



REPUBLIC OF KENYA



**Meja & 2 others v Amwaga & 2 others (Environment and Land Appeal
E003 of 2023) [2023] KEELC 17343 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

E ASATI, J

MAY 11, 2023

BETWEEN

PETER MIHESO MEJA 1ST APPELLANT

MELVIN MINAYO OPIYO 2ND APPELLANT

REBECCA SAMMY 3RD APPELLANT

AND

ISAAC VUSUNGU AMWAGA 1ST RESPONDENT

AHMED ABDALLAH AHMED SAAD 2ND RESPONDENT

JOHN MADETE MEJA 3RD RESPONDENT

*(Being an appeal against order of the Senior Principal Magistrate's
Court(Honourable R.M Ndombi(SRM) given on the 23/02/2023 at Vihiga Senior
Principal Magistrate's Court Civil Case ELC Misc Appl Case No.7 of 2021)*

RULING

1. The application before court for determination is the Notice of Motion dated 21ST March, 2023 brought under Sections 1A, 1B, 3A, 63(e) and 75 of the *Civil Procedure Act*, Order 1 Rule 10(2), Order 10 Rule 11, Order 42 Rule 1 and 6, Order 43 Rule 1(3) of the *Civil Procedure Rules, 2010*. It seeks for the orders that;
 - a. This application be heard ex-parte in the first instance
 - b. pending the hearing and determination of this application inter-partes there be a stay of execution of the Judgment of the Subordinate Court issued on June 9, 2022 together with the Decree issued on June 22, 2022 and all other consequential orders arising therefrom in Vihiga Senior Principal Magistrate's Court Civil Case No ELC misc App No7 of 2021



- c. The application be heard inter-partes as a matter of urgency on such date and at such time as this Honourable Court may direct
 - d. This Honourable court be pleased to grant the intended interested parties/Appellants herein leave to be enjoined as parties in the proceedings and champion their case
 - e. This Honourable Court be pleased to grant leave to the Applicants herein to lodge an Appeal against the order of the Subordinate Court dated February 23, 2023 and all other consequential orders arising therefrom of the Honourable R.M Ndombi(Ms.) (SRM) in the Principal Magistrate’s Court at Vihiga in Civil Case NoELC Misc App No7 of 2021
 - f. pending the hearing and determination of the Appeal herein, there be a stay of execution of the subordinate Courts Judgment issued on June 9, 2022 together with the Decree issued on June 22, 2022 and all other consequential orders arising therefrom in Vihiga Senior Principal Magistrate’s Court Civil case NoELC Misc App No7 of 2021
 - g. This Honourable Court be pleased to stay all other consequential proceedings pending appeal referred in prayer No6
 - h. Costs of the application be in cause.
2. The grounds upon which the application is brought are that the main issue contested in the lower Court case No Vihiga SPMC EL Misc App No7 of 2021 was ownership of a portion of land demarcated by the 1st Respondent, from L.R Notiriki/Tigoi/685 (‘Kakamega/Tigoi/685) (the suit property). That the applicants are beneficial owners of the suit land. That they were not joined in the suit and only came to learn of the existence of the suit after judgement and at the execution stage. That they filed an application seeking inter alia to be joined in the suit so as to defend their interests in the suit land. That they sought a number of orders in the application including an order for joinder of parties, review and setting aside of the judgement, lifting of warrants issued in execution of the judgement and interlocutory injunction. That the trial court heard the application and vide its ruling delivered on February 23, 2023 dismissed the application. That the applicants have subsequently lodged this appeal against the ruling and unless an order of stay is granted, the appellants stand to suffer substantial and irreparable loss and the appeal rendered nugatory. That the appellants are ready and willing to abide by the terms the court may deem just. That the application has been brought without unreasonable delay and that it is in the interest of justice that it be allowed.
 3. The 1st Respondent opposed the application vide his Replying Affidavit sworn on April 6, 2021. He stated that the application is made in bad faith and calculated to prejudice him and to delay him from enjoying the fruits of justice. That the application does not meet the threshold for granting the orders sought as such the application is scandalous, frivolous and/or vexatious or otherwise an abuse of the Court process. He stated that he has never interfered with their portion of land and he has been in possession of the Land for more than 7 years. That warrants of arrest were issued for defiance of Court orders. That the applicant were not parties to the Primary suit therefore have no locus to file an appeal. That in the absence of a valid appeal he prays that the application be struck out with costs. He prays that the Applicants be directed to give security for the appeal and to further pay his compensation for the illegal demolition of his parameter wall which was valued at kshs 139, 000 and costs of the civil jail of Kshs 32, 400.
 4. Prayers a, b, and c of the application are already spent. Prayer (d) is a prayer for joinder of parties. The 1st Respondent contends that the Applicants have no locus standi under the provisions of the Civil Procedure on joinder and do not allow for joinder at appeal stage not having participated in the



