



Osiemo v Angoi (Suing as the legal administrator of the estate of Joseph Nyamari Nyagaka (Deceased) (Environment and Land Appeal 25 of 2022) [2023] KEELC 18381 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 25 OF 2022**

M SILA, J

JUNE 22, 2023

BETWEEN

MAURICE ONDITI OSIEMO PLAINTIFF

AND

ROBERT ANGOI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF JOSEPH NYAMARI NYAGAKA (DECEASED) DEFENDANT

RULING

(On application for stay pending appeal)

1. The application before me is that dated 27 March 2023 filed by the appellant. It is an application that seeks stay of execution of the judgment in the suit Kisii CMCC/ELC No. 50 of 2019, pending hearing of this appeal. The application is opposed.
2. The background is that the respondent filed suit in the Chief Magistrate's Court against the appellant where he sued the appellant in respect of title to the land parcel Kisii Municipality/Block I/587 (the suit property). He filed suit as the legal representative of the estate of Joseph Nyamari Mogaka (deceased). His case was that the suit property was registered in the name of the deceased and that a title held by the appellant to the same property was procured fraudulently. The appellant filed defence and counterclaim where he asserted that it was his title which was the lawful one and he asked for orders for the cancellation of the title of the deceased. It will thus be seen that both appellant and the respondent held titles to the suit property and a decision had to be made as to which of the two titles is the lawful one. In a strange twist, the title of the respondent was supported by the Land Registrar, Kisii, while the title of the appellant was supported by the Chief Land Registrar. Upon hearing the case, the trial Magistrate held in favour of the respondent vide a judgment delivered on 19 October 2022. Aggrieved, the applicant filed this appeal and also filed an application for stay pending appeal in the lower court.



It was dismissed in a ruling delivered on 2 February 2023. It is on that basis that the applicant has now approached this court seeking stay pending appeal.

3. In this application, he asserts to be the rightful owner and deposes that he has been in possession of the suit property since the year 2009 and will suffer substantial loss if stay is not granted.
4. The respondent filed Grounds of Opposition to oppose the motion. It is inter alia urged that no execution process has commenced; that the trial court issued an order of injunction and that there is nothing to be stayed; that the application is devoid of merit.
5. Both Mr. Ayienda, learned counsel for the applicant and Mr. Ochwangi, learned counsel for the respondent, filed submissions which I have considered before arriving at my decision.
6. The principles upon which an application such as these ought to be determined is found in Order 42 Rule 6 (2) which provides as follows :-
 - (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.
7. From the above, three principles are discernible, that is :-
 - i. The application needs to be made without unreasonable delay;
 - ii. The applicant needs to demonstrate that he will suffer substantial loss if stay is not granted.
 - iii. The applicant should be ready to offer security for the due performance of the decree.
8. On the first principle, I do not think that it can be argued that this application has been made after an inordinate lapse of time. The applicant had a previous application for stay pending appeal before the Magistrate's Court which was dismissed on 2 February 2023. This application was filed shortly thereafter on 27 March 2023 before the decree could be executed. I am persuaded that the applicant filed his application without unreasonable delay.
9. The second principle is substantial loss. I am persuaded that the applicant stands to suffer substantial loss if the decree is executed and he succeeds on appeal. Indeed, he may find that succession in respect of the estate of the deceased has been done and the suit land distributed to beneficiaries, and in such instance the suit land may not be recoverable, or will not be recoverable unless there is other litigation.
10. The third principle is security. Both parties have titles to the suit land. It would however appear that it is the appellant in possession, since in his plaint, the respondent did ask for an order of eviction. I think an order of status quo is sufficient security for both parties in the circumstances of this case. In essence the status quo regarding the titles of both parties be maintained and no party should enter into any dealings, and also the status quo regarding possession be maintained, until the appeal is heard and determined. There should be no construction of any structures on the suit property and it should be kept in the state that it is currently until the appeal is finalized.



10. The last issue is the costs of this application. The costs will abide the outcome of the appeal.

11. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 22 DAY OF JUNE 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

