



Kitoto & another v Akuko & another (Sued as the legal representatives of the Estate of Joseph Akuko Nyamiri and Alice Osuri Akuko - Deceased) (Environment and Land Appeal E014 of 2023) [2023] KEELC 18797 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E014 OF 2023
SO OKONG'O, J
JULY 13, 2023**

BETWEEN

SELINA AUMA KITOTO 1ST APPELLANT

PETER ODHIAMBO ODAK 2ND APPELLANT

AND

HARRISON NYAMIRI AKUKO 1ST RESPONDENT

JACKLINE ATIENO 2ND RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH
AKUKO NYAMIRI AND ALICE OSURI AKUKO - DECEASED**

RULING

1. What is before the court is the Appellants' application brought by way of a Notice of Motion dated March 17, 2023 seeking a stay of execution of the judgment and decree made by Hon WK Onkunya SRM on February 17, 2023 in Kisumu CMCELC No 442 of 2018 (hereinafter referred to as "the lower court") pending the hearing and determination of the appeal herein. The application is supported by the affidavit of the Appellants' advocate, Joel Orego sworn on March 17, 2023.
2. The Respondents sued the Appellants and the Kisumu County Land Registrar (hereinafter referred to only as "the Land Registrar") in the lower court seeking an order for the cancellation of the registration of the Appellants as the owners of all that parcel of land known as Title No Kisumu /Wathorego/1898 (hereinafter referred to as "the suit property") and the costs of the suit. The Respondents averred that their deceased parents, Joseph Akuko Nyamiri (hereinafter referred to as "Joseph") and Alice Osuri Akuko (hereinafter referred to as "Alice") in respect of whose estates they were the administrators were at all material times registered as the joint owners of the suit property. The Respondents averred that Alice died on March 4, 2001 while Joseph died on October 9, 2002. The Respondents averred



that on September 5, 2001 after the death of Alice but while Joseph was still alive, the 1st Appellant with the assistance of the Land Registrar caused the suit property to be transferred to her name. The Respondents averred that at the time the suit property was registered in the name of the 1st Appellant, Grant of Letters of Administration in respect of the estate of Alice had not been taken out and Joseph who was still alive was not involved in the transfer. The Respondents averred that the 1st Appellant subsequently sold the suit property to the 2nd Appellant. The Respondents contended that the transfer of the suit property to the 1st Appellant and subsequently to the 2nd Appellant was fraudulent and illegal. The Appellants filed a defence on January 14, 2019 denying the Respondents' claim.

3. At the trial in the lower court, the Respondents testified and produced several documents in evidence as exhibits. On their part, the Appellants closed their case without tendering any evidence in their defence. In a judgment dated February 17, 2023, the lower court found that the transfer of the suit property from Joseph and Alice to the 1st Appellant and subsequently the 2nd Appellant was carried out illegally and fraudulently. The lower court directed the Land Registrar to cancel the registration of the Appellants as the proprietors of the suit property and to revert the property to the name of Joseph. The court also awarded the Respondents the cost of the suit.
4. In the application before the court, the Appellants' advocate has averred that the appellants were aggrieved by the said judgment of the lower court and filed the present appeal. The Appellants' advocate averred further that if the stay sought is not granted, the Respondents would execute the judgment of the lower court thereby rendering the Appellants' appeal nugatory in the event that the appeal is successful. The Appellants' advocate averred that the Appellants' appeal raises arguable issues and has good prospects of success. The Appellants' advocate averred that the Appellants were willing to abide by any condition that the court could impose as a condition for granting the stay sought.
5. The application was opposed by the Respondents through a joint replying affidavit sworn on May 3, 2023. The Respondents termed the application frivolous, vexatious, and an abuse of the process of the court. The Respondents averred that the Appellants' made a conscious decision not to adduce evidence in the lower court and as such the court cannot be blamed for that failure. The Respondent averred that the application which was supported by the Appellants' advocate was an afterthought and lacked merit. The Respondents averred that the Appellants had not satisfied the conditions for granting a stay of execution.
6. The application was heard on May 15, 2023 when the advocates for the parties made oral submissions for and against granting the orders sought in the application. I have considered the application together with the affidavit filed in support thereof, I have also considered the replying affidavit filed by the Respondents in opposition to the application. Finally, I have considered the submissions by the advocates for the parties.
7. The Appellants' application was brought under order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#). Order 42 rule 6(2) of the [Civil Procedure Rules](#) provides that:
 - (2) No order for stay of execution shall be made under sub-rule (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 ultimately be binding on him has been given by the applicant."



8. In *Kenya Shell Limited v Karuga* (1982 – 1988) I KAR 1018 the court stated that:

"It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money."

9. I am persuaded that the Appellants would suffer substantial loss if the stay sought is not granted. It is not disputed that the 1st Appellant was registered as the proprietor of the suit property on September 5, 2001 and that she transferred the suit property to the 2nd Appellant on December 15, 2006. When the suit in the lower court was brought against the Appellants, the 2nd Appellant had held title to the suit property for about 12 years and was still registered as the owner of the property. In the judgment delivered by the lower court which is the subject of this appeal, the court ordered that the 2nd Appellant's title which he had held for that long be cancelled and the suit property reverted to the name of the Respondents' father, Joseph. What this means is that unless the stay sought is granted, the 2nd Appellant risks losing the suit property to the Respondents. Once the suit property is registered in the name of Joseph, nothing would stop the Respondents, his legal representatives, from disposing of the same to third parties. In the circumstances, the chances of the suit property being completely put beyond the reach of the 2nd Appellant if the stay sought is not granted is real. On the issue of security, the Appellants have stated that they are willing to abide by any order on security that the court may make as a condition for granting the stay sought.

Conclusion

1. The upshot of the foregoing is that the Appellants' application dated March 17, 2023 has merit. The application is allowed in terms of prayer 3 thereof. The Restriction registered against the title of the suit property by the Land Registrar on February 12, 2007 as entry No 7 shall remain in force to preserve the suit property pending the hearing and determination of the appeal or further orders by the court. The Appellants shall deposit in an interest-earning bank account in the joint names of the advocates on record for the parties a sum of Kshs 500,000/- as security within 60 days from the date hereof in default of which the stay granted herein shall stand discharged without any further reference to the court. The costs of the application shall be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 13TH DAY OF JULY 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Orego for the Appellants

Ms. Ochieng for the Respondents

Ms. J.Omondi-Court Assistant

