



REPUBLIC OF KENYA



Rombo Group Ranch & another v Kajiado District Land Registrar & 3 others (Environment and Land Appeal E027 of 2022) [2023] KEELC 16918 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E027 OF 2022
LC KOMINGOI, J
APRIL 20, 2023**

BETWEEN

ROMBO GROUP RANCH 1ST APPELLANT

JOHN SITELU NKIMPAPAI 2ND APPELLANT

AND

KAJIADO DISTRICT LAND REGISTRAR 1ST RESPONDENT

**ISAAC SOLITEI SIKEMBEI (ADMINISTRATOR OF THE ESTATE OF THE
LATE JOSHUA SIKEMBEI PARTEYEI) 2ND RESPONDENT**

JOSHUA LEKUNIN OLE YIAMBITI 3RD RESPONDENT

EMKAY ESTATE LIMITED 4TH RESPONDENT

RULING

2. It seeks orders;
 1. Spent.
 2. Spent.
 3. That this Honourble Court be pleased to grant a stay of the implementation of the Decision of P.K. Tonui, the District Land Registrar, Kajiado delivered on the 24th March, 2022 pending full hearing and determination of the Appeal.
 4. That costs of this Application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 6.
4. The application is supported by the affidavit of John Sitelu Nkipapai, the 2nd Appellant/Applicant sworn on the 22/6/2022 and supplementary affidavit sworn on the 12/10/2022.



5. The Application is opposed. There is a Replying Affidavit sworn by Andrew Machogu the District Surveyor Kajiado South, sworn on the 3/10/2022.
6. There are also Replying Affidavits sworn by Isaac Solitei Sikembei, the 2nd Respondent on the 22/9/2022 and the 3/10/2022 respectively.
7. On the 6/10/2022, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.
8. The Appellant's submissions are dated 11/10/2022.
Counsel submitted that the Notice of Motion herein has met the requirements set out in the case of *Giella Vs. Cassman Brown & Co. Ltd* (1973) EA 358.
9. It is further submitted that the decision of the Land Registrar is demonstratively biased and is incomplete, unlawful and without basis in Law.
10. It is also submitted that the implementation of the Decision of the Land Registrar will occasion loss of land belonging to Rombo Group Ranch the 1st Appellant/Applicant therein and that the harm that would arise if the implementation is not stalled pending the hearing and determination of the Appeal would be grave and irreparable to the 1st Appellant and its members.
11. Further that the Appellants has a good case with good chances of success on Appeal. That the balance of convenience tilts in the maintenance of the Status quo until the appeal is heard and determined. They pray that the application be allowed.
12. The 1st Respondent's submission are dated 15/3/2023.
Counsel submitted that the Appellant's did not seek leave to file the appeal and have not given any compelling reasons as to why the appeal was filed Ninety (90) days after the Land Registrar delivered his ruling.
13. Its further submitted that the Applicant must demonstrate good and sufficient cause for not filing the appeal in time. He has put forward the cases of *Thuita Mwangi Vs. Kenya Airways* (2003) eKLR.
Nicholas Kiptoo Korir Arap Salat Vs. IEBC & 7 Others (2014) eKLR.
14. Counsel further submitted that the Land Registrar acted within his mandate to hear and determine a boundary dispute as per the Provisions of Sections 18.19 and 20 of the *Land Registration Act*. All parties were present during the site visit, none of the parties reported any improprieties or biased procedure determining the said dispute.
15. It is further submitted that the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its Provisions.
16. Counsel further relied on Order 42 rule 6(2) of the *Civil Procedure Rules* and the case of *Antoine Ndiaye Vs. African Virtual University* (2015) e KLR. He has also relied in the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* (2012) e KLR to state that the Appellants have not demonstrated that they have met the requirements set out under Order 42 rule 6(2) of the *Civil Procedure rules*. That they have not provided sufficient evidence or proof of the substantial loss that they will suffer.
17. Counsel further submitted that there is nothing arising from the ruling of the Land Registrar to be stayed since the ruling did not require any party to do or refrain from doing anything at all.
18. It was also submitted that the Land Registrar and the Surveyor performed their duties as mandated by law and the Applicants have not demonstrated that the process was marred by any irregularities.



He prays that the application be dismissed with costs.

19. The 2nd to the 4th Respondent's submissions are dated 17/10/2022. Counsel submitted that the Appellants/Applicants did not seek leave of court for extension to file the appeal out of time. He has put forward the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission and 7 Others* (2014) e KLR.

This appeal was filed 91 days after the ruling was delivered and no reason for the delay has been given.

20. It was further submitted that the Land Registrar acted within his mandate to hear and determine the boundary dispute as per the Provisions of Sections 18, 19 and 20 of the *Land Registration Act* No. 3 of 2012.

21. It is further submitted that the Applicants have not demonstrated that they have met the threshold set out in Order 42 rule 6 of the *Civil Procedure Rules* – Most importantly they have not shown what substantial loss they will suffer if the stay is not granted.

