



Gikonyo & 7 others v Wanjiru & 4 others (Environment and Land Appeal E011 of 2023) [2023] KEELC 18705 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

**YM ANGIMA, J
JULY 13, 2023**

BETWEEN

PETER GIKONYO & 7 OTHERS APPELLANT

AND

ESTHER WANJIRU & 4 OTHERS RESPONDENT

(Arising from the judgement in Engineer SPMC ELC No E015 of 2021 – Peter Gikonyo & 7 Others v Esther Wanjiru & 4 others dated October 26, 2022)

RULING

A. Introduction and Background

1. The record shows that vide a judgment dated October 26, 2022 the trial court entered judgment for the Respondents on their counterclaim in Engineer SPMC ELC No E015 of 2021 – Peter Gikonyo & 7 Others v Esther Wanjiru & 4 others. The Appellants’ suit had been dismissed for want of prosecution on October 12, 2022 for their failure to attend court to prosecute their suit.
2. The material on record shows that the trial court granted the following reliefs to the Respondents as per their counterclaim:
 - (a) That a declaration do issue affirming that the 2nd defendant is the bona fide owner of land parcels number Nyandarua/Mumui/1300 and Nyandarua/Mumui/1301.
 - (b) That a declaration do issue affirming that the plaintiffs are trespassers on land parcel numbers Nyandarua/Mumui/1300 and Nyandarua/N4umui/1301.



- (c) That a declaration do issue that the plaintiffs are only entitled to occupy the portion of land demarcated as belonging to Mr. Peter Gitau being portion "A" of the mutation form and not any other portion of land.
 - (d) That a permanent injunction do issue against the plaintiffs by themselves, servants, agents or any person acting under their instructions or control from dealing, interfering, alienating or otherwise disposing off land parcels number Nyandarua/Mumui/1300 and Nyandarua/Mumui/1301.
 - (e) Costs of the suit.
3. It would appear that vide a notice of motion dated 04.01.2023 the Appellants sought the setting aside of the ex parte judgment in favour of the Respondents, a stay of execution of the resultant decree and a chance of being heard on their claim. By a ruling dated 22.02.2023 the trial court dismissed the said application with costs mainly on the ground that it had no jurisdiction to grant the orders sought by the Appellants in their suit. Being aggrieved by the said ruling, the Appellants filed a memorandum of appeal dated 23.02.2023 on 03.03.2023 challenging the same.

B. The Appellants' Instant Application

4. Simultaneously with the filing of the memorandum of appeal, the Appellants filed a notice of motion dated February 23, 2023 based upon Order 42 rule 6 of the *Civil Procedure Rules, 2010*, (the Rules) Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* (Cap. 21) and all other enabling provisions of the law seeking a stay of execution of the judgment and decree of the trial court dated October 26, 2022. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Peter Mwangi Gikonyo on January 4, 2023 and a further affidavit sworn by him on January 13, 2023 in the earlier application dated January 4, 2023 before the trial court. It was asserted that the appeal stood good chances of success and that unless the stay sought was granted the pending appeal stood to be rendered nugatory if ultimately successful. It was further contended that the Appellants were unfairly denied a chance of being heard before the trial court and that if the ex parte decree were to be executed they shall suffer great injustice.

C. The Respondents' Response

5. The 1st Respondent filed grounds of opposition dated April 2, 2023 raising the following objections to the application:
- (a) That the application does not show any cause of action against the 1st Respondent for the reason that the title deeds in contest include Nyandarua/Mumui/1299, Nyandarua/Mumui/ 1300 and Nyandarua/Mumui/ 1301 while that of the 1 Respondent being Nyandarua/Mumui/1302, which the same does not form part of the contested land parcels.
 - (b) That the application stems from a suit that is not only bad in law but equally defective thus not deserving of the orders sought before this court.
 - (c) That the applicant herein has filed a similar suit subject of the application herein before High Court at Nakuru Succession Cause No 20 of 1991 seeking the same orders being sought before this court.



- (d) That the applicant is forum shopping for a 'suitable' court to issue the orders sought herein having failed to convince the Judge presiding over the Nakuru Succession Cause No 20 of 1991.
 - (e) That the application is otherwise incompetent, misconceived, misplaced and is an abuse of the court process and the same ought to be dismissed with costs.
6. The 2nd Respondent filed a replying affidavit sworn on 21.03.2023 in opposition to the application upon, inter alia, the following grounds:
- (a) That the application was frivolous, vexatious and an abuse of the court process since the decree sought to be stayed was incapable of execution.
 - (b) That the Appellants had filed a similar application for stay of execution in Nakuru High Court Succession Cause No 20 of 1991 which was pending determination.
 - (c) That the Appellants were guilty of forum shopping.
 - (d) That there was no evidence that the Appellants stood to suffer substantial loss in the absence of a stay.
 - (e) That the Respondents should not be denied the enjoyment of the fruits of their judgment in the absence of evidence that the pending appeal may be rendered nugatory in the absence of a stay.

