



**Nyang'au & another v Mang'era (Suing as an administratrix of the Estate of Vincent Matwere Mogaka (Deceased)) (Environment and Land Appeal E019 of 2022) [2023] KEELC 20343 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20343 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT AND LAND APPEAL E019 OF 2022  
JM KAMAU, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**FLORENCE NYAKERARIO NYANG'AU ..... 1<sup>ST</sup> APPELLANT**

**MARK ANARIKO ONUNDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EBISIBA BOCHABERI MANG'ERA ..... RESPONDENT**

**SUING AS AN ADMINISTRATRIX OF THE ESTATE OF VINCENT MATWERE  
MOGAKA (DECEASED)**

*(Being an Appeal from the Judgment of Hon. M.C. Nyigoi – PM dated and delivered on the 30th day of November 2022 in MC. ELC Case No. 6 of 2020 at Nyamira)*

**RULING**

1. This court delivered a judgment on June 19, 2023 dismissing the appeal from the judgment of the Honourable M.C Nyigoi – PM delivered on November 30, 2022 in Nyamira CMCC ELC No 6 of 2020. The result of the judgment of this court is that the respondent's title deed LR No North Mogirango/Mokomoni/293 will not be impeached since the appellants were unable to prove that the same was fraudulently acquired. Consequently, the appellants having been dissatisfied with the judgment of the lower court and the outcome of the appeal thereto have preferred an appeal to the Court of Appeal and have even filed a notice of appeal dated June 29, 2023.
2. In the meantime, they sought stay of execution of the decree of the trial magistrate's court on the grounds that: -



1. That pursuant to the said entry of judgment, the respondent is intended to levy execution against the appellant/applicant with a view to realizing and/or recovering the fruits of the judgment.
2. That the dismissal of the appeal gives effect to the orders issued in the judgment of the trial Magistrate Court of injunction, eviction and exhumation of the remains of Joshua Anarikowho is a son to the 2<sup>nd</sup> appellant which will render this appeal nugatory unless stay orders are issued.
3. That the appeal raised weighty issues of law which the appellants should be allowed to converse in the Court of Appeal, without the appeal being rendered nugatory, or a mere academic exercise and therefore should the orders sought in the application not granted the appeal will be rendered moot.
4. That if this honourable court does not stay the impugned judgment, the appellants will suffer irreparable damage and mental anguish thus the urgency.
5. That this application has been brought with reasonable promptitude, and without unnecessary delay and the applicants are in the process of getting the court's typed proceedings.
6. That the respondent would not suffer any prejudice if the orders sought herein are granted.

and in order to demonstrate good faith, the appellants have committed themselves to provide security. In opposition to the said application, the respondent filed her grounds of opposition dated July 5, 2023 as follows: -

1. The honourable court has no jurisdiction to hear and determine the instant application as same is *functus officio* having pronounced itself *vide* judgment dated and delivered on the June 19, 2023 while sitting on appeal.
2. The issues raised in the instant application can only be canvassed in the Court of Appeal particularly with appellant/applicants herein having lodged the notice of appeal dated June 29, 2023 although same not served on the respondent thus the court herein is bereft of jurisdiction to hear and determine the instant application.
3. Besides, the instant application is res-judicata as issues raised in the instant appeal particularly pertaining to stay of execution herein have been determined *vide* ruling dated and delivered on the February 28, 2023.
4. Besides, the instant application is an appeal in disguise which appeal has been determined and the only recourse if any, available to the appellants/applicants is to move the Court of Appeal appropriately. For clarity, the application has been lodged in a wrong forum. For clarity, the appellants/applicants are guilty of forum shopping.
5. In any event, the appeal herein is not an original suit to warrant the application and/or invocation of order 42 rule 6 of the *Civil Procedure Rules, 2010*. For clarity, order 42 rule 6 only applies to scenarios where the court from where the decree is issued or where the appeal is preferred to, hence the appellants/applicants having obtained orders of stay of execution in the instant appeal *vide* ruling dated February 28, 2023 of the decree at the trial court pending the hearing and determination of the instant appeal cannot partake of yet another stay orders in the instant court but in the Court of Appeal where the appeal has been preferred.



6. Consequently, the instant applicant is an abuse of the court process and thus intended to obstruct justice.
7. The honourable court is being asked to stay its own decision in an appeal contrary to the law where a party aggrieved by judgment ought to appeal to the court of appeal as the honourable court herein downed its tool upon delivery of judgment on the June 19, 2023. For clarity, the honourable court exhausted and/or spent its jurisdiction upon the delivery of the judgment on June 19, 2023.
8. At any rate, the appellants/applicants herein have not shown and/or established sufficient cause and/or basis, to warrant the various orders being sought, whatsoever and/or howsoever.
9. Besides, the instant application has been brought to court with unclean hands and hence same reeks of mala-fides. In any event, the appellants/applicants are devoid of candor and hence underserving of equitable discretion of the honorable court, whatsoever.
10. Be that as it may, the appellants/applicants have not shown and/or established any evidence of substantial loss, whatsoever and/or howsoever, to warrant granting the orders of stay of execution.
11. The instant application has been made and/or mounted with unreasonable delay. Consequently, the appellant/applicant is guilty of laches.

3. I have considered rival submissions.

Order 42 rule 6 of the [Civil Procedure Rules, 2010](#) specifies the circumstances under which the court may order stay of execution of a decree or order pending an appeal. It provides that an applicant must demonstrate the following: -

- a) Substantial loss may result to the applicant unless the order was made;
- b) The application was made without unreasonable delay; and
- c) Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.

4. Contrary to the argument advanced by the respondent, this provision is not restricted to a first appeal. It equally applies where there is a second appeal.

5. From the above provision, it is clear that the court must be satisfied that there is “sufficient cause” to grant a stay. Evidently, all the three (3) conditions above must be met simultaneously. I have not lost sight of the argument by the applicant that if stay is not granted, there is a likelihood that since the dismissal of the appeal will give effect to the execution of the orders issued in the judgment of the trial Magistrate Court of injunction, eviction and exhumation of the remains of Joshua Anariko this will render this appeal nugatory unless stay orders are issued.

6. We need to ask ourselves whether it would be useful to proceed with the appeal without preserving the subject matter of the same. It may turn out to be an academic exercise. This court has wide discretion to grant a stay of execution but of course it must be guided by the aforesaid principles of law. I therefore order that there be a stay of execution of the decree and judgment of the Honourable C.M Nyigei in Nyamira CMCC No 6 of 2020 dated November 30, 2022 together with all consequential orders arising therefrom on condition that the applicants deposit the sum of Kshs 30,000/= in court as security for



costs within the next 45 days. I further order that the record of appeal be served forthwith and the appeal be disposed of within the next 30 days. The costs of this application shall abide the outcome of this appeal.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF SEPTEMBER 2023.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of:-**

Court Assistant: Sibota

Appellant: Ms. Gogi holding brief for Mr. Bonuke

Respondents: Mr. Maroko holding brief for Mr. Mulisa

