



Anasi (Suing as the legal administrator of the Estate of Abigael Kemunto Opande) v Opande & 5 others (Environment & Land Case 165 of 2016) [2023] KEELC 19147 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19147 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 165 OF 2016**

**M SILA, J
JULY 26, 2023**

BETWEEN

IRENE MWANGO ANASI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF ABIGAEL KEMUNTO OPANDE) PLAINTIFF

AND

**JARED TOM NGITI OPANDE 1ST DEFENDANT
STEVE NYAGAKA ORORA 2ND DEFENDANT
EEDI KENYA LIMITED 3RD DEFENDANT
LAND REGISTRAR, KISII COUNTY 4TH DEFENDANT
HON ATTORNEY GENERAL 5TH DEFENDANT
INKA HOLDINGS LIMITED 6TH DEFENDANT**

RULING

(On application for stay pending appeal filed by the 1st, 2nd and 6th defendants)

1. The application before me is that dated 15 March 2023 filed by the 1st, 2nd, and 6th defendants. They seek orders of stay of execution of the judgment delivered on 16 February 2023 pending hearing of an intended appeal to the Court of Appeal. The application is not opposed by the 3rd defendant, and the State Law Office, representing the Land Registrar, Kisii, and the Attorney General, respectively the 4th and 5th defendants. It is however opposed by the plaintiff.
2. The background is that the plaintiff filed suit as the administrator of the estate of her late mother Abigael Kemunto Opande (deceased). She contended that the deceased was the registered proprietor of the land parcel Nyaribari Chache/Keumbu/3017. She claimed that the 1st defendant, who happens



to be her brother, secretly obtained a grant of letters of administration *vide* Keroka SRM Succession Cause No. 4 of 2012, and transferred the land to himself. She averred that she filed an application to challenge the grant and while that was pending, an order prohibiting the sale of the land was registered. Her application succeeded and the grant was revoked. She contended that despite the prohibitory order, the 1st defendant transferred the land to the 2nd defendant. The 2nd defendant subsequently transferred the land to the 6th defendant which is a company that he has interest in and where he is director. The land was subsequently subdivided into the land parcels Nyaribari Chache/Keumbu/3303 to 3308 and sold to the 3rd defendant for Ksh 46,000,000/=. In the suit, the plaintiff *inter alia* wished to have an order to cancel the subdivisions and restore the land parcel No. 3017 to the name of the deceased. The 3rd defendant lodged a cross-claim for refund of the sum of Ksh 46,000,000/= in the event that the plaintiff's suit succeeded.

3. The case was heard by Onyango J, who delivered judgment on 15 February 2023. She entered judgment in favour of the plaintiff. She nullified the titles held by the 3rd defendant and ordered reinstatement of the original land parcel No. 3017. She also entered judgment for the 3rd defendant for the cross-claim and ordered the 6th defendant to pay back to the 3rd defendant the sum of Ksh 46,000,000/= together with costs and interest from the date of the judgment till settlement in full.
4. Aggrieved by the judgment, the applicants filed a Notice of Appeal and have followed it up with this application for stay pending appeal. In the supporting affidavit, it is averred that the effect of the judgment is that the 1st defendant needs to refund the 2nd defendant the sum of Ksh 9,500,000/= which he paid for the land, which the 1st defendant has no capacity to pay, whereas the 6th defendant is indebted to the 3rd defendant in the sum of Ksh 46,000,000/= plus interest and cost. They contend that they stand to suffer substantial loss. They have offered as security for the due performance of the decree the land parcels Nyaribari Chache/Keumbu/6091,6092, 6093, 6094, 6095, 6096 and 6097, owned by the 2nd defendant. They have annexed a valuation report prepared by M/s Dammon Appraisers, showing that the properties are valued at Ksh 58,000,000/=.
5. The plaintiff filed a replying affidavit to oppose the motion. She has deposed *inter alia* that no evidence of substantial loss has been provided; that the valuation report is not accompanied by the valuer's practicing licence; and that the intention of the applicants is to obstruct and/or defeat the tenor of the decree.
6. I have considered the application and the submissions filed by counsel for the applicants and counsel for the plaintiff. As I mentioned earlier, the application is not opposed by the other parties.
7. This is an application for stay pending appeal and I stand guided by the principles outlined 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.
8. From the foregoing, it will be seen that the court ought to consider three issues when canvassing 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 orders for the due performance of the decree.
9. On the first issue, that is delay, I think the application was filed timeously. In fact, in his submissions, counsel for the plaintiff did concede that there has been no delay in the filing of the application.
 10. On substantial loss, despite the plaintiff arguing that no substantial loss has been established, I am persuaded that the applicants do stand to suffer substantial loss if the decree is executed and they manage to succeed on appeal. If the decree is executed, the land will revert back to the parcel No. 3017 in name of the deceased. It can be subjected to succession and distributed, and may never become available in case the applicants succeed. Moreover, in the decree, there is to be payment to the 3rd defendant of the sum of Ksh 46,000,000/= which is a colossal amount of money. If this is done and the applicants succeed, there is no guarantee that they will be refunded this money.
 11. The last issue is security. The applicants have offered various parcels of land to constitute security. They are together valued at Ksh 58,000,000/=. Although counsel for the plaintiff cast aspersions on the valuation report, the plaintiff has not presented any valuation report that contradicts the value availed by the applicants. It has also not been shown by the plaintiff, that the properties being presented as security, cannot constitute good security for the due performance of the decree. I actually think that they do provide adequate security for the due performance of the decree.
 12. It will be seen from the foregoing that I am persuaded that there is merit in this application. I will allow it and order a stay of execution of the judgment pending hearing of the appeal to the Court of Appeal. I will issue an order of prohibition, prohibiting the registration of any disposition in the registers of the land parcels Nyaribari Chache/Keumbu/6091,6092, 6093, 6094, 6095, 6096 and 6097. The entry in the prohibition to elaborate that the said properties are prohibited for reason that they constitute security for the due performance of the decree herein.
 13. The last issue is costs. The costs of this application will abide the outcome of the appeal.
 14. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 26TH DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