D. Directions on Submissions

7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellants' submissions were filed on May 12, 2023. There is no indication on record of the rest of the Respondents having filed any submissions.

E. Issue for Determination

8. The court has perused the Appellants' notice of motion dated February 23, 2023, the 1st Respondent's grounds of opposition as well as the 2nd Respondent's replying affidavit in opposition thereto. The court is of the opinion that the main issue for determination herein is whether or not the Appellants have made out a case for the grant of an order of stay of the judgment of the trial court dated 26.10.2022 pending the hearing and determination of the appeal.

F. Analysis and Determination

9. The court has considered the material and submissions on record on the issue of stay. Whereas the Appellants submitted that they had made out a case for stay of execution of the decree the 2nd Respondent contended otherwise. In particular, the 2nd Respondent contended that there was no evidence that the Appellants stood to suffer substantial loss in the absence of a stay. It was further submitted that the trial court had not made any executable order since it had merely dismissed the Appellant's suit and also dismissed their application for stay of execution and setting aside of the ex parte decree.



10. It is evident from the material on record that the Appellants' appeal is not against the ex parte decree dated October 26, 2022 but against the ruling and order dated February 22, 2023 refusing to set aside the said decree. This is confirmed by the material on record which shows that the Appellant's memorandum of appeal dated February 23, 2023 was challenging the order of the trial court made on February 22, 2023. consequently, there is no memorandum of appeal on record against the ex parte decree of October 26, 2022.
11. The court is of the opinion that the court's jurisdiction to grant a stay a of execution of a decree can only arise under Order 42 rule 6(2) of the Rules once there is a pending appeal against that decree. There being no appeal against the said ex parte decree it would follow that the court would have no jurisdiction to grant a stay of execution of the decree dated 26.10.2023.
12. Even if the court had jurisdiction to grant a stay of execution of the decree, the court is not satisfied that the Appellants shall suffer any substantial loss in the absence of such an order. The judgment of the trial court shows that most of the reliefs which were granted were merely declarations and the only injunction granted simply restrained them from "dealing, interfering, alienating or otherwise disposing of land parcels number Nyandarua/Mumui/1300 and Nyandarua/Mumui/1301".
13. The record shows that no eviction order was made against the Appellants hence it is difficult to see what substantial loss they shall suffer by being restrained in dealing with, alienating or disposing of the two suit properties. The court is also not satisfied that the pending appeal may be rendered nugatory in the absence of a stay order. The Appellants have not demonstrated that whatever may happen to them or the land parcels they seek to retain shall be irreversible or that whatever loss they may thereby suffer shall be beyond compensation in damages.
14. In the case of *Stanley Kangethe Kinyanjui –vs- Tony Keter & 2 Others* [2013] eKLR the Court of Appeal considered the meaning of the term nugatory as follows:
 - “(ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002]1 EA 227 at page 232.
 - “(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
15. The court has further noted that the Appellants have a pending application for stay of the decree of the trial court pending before the High Court at Nakuru. There is no indication on record to demonstrate that the said prayer for stay has been formally withdrawn. The Appellants attached a letter dated 03.05.2023 to their written submissions purporting to withdraw the prayer for stay of execution. There is, however, no evidence on record to demonstrate that the said letter was ever filed before the High Court at Nakuru and whether the intended withdrawal was ever endorsed by the court. The court is of the opinion that the Appellants may be gambling with the judicial process which would be an indication of abuse of the court process.

G. Conclusion and Disposal Order

16. The upshot of the foregoing is that the court finds no merit in the Appellants' application for stay of execution of the decree of the trial court. Consequently, the court makes the following orders for disposal of the application.
 - (a) The Appellants' notice of motion dated February 23, 2023 is hereby dismissed.



(b) Costs of the application shall be costs in the appeal.

(c) The appeal shall be mentioned on October 9, 2023 to confirm the filing of the record of appeal.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 13TH DAY OF JULY, 2023.

In the presence of

N/A for the Appellant

Ms. Otieno for the 1st Respondent

Mr. B.K. Chacha for the 2nd Respondent

N/A for the 3rd – 5th Respondents

C/A - Carol

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Y. M. ANGIMA

JUDGE

