



**Ogwakwa v Nyaruri & 4 others (Environment & Land Case
75 of 2017) [2023] KEELC 19159 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 75 OF 2017**

M SILA, J

JULY 27, 2023

BETWEEN

CYRUS ANYONA OGWAKWA PLAINTIFF

AND

MAUTI NYARURI 1ST DEFENDANT

BENJAMINBITERA NAYRURI 2ND DEFENDANT

KENYATTA MOIRURUKI 3RD DEFENDANT

DENNIS ALLOYS 4TH DEFENDANT

DISHON ONSERION 5TH DEFENDANT

(An application for stay pending appeal)

RULING

1. The application before me is that dated 23 May 2023 and filed on even date filed by the defendants. They seek an order of stay of execution of the judgment delivered on 22 February 2023, pending hearing and determination of an appeal to the Court of Appeal. The application is opposed by the plaintiff, who has himself filed an application, lodged on the same day, seeking orders for the eviction of the defendants from the disputed property.
2. The background is that through a plaint filed on 4 April 2017, the plaintiff averred that the land parcel South Mugirango/Boikanga/1342 was registered under one Monyinyo Onkundi, his deceased grandmother. He contended that the defendants, without going through succession, caused the subdivision of this land into the land parcels South Mugirango/Boikanga/3344, 3345, 3346, 3347 and 3348. In the suit, he asked for cancellation of their titles and their eviction from these parcels of land. I heard the case and delivered judgment on 22 February 2023. I found that indeed the defendants had proceeded to subdivide the land parcel South Mugirango/Boikanga/1342 without first formally



succeeding the property of the deceased in accordance with the Law of Succession Act, Cap 160, Laws of Kenya. I ordered the cancellation of their titles and for the land to revert back to the original land parcel in name of Monyinyo Onkundi and the same be subjected to succession in the usual manner. I gave the defendants 90 days to give vacant possession or they be evicted and barred them from excavating stones, cutting down trees, removing any material from the land, constructing or in any other way wasting the land. I also granted the plaintiff the costs of the suit.

3. On 23 February 2023, the defendants filed a notice of appeal and they have now come with this application for stay pending appeal. In the supporting affidavit, it is deposed that the plaintiff has begun cutting down the boundaries of the land (the subdivisions, I suppose). In response to the application, the plaintiff filed a replying affidavit where he contends that the application is a waste of the court's time and that since judgment was delivered, the defendants have not prosecuted their appeal and that there is deliberate delay. He believes that he should be left to enjoy the fruits of the judgment. He has raised an issue regarding the notice of appeal, which provides that judgment was delivered by Hon Justice Jane Onyango, and not myself. In his application, he seeks for the eviction of the defendants from the land.
4. I have considered the application.
5. Before I go too far, there is the issue raised that the notice of appeal is defective as the judgment is not of Onyango J. I think that is merely an error which causes no prejudice to the defendant. I will now proceed to deal with the substance of the application.
6. This being an application for stay pending appeal, I stand guided by the provisions of 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, it will be noted that the court ought to consider three issues when addressing an application for stay of execution pending appeal. These are :-
 - (i) That the application has been made without unreasonable delay;
 - (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
 - (iii) That there is provision of security as the court may order for the due performance of the decree.
8. I stand guided by these principles.
9. I will start with delay. The application herein was filed on 23 May 2023. I do not think that it was filed after unreasonable delay as the defendants had 90 days from 23 February 2023 to give vacant possession. The next is substantial loss. From the evidence that was tendered, the defendants have been residing on the disputed land for a considerable amount of time. They have titles in their names. If the decree is executed, it means that they will be evicted and their titles cancelled. Assuming that they succeed on appeal, they will have been denied use of the land, and reversing the cancellation of title



will be a labourious process. I am persuaded that they have shown that they stand to suffer substantial loss if the decree is executed.

10. The last issue is security. I do not see any loss that the estate of the deceased will suffer other than loss of the right to derive benefit from the use of the land. This can be mitigated by a deposit of some sum of money which can compensate the estate of the deceased for the duration of the appeal. The land is more or less agricultural land but no evidence was led as to its productivity. In my discretion, I will order each defendant to deposit the sum of Kshs 30,000/= in a joint interest earning account, or to court, to constitute security to the plaintiff. This money be deposited within 90 days from today. In the event that they lose the appeal, this money be released to the plaintiff, but in the event that they succeed on appeal, the money be released back to them. I will also order that the taxed costs be deposited as above within 90 days of taxation. If the above orders on deposit of the monies as security is not complied with, time being of essence, there will be no order for stay of execution and the judgment may be executed. Thus from the date hereof, there will be an interim order of stay of execution for a period of 90 days, but any stay after that date will be dependent on deposit of security as ordered above. If any defendant does not abide by the above, the decree may be executed against him.
11. In addition to the above, in the judgment, I had barred the defendants from excavating stones, cutting down trees, removing any material from the land, constructing or in any other way wasting the land. This order will remain until the appeal is determined. The defendants are only at liberty to cultivate seasonal crops and if there are some structures, not to cause any more to be put up. If there will be violation of this order, the plaintiff is at liberty to raise complaint, and if satisfied that there is violation, this court reserves the discretion to nullify the orders of stay of execution and give liberty to the plaintiff to execute the decree.
12. The last issue is costs. The costs of this application shall abide the outcome of the appeal.
13. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 27 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

