



**Bwana v Mamboleo & another (Environment & Land Case  
85 of 2021) [2023] KEELC 18859 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18859 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 85 OF 2021**

**JM KAMAU, J**

**JULY 18, 2023**

**BETWEEN**

**ZIRUEL ONDICHO BWANA ..... PLAINTIFF**

**AND**

**SAMWEL MOGAKA MAMBOLEO ..... 1<sup>ST</sup> DEFENDANT**

**THOMAS AREBA MAGARE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

This court delivered its Judgment in this case on 28/03/2023. The Plaintiff had filed a suit on 23/11/2020 with the following prayers: -

1. A Declaration that the Defendants' right to recover a portion measuring 3½ (3.5) Acres out of Lr. No. Mwangori Settlement Scheme/146 (herein referred to as the suit property) is barred under the *Limitations of Actions Act* cap 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the Plaintiff herein openly, peacefully and continuously been in occupation and possession of the entire of the suit property for a period of more than 35 years and thus exceeding the Statutory timeline for recovery of immovable property.
2. There be an order that the Plaintiff be registered as the Proprietor of the portion measuring 3½ (3.5) Acres out of Lr. No. Mwangori Settlement Scheme/146 in place of the Defendants and/or the Register thereof be rectified to reflect the Plaintiff as the lawful and legitimate owner thereof, that is, the portion measuring 3.5 Acres.
3. The Honourable court be pleased to order and/or direct the Defendants herein to execute the Application for Land Control Board consent, the Transfer instrument and/or such other Transfer Instruments, as may be necessary and/or appropriate, to facilitate the sub-division of LR. no. Mwangori Settlement Scheme/146, transfer instruments and facilitate the registration of the resultant sub-division thereof, measuring 3.5 Acres out of the suit property in the name of the Plaintiff.



4. In the alternative and without prejudice to prayer 3 hereof, the Deputy Registrar/Executive Officer of the Honourable court be mandated and/or authorize to execute the relevant Transfer Instrument/Documents, *inter alia*, Application for Land Control Board consent, Mutation and Transfer touching on and/or concerning the suit Property, to facilitate the sub-division thereof and consequential transfer of the resultant portion in favour of the Plaintiff.
5. There be granted an order of Permanent Injunction, restraining the Defendants by themselves, agents, servant and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the portion measuring 3.5 acres currently falling and/or comprising part of the suit property and any portion, in any manner whatsoever and howsoever.
6. Costs of this originating summons be borne by the Defendants.
7. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

Judgment was delivered on 28/03/2023 as follows: -

1. A Declaration be and is hereby issued that the Defendants' right to recover a portion measuring 3½ (3.5) Acres out of Lr. No. Mwangori Settlement Scheme/146 is barred under the *Limitations of Actions Act* cap 22 of Laws of Kenya, and his Title thereto extinguished.
2. The Plaintiff be registered as the Proprietor of the portion measuring 3½ (3.5) Acres out of Lr. No. Mwangori Settlement Scheme/146 in place of the Defendants and the Register thereof be rectified to reflect the Plaintiff as the lawful and legitimate owner of the portion measuring 3.5 Acres thereof.
3. The Defendants are hereby directed to execute the Application for Land Control Board consent, the Transfer documents and such other Transfer Instruments as may be necessary and appropriate to facilitate the sub-division of LR. No. Mwangori Settlement Scheme/146, transfer and registration of the resultant sub-division thereof, measuring 3.5 Acres out of the suit property in the name of the Plaintiff.
4. In the alternative and without prejudice to 3 above, the Deputy Registrar of this Court is hereby mandated and authorized to execute the relevant Transfer Instruments/Documents, *inter alia*, Application for Land Control Board consent, Mutation and Transfer touching on and concerning the suit Property, to facilitate the sub-division thereof and consequential transfer of the resultant portion in favour of the Plaintiff.
5. An order of Permanent Injunction restraining the Defendants by themselves, agents, servant and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the portion measuring 3.5 Acres currently falling and/or comprising part of Lr. No. Mwangori Settlement Scheme/146 or any portion, in any manner whatsoever and howsoever.

On 19/04/2023, the Defendants/Applicants made on Application for stay of Execution in the following words: -

1. The instant Application be certified urgent and the same be heard Ex-parte in the first instance.
2. Pending the hearing and determination of the instant Application, the Honorable court be pleased to grant interim orders of stay of execution and/or Decree issued on 28<sup>th</sup> day of March 2023 together with all consequential orders arising therefrom and/or attendant thereto.