primary suit. He stated that the grounds raised on appeal seek review of orders raised by the court. The Applicants contended that Order 1 Rule 10(2) allow joinder of parties at any stage of the proceedings as long as the court finds that the party is a necessary party whose presence in the case will assist in the determination of the dispute. An application for joinder of the appellants as parties in the lower court case was the subject of the ruling appealed against. The appeal herein challenges the trial court's refusal to grant the prayer for joinder. As such the appropriate forum to canvass the prayer is in the appeal and not in this application. To canvass and/or decide on the prayer at this stage will be tantamount to hearing and deciding on the substance of the appeal before the appeal itself is heard.

5. Prayer (e) is a prayer for an order that: -

“This Honourable Court be pleased to grant leave to the Applicants herein to lodge an Appeal against Order of the Subordinate Court dated February 23, 2023 and all other consequential orders arising therefrom of the Honourable R.M Ndombi(Ms.) (SRM) in the Principal Magistrate's Court at Vihiga in Civil Case NoELC Misc App No7 of 2021.”

Perusal of the court record shows that the appeal herein is in respect of the trial court's ruling delivered on February 23, 2023. The Memorandum of Appeal vide which the appeal was filed is dated 21st of March 2023 and filed in court on March 23, 2023. It indicates on the heading of the Memorandum of Appeal that it is an appeal against the order of the Senior Principal Magistrate's court (Hon R M Ndombi (SRM) given on February 23, 2023 in Vihiga SPMC ELC Misc Appl Case No 7 of 2021. It is not clear from the prayer what leave the applicant is seeking.

6. Prayers (f) and (g) are prayers for orders of stay of execution and of proceedings pending appeal

Under Order 42 Rule 6 of the [Civil Procedure Rules](#) an Applicant must satisfy the court that:

- i. Substantial loss may result to him unless the order is made;
- ii. That the application has been made without unreasonable delay; and
- iii. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

It is the applicant's case that there is risk of execution of the decree to their detriment. That the Respondent may proceed to register the contested portion of Land that he had demarcated from L.R NoTiriki/Tigoi/689('Kakamega/Tigoi/685') in his name in execution of the decree. That the 1st Respondent had filed contempt of Court proceedings against 1st Appellant and warrant of arrest issued threatening his liberty. I have perused a copy of the decree attached to the application. It shows that the applicants were not parties to the suit in the lower court. That among the orders in the judgement were a declaration vesting the suit land in the 1st Respondent an order of exhumation of a body from the suit land, an order for transfer and registration of the suit land in the name of the 1st Respondent among others. The record shows that in spite of the applicants not being parties in the suit, warrants of arrest were issued against them. I find that there is sufficient ground to stay the execution and give the applicants a chance to be heard in their appeal. They have demonstrated substantial loss. In [Silverstein v Chesoni](#) (2002)1 KLR 867 it was 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 loss would render the Appeal nugatory”

7. As regards whether the application was brought without unreasonable delay, I note that the ruling appealed against was delivered on February 23, 2023 and the application was filed March 21, 2023. The



Applicants stated that they were unable to file the application immediately the ruling was read because they had applied for proceedings. I find that the application was filed without unreasonable delay.

8. The applicants have indicated their willingness to abide by conditions set by the court. The 1st Respondent prayed in his Replying affidavit that the applicants be directed to pay for his compensation for illegal demolition of his parameter wall which was valued at Kshs 139, 000 and costs for the Civil jail Kshs 32,400 as security for granting the orders sought. In *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 Others* [2014] eKLR the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

9. In the circumstances of this case and having found that the application for joinder of parties is the subject of the appeal and hence cannot be canvassed at this stage, that the prayer for leave to appeal has no basis and that there is merit in the prayer for stay of execution of the judgement, I allow the application on the following terms

- a. An order of stay of execution of the judgment dated June 9, 2022 in Vihiga SPMCE &L Misc Appl No 7 of 2021 together with all consequential decrees and/or orders is hereby issued pending hearing and determination of the appeal herein.
- b. The applicants to deposit the sum of Kshs 100,000 in a joint interest earning account in the names of Counsel for the Applicants and Counsel for the 1st Respondents as security within 45 days hereof in default of which the stay order will lapse.
- c. Costs of the application to abide the appeal.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 11TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Neville Court Assistant.

Muhavi Advocate for the Applicant

Cheruiyot Advocate for the Respondents

