundamental issues of facts and law with chances of success.
6. The Application is opposed by the 1st Defendant's Replying Affidavit. He asserts that the application is incompetent and misconceived as the orders sought are wide and beyond the scope of an application for stay of execution, thus the application is a regurgitation of the suit for which the Court is functus officio.
7. The Defendants accuse the Plaintiffs of trying to sell the property, and allowing the application would be tantamount to allowing the Plaintiffs to perpetrate an illegal act and disenfranchise the Defendants from enjoying the fruits of their Judgment. That no loss has been demonstrated to be suffered and that there is no allegation that the Defendants are people of straw. They assert that the value of the property is Kshs 160,000,000 for which a pleading of security ought to have been made, together with the awarded damages of Kshs 500,000.



8. Parties filed submissions, the Applicant's dated December 2, 2022 intimating willingness to lodge security as may be deemed appropriate. He asserted that under order 40 rule 2, a party may apply for an injunction either before or after Judgment. The 2nd and 3rd Plaintiff further supported the application filing submissions dated January 23, 2023 reiterating that there was a looming merit- appeal and that there was no proof of their attempt to sell the property.
9. The 1st and 2nd Defendant also filed submissions dated December 22, 2022 contending that the application sought orders beyond the jurisdiction of the Court and that the application lacked merit for lack of demonstrating substantial loss if stay is refused. The 3rd and 4th Defendants filed submissions dated January 10, 2023 contending that there was no arguable appeal, neither had substantial loss been demonstrated.
10. I have considered the application with the accompanying documents, the grounds of opposition, affidavits and submissions by all counsel. The applicant has sought both an injunction and a stay of execution of the Judgement of the court.
11. The issues that arise for the courts determination are;
 - a) Has the applicant proven that this is a case where the court should exercise its inherent jurisdiction to grant an injunction after Judgement?
 - b) Should the court grant stay of Execution?
12. The plaintiffs have sought an order for injunction. The plaintiffs argue that the court has powers under section 13 (7) a of the [Environment and Land Court Act](#) to grant permanent preservation orders. I do concur with the plaintiffs that this court has wide jurisdiction to grant reliefs which include interim and permanent preservation orders by way of injunctions. The court has inherent powers to do that which is required to meet the ends of justice. However, the power must be exercised judicially and not arbitrarily.
13. The Court of Appeal had occasion to give guidance on the exercise of this power in the case of [Kenya Power and Lighting Company v Benzene Holdings T/A as Wyco Holdings](#) in which the court referred to [Halsbury's Laws of England, 4th Edn Vol 37 Para 14](#) wherein it was stated inter alia; The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."
14. In the instant case, a court of concurrent and competent jurisdiction after hearing the parties in this case which was filed in the year 2011 has made a decision in favour of the defendants in whose name the title is held. In my view for the court would exercise this power if satisfied that there is likely to be injustice occasioned to the applicant if the orders sought are not granted. The injustice has not been established and there would thus be no reason to issue an injunction as requested .
15. The law regarding stay of execution is now well settled. The relief of stay of execution pending the hearing and determination of an appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules 2010* which provide that

6.



- (1) 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 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.
16. The courts have had occasion to define what amounts to substantial loss. In *Silverstein v Chesoni* [2002]1 KLR 867 the Court held that: -
- “The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”
17. In this case, the Plaintiffs sought to cancel the 1st and 2nd Defendants’ title to the land. The Defendants counterclaimed to restrain the Plaintiff from interfering with their property. The Court granted the Defendants’ counterclaim and permanently restrained the Plaintiffs from interfering with the Defendants possession of the land.
18. The court order affirmed the position that was existing. The Plaintiffs are not in possession of the land hence the order by the court cannot result in any action against the plaintiffs save for possible execution on the issue of payment of general damages of Kshs 500,000.
19. In the end I am guided by the principles set out in the case of *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR, thus:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”



20. In balancing the rights of the applicant and the decree holder herein the court finds that it is in the interest of justice that the applicant should not have to pay the decretal amount while awaiting the determination of the appeal.
21. Consequently, the application is partially allowed in the following terms;
- a) Stay of Execution is granted in respect of the payment of General Damages 500,000 subject to clause (b) and (c) below.
 - b) The applicant to furnish the court with a bank guarantee for Kshs 500,000 within a period of 30 days.
 - c) The applicant to file a record of appeal within 120 days .
 - d) The prayer for injunction is dismissed.
 - e) Each party to bear their own costs.

Dated, signed and delivered at Nairobi this 16th day of March 2023.

Judy Omenge

JUDGE

In the presence of: -

Ms Atieno for Applicant

Mr Mwaniki for 2nd and 3rd Plaintiffs

Mr Motari for the 4th Defendant

Steve - Court Assistant