22. Counsel further submits that the Appellants' Notice of Motion is not brought under Order 42 rule 6 of the *Civil Procedure Rules*. That there is nothing arising from the ruling of the Land Registrar to be stayed as they did not require the Appellants or the Respondents to do or refrain from doing anything.

Counsel has put forward the case of *Peter Kamondia Njuguna Vs. Paul Nganga Gachie* (2015) e KLR where the Court of Appeal quoted the case of *Maragu Rucha & Another Vs. A.G & 10 others* (2014) (Civil application No. 180 of 2013) where the court stated that: "the superior court has not therefore ordered any of the parties to do anything or refrained from doing anything. There is therefore no positive or enforceable order made by the superior court which can be the subject matter of the application for injunction or stay".

23. Counsel also submitted that the Land Registrar and the Surveyor delivered on their mandate. The Applicants have not demonstrated that they failed. They pray that the Application be dismissed with costs.

24. I have considered the Notice of Motion and the Affidavit in support. I have also considered the responses thereto, the written submissions and the authorities cited. The issue for determination are;

- i. Whether the Appellant's/Applicant's application meets the threshold for grant of orders of stay of execution pending hearing and determination of the Appeal.
- ii. Who should bear costs of this application?

25. I have gone through the Notice of Motion dated 22/6/2022. I find the same is brought under Section 21A, 3A of the *Civil Procedure Act*, (Cap 21 Laws of Kenya) Order 51 Rules of the *Civil Procedure Rules* 2010 and all other enabling Provisions of the Law.

The said Notice of Motion was drafted by the firm of Taliti Collins Advocates. It is no excuse for an advocate to quote the wrong provisions of the Law as the rules were not made in vain. The correct Provisions ought to be Order 42 rule 6(2) of the *Civil Procedure rules*.

26. The principles guiding the grant of stay of execution pending Appeal are well settled. Order 42 rule 6(2) of the *Civil Procedure Rules* provides that;

- (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 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

It is clear from the above Provision that for an Order of stay of execution to be granted, specific conditions must be met by the Applicant.

27. Before I delve into the requirements of Order 42 Rule 6(2) of the *Civil Procedure Rules*, it is important to deal with the issue as to whether this Appeal was filed timeously.

The impugned ruling by P.K. Tonui Land Registrar is dated 4/3/2022. It is not in dispute that any party aggrieved by this decision had thought to appeal within 30 days.

28. The Memorandum of Appeal is dated 22/6/2022. The same was filed on the 26/6/2022. This is about 90 days from the date of the ruling. No explanation was given for the delay. The Appellants/Applicants ought to have sought leave of this court to extend the time for which to file the appeal. They did not do so.

I find that failure to seek leave before filing the appeal is fatal to the Notice of Motion.

29. Going back to the requirements of Order 42 rule 6 (2) of the *Civil Procedure Rules*, I am of the view that the application has been brought after an inordinate delay. As stated earlier no explanation has been given for the delay.

I note that from page 6 of the ruling the Land Registrar stated;

the position of the 3 parcels as it is currently on the ground are correct and NONE of them should be altered in any way since the boundaries are intact and undisputedly identifiable”

I agree with the Respondent’s submissions that the ruling of the Land Registrar did not require the Appellants or the Respondents to do or refrain from doing anything.

In the case of *Peter Kamondia Njuguna Vs. Paul Nga’nga Gachie* (2015)e KLR, the Court of Appeal quoted the case of *Maragu Rucha & Another Vs. Attorney General & 10 Others* (Civil Application No. 180 of 2012) where the court stated;

the Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the Superior Court which can be the subject matter of the application of injunction or stay”.

The same can be said about the instant application. There is nothing to be stayed as regards the ruling of P.K. Tonui Land Registrar dated 24/3/2022.

31. It is the Appellants/Applicants case that the implementation of the decision of the Land Registrar will occasion loss of land belonging to the 1st Appellant.

As to what substantial loss is, it was observed in *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* (2012) eKLR that;

No doubt, in Law, the fact that the process of execution has been put in Motion, or is likely to be put in Motion by itself, does not amount to substantial loss. Even where execution has been levied and completed, that is to say, the attached properties have been sold as is the case here, does not in itself amount to substantial loss. Under Order 42 rule 6 of the *Civil Procedure Rules*. This is so because execution is a Lawful process. The applicant must establish other 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 the successfully



party in the appeal..... 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 loss would render the appeal nugatory”.

I find that the Appellants/Applicants have failed to demonstrate that they will suffer substantial loss if these orders are not granted.

32. In conclusion I find no merit in this application and the same is dismissed. The costs do abide the outcome of the Appeal.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF APRIL 2023.

L.C. KOMINGOI

JUDGE.

In the Presence of:

Mr. Taliti for the Appellant.

Ms. Wanjiru for the 1st Respondent.

Ms. Wanjiku for Ms Moinket for the 2nd - 4th Respondents.

Court Assistant – Mutisya.