3. The Honorable court be pleased to grant an order of execution and/or enforcement of the Judgment and Decree issued on 28<sup>th</sup> day of March 2023 together with consequential orders arising therefrom and/or attendant thereto pending the hearing and determination of the appeal in terms of the Notice of Appeal dated 4<sup>th</sup> day of April 2023.
  4. Costs of this Application do abide the Appeal.
8. Such other and/or further orders as this Honorable court may deem just and expedient be granted.
- Which was anchored by the following grounds: -
- a. The Plaintiff/Respondent herein filed and/or commenced the instant suit seeking various prayers and/or reliefs against the Respondent.
  - b. Upon being served the Defendants/Applicants duly entered appearance and filled statement of Defence.
  - c. Subsequently, the instant suit was listed for hearing and indeed same was heard culminating to Judgment being rendered on 28<sup>th</sup> day of March 2023.
  - d. Pursuant to the said Judgment under reference the Honorable court ordered that the said Judgment be executed.
  - e. The Plaintiff/Respondent is intent anytime on commencing execution of the said Judgment anytime.
  - f. The Defendants/Applicants were dissatisfied with the said Judgment and they have preferred an Appeal to the court of Appeal and therefore an order of stay of execution is necessary.
  - g. In the premises the Defendants/Applicants herein have filed an Appeal with over whelming chances of success as against the Judgment and Decree of the Honorable Court.
  - h. In the circumstances there exists sufficient cause and/or basis in terms of an arguable appeal.
  - i. Be that as it may, the Defendants/Applicants are desirous to be heard and/or afforded an opportunity to be heard on the Appeal.
  - j. Nevertheless, the execution and/or implementation of the Decree will cause the suit property to be transferred, registered in the Plaintiff's/Respondent's name and eventually the Defendants/Applicants shall be evicted from the suit property.
  - k. In this regard, such action and/or activities shall place the suit property beyond the reach of the Defendants/Applicants.
  - l. In a nutshell, the execution and/or implementation in the event that the Appeal success which is most likely.
  - m. In any event the Defendants/Applicants are ready and willing to offer security in such manner as the Honorable court may deem just reasonable and expedient.
  - n. In any event the instant Application has been made without unreasonable delay.
  - o. The Plaintiff/Respondent would not suffer any prejudice if the orders sought herein are granted.



- p. Notwithstanding the foregoing this Honorable court should afford the Defendants/Applicants reasonable opportunity to pursue the Appeal.
- q. It is in the interest of justice that the Application herein be heard and allowed.
9. The Plaintiff/Respondent opposed the Application vide his Replying Affidavit sworn on 27/04/2023 and deponed that the issue of ownership has now been adjudicated upon and nothing is left for further adjudication and that litigation must come to an end. The Defendants shall not suffer any loss or injury in so far as they are not owners of the suit property and that execution does not in itself amount to substantial loss under order 42 Rule 6 of the *Civil Procedure Rules* and after that the Applicants prejudice if the orders are not granted. He argues that he has a right to enjoy the fruits of his successful Judgment and has not offered no security for the stay due performance of the Decree.

I have heard both parties through their written Submissions and the highlighting of the same before retiring to write this Ruling.

10. To begin with, stay of Execution is a right of every Judgment Debtor however hopeless the chances of succeeding an appeal is. In fact, whether the appeal has chances of success or not is not a factor that the trial court or the court from which the appeal emanates should consider. This is so because the court that delivers a Judgment is always sure that it was right and that its Judgment is water tight. If this were to be a factor then probably no stay of execution would ever succeed. You can therefore not lock out a Judgment Debtor in an Application for stay of execution on this ground.
11. Secondly, I do not agree with the Decree Holder that the issues of ownership over the suit land have now been fully canvassed and adjudicated to the pulp and nothing is left for further adjudication. This is because the Judgment Debtor has a right of appeal to the Court of Appeal of Kenya and possibly even to the Supreme Court of Kenya. The deposition by him that *“the Defendants/Applicants are desirous to take me to another trip taking years vide an Appeal dealing with the same issues in dispute, same subject matter and enjoying stay as they keep me from enjoying peaceful occupation of my land which conduct is oppressive and an abuse of the court process”* are therefore unfortunate, to say the least. Also, the phrase that *“litigation must come to an end and the same issues cannot be adjudicated between the same parties forever”* is more unfortunate. This is taking the phrase out of context. If this were the case, then there would be no provision for appeal which is very important in our jurisprudence. As to whether there is a likelihood the Judgment Debtor would suffer irreparable loss or injury should the stay not be granted, the answer is in the affirmative. Supposing the land the subject matter of appeal changes hands in multiplicity or the same is used as security for loan, the Judgment Debtor will be prejudiced should he succeed on appeal. The loss will not only be substantial but the cost of reversing the loss, if at all, may be so enormous. The Decree Holder in paragraph 21 of his Replying Affidavit urges that the law should be allowed to now take its course. Part of the course is to allow stay of execution as the appeal proceeds. The stay of execution could be a river tributary, but a very important one for that matter.

But I must also caution that I cannot allow an unconditional stay in such a case where the Judgment Debtors have the Title Deed in their possession without security. This may be very dangerous.

12. 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 =versus= 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.....”

13. 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. There shall be a Stay of Execution of the Judgment of this Court dated 28/3/2023 on condition that the Title Deed to the property known as Lr No. Mwongori Settlement Scheme/146 is deposited in Court within the next Fifteen (15) days from the date hereof failure to which these orders will automatically lapse.
  - b. The intended Appeal shall be filed within the next ninety (90) days hereof.
  - c. The Costs of this Application shall await the outcome of the intended Appeal.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY OF JULY 2023.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of:**

**Court Assistant: Sibota**

**Plaintiff: Mr. Gichana holding brief for Mr. Otieno for Respondent**

**Defendant: N/A**

