



Oriango v County Government of Nyamira & 4 others (Environment & Land Case 95 of 2021) [2023] KEELC 18980 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 95 OF 2021**

JM KAMAU, J

JULY 27, 2023

BETWEEN

JAMES ONYANGO ORIANGO PLAINTIFF

AND

THE COUNTY GOVERNMENT OF NYAMIRA 1ST DEFENDANT

ZACHARIAH ODIDA KISIMA 2ND DEFENDANT

PATRICK MONARI 3RD DEFENDANT

HEDSON NYALI 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Before me is an Application for stay of Execution dated 02/06/2023 brought by the 1st defendant/ applicant. This follows the Judgment of this court dated 22/03/2023 that reads as follows: -
 - a. A declaration be and is hereby issued that the Plaintiff is the owner of 9 Hectares out of land parcel North Mugirango/Magwagwa II/403 to be registered in the name of the 1st defendant the same being ancestral land.
 - b. An order is hereby made that the 1st defendant do forthwith transfer to the plaintiff 9 Hectares out of land parcel No. North Mugirango/ Magwagwa II/403 in lieu of which the Deputy Registrar of this honourable court do execute transfer documents in place of the 1st defendant.
 - c. A permanent injunction do issue against the defendants and/or their agents or servants, to desist from interrupting the Plaintiff's quiet enjoyment of the land in the designated 9 Hectares out of land parcel No. North Mugirango/ Magwagwa II/403.



- d. Kshs. 1,250,000/= General Damages, Exemplary Damages and Aggravated Damages for unlawful eviction, destruction of property and for the attendant nervous shock, emotional distress, psychological, mental anguish and the unconstitutional, cruel, degrading and inhuman treatment meted on and occasioned to the Plaintiff and his family when carrying out the unconstitutional and illegal eviction.
2. The prayers sought in the Application dated 02/06/2023 are as follows: -
- a. That this Application be certified as urgent, be heard ex-parte and service of the same be dispensed with in the first instance;
- b. That this honorable court be pleased to order stay of execution of the Judgment, Decree and Order to transfer 9 Hectares out of land parcel North Mugirango/magwagwaii/403 to the Plaintiff/Respondent of this Honorable Court delivered on 22/03/2023 pending the hearing and determination of this Application inter parties;
- c. That this honorable court be pleased to order stay of execution of the Judgment, Decree and Order to transfer 9 Hectares out of Land Parcel North Mugirango/MagwagwaII/403 to the plaintiff/respondent of this honorable court delivered on 22/03/2023 pending the hearing and determination of the intended appeal.
- d. That costs of this Application be in the cause.
3. The same is supported by the Affidavit of one Jack Magara, the County Secretary of the 1st defendant/applicant who depones that the 1st defendant intends to Appeal against the said Judgment and has indeed sought for the proceedings and certified copy of the Judgment and Decree in the case and has already filed a Notice of Appeal in order to commence the intended appeal to the court of Appeal and fears that should the stay not be granted, then the Applicant stands the risk of having 9 Hectares out of land parcel No. North Mugirango/MagwagwaII/403 transferred to the Plaintiff/Respondent. The other defendants do support the applicant's Application. On his part, the plaintiff has opposed the Application and both contesting parties have filed their written Submissions which I have considered.
4. Stay of Execution is a Judgment Debtor's right. Nonetheless, it is important that the court takes into consideration the likely effect of granting the stay of execution in question or of the failure to do so. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the court on equal footing and see where the scales of justice lie, considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. And as this court has held in the past and most recently in the case of *Shadrack Nyaberi Mwakae v David M. Omoganda Ong'era, Nyamira* ELC Case No. 92 of 2021:

“.....the interest of the court in stay of execution in the case of a non-monetary Decree such as this one is usually meant to serve the purpose of preserving the subject matter only so that whoever succeeds in the Appellate Court, will find the property still intact. The court therefore needs to be more cautious and interrogate the consequences of failure to preserve the subject matter. The orders issued in this case should therefore be geared towards preserving the property itself until the outcome of the intended Appeal. Should we grant the orders as sought by the applicants herein, what happens to the properties in issue? The



Title Holders would be at liberty to dispose of the properties. Will this not, in the words of the applicants, place the suit property beyond the reach of the Respondent as well? This court therefore has an obligation to give orders that act as a prohibiting safeguard against any further dealings with the suit lands. In this particular case, the Titles to the suit properties are still in the names of and in the hands of the applicants despite the court having declared that the applicants acquired them unlawfully. This is very lethal. What would prevent the applicants from transferring the suit lands to third parties in the absence of any information as to the judgment of the court being available to such third parties? It would turn the entire proceedings herein and in the appellate court into an academic exercise and mockery and later burden this court and/or the appellate court with a flurry of Applications. It is of paramount importance to ensure realization of the ultimate winners' fruits of litigation and that nothing complicates the matter after the final Judgment.....”

5. Consequently, taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful Party, I make the following orders:

- a. Upon transfer by the 1st defendant to the plaintiff of 9 Hectares out of land parcel No. North Mugirango/ Magwagwa II/403, the said Title Deed shall be deposited in this court and there shall be no further transaction against the said Title until the intended Appeal is disposed of.
- b. There shall then be a Stay of Execution of the Judgment of this court dated 22/3/2032 on condition that the Title Deed to the property known as LR NO. North Mugirango/ Magwagwa II/403 is deposited in court within Fifteen (15) days from the date of transfer failure to which these orders will automatically lapse.
- c. The Decree Holder shall have uninterrupted exclusive use, possession and occupation of the 9 Acres aforesaid only subject to (a) above.
- d. The intended Appeal shall be filed within the next ninety (90) days hereof.
- e. The Costs of this Application shall await the outcome of the intended Appeal.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF JULY 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Sibota - Court Assistant

Plaintiff in person

Mr. Bonareri holding brief for Mr. Nyachiro for the 1st Defendant

Mr. Ondima for the 2nd & 3rd Respondents

Mr. Ndiritu for the 5th Defendant

