



**Wambui v Wangari (Environment and Land Appeal E006 of 2023)  
[2023] KEELC 21419 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

**AK BOR, J**

**OCTOBER 30, 2023**

**BETWEEN**

**JANE NJERI WAMBUI ..... APPELLANT**

**AND**

**IRENE NYAWIRA WANGARI ..... RESPONDENT**

**RULING**

1. Through the application dated 5/7/2023, the Appellant sought orders to stay execution of ruling and order made by the Learned Magistrate on 4/4/2023 in Nanyuki CMCCC No. E041 of 2021 pending hearing of the appeal. Further, she sought a temporary injunction to restrain the Respondent or her agents from selling, subdividing, trespassing, demolishing, alienating or otherwise interfering with the land known as Narumoru/Narumoru Block 1/Ragati/2530 pending the hearing of the appeal.
2. The application was made on the grounds that after the Learned Magistrate gave his ruling, the Appellant sought stay from that court but the application was dismissed on 4/7/2023. Following that dismissal, the Respondent submitted an application for Land Control Board (LCB) consent for execution by the court. The Appellant was apprehensive that the Respondent may cause the suit land to be divided into two portions and sell the land which would occasion substantial loss and damage to the Appellant.
3. The Appellant indicated that she was ready to furnish such security as the court may order for the performance of such decree as may ultimately be binding on her.
4. The Appellant swore the supporting affidavit and deponed that the suit land which measures approximately 0.08 hectares could not legally and practically be subdivided into two equal portions without contravening the relevant planning laws. She relied on the report prepared by Homeland Valuers and urged that if the orders for stay were not granted, her appeal would be rendered nugatory. She annexed a copy of the ruling to her affidavit.



5. The Respondent urged in her replying affidavit that it had not been shown that the appeal had high chances of success. She averred that it was not in dispute that the suit land was jointly owned and registered in her name and the Appellant's. She added that the Appellant had been occupying and using the entire parcel of land for her own benefit and depriving her of the use of her share of the property which she claimed violated her constitutional right protected by Article 40 of *the Constitution*. She argued that the Appellant had not specified what loss she was likely to suffer and argued that the application was only filed to delay the partitioning of the suit property which would enable her use her share of the suit land.
6. The court directed parties to file written submissions. The Appellant submitted that the Respondent was keen to cause the subdivision of the suit land into two equal portions. The Appellant relied on order 42 rule 6 (1) of the *Civil Procedure Rules* in support of her application and submitted that the trial court had in effect given a final order in the dispute before the matter was heard on merit. Further, that there was no basis for the order which the court had given because no such order was sought in the pleadings. The Appellant submitted that the application was made without delay and that she was apprehensive that the Respondent may sell part of the suit land upon subdivision to third parties yet the surveyor's report indicates that a subdivision of the land would be untenable.
7. The Respondent submitted that the Appellant had not satisfied the court that she would suffer substantial loss if the court does not stay execution. She contended that the fact that the Appellant had been occupying and using the suit land for her own benefit and that she had set in motion the process of execution did not amount to substantial loss. The Respondent maintained that the Appellant had not demonstrated the loss she would suffer. She argued that the application ought to fail because the Appellant had not provided security.
8. The issue for determination is whether the court should stay execution of the orders made by the Learned Magistrate on 4/4/2023. From the plaint filed before the trial court, it is clear that the Appellant pleaded that she was jointly registered with the Respondent as co-proprietors of the suit land. She claimed that the Respondent had entered her portion of the land and was destroying the temporary structures on her portion with the intention of transferring the whole parcel of land to a third party. She sought a permanent injunction to restrain the Respondent from interfering with her ownership, use and possession of her portion of the suit land. In the defence filed in court by the Respondent, she denied entering the Appellant's portion of the suit land and expressed her desire to have the suit land partitioned so that both parties could have their own distinct portions.
9. Before the suit could be heard, the Respondent filed an application dated 10/1/2022 seeking to have the Appellant directed to execute forms for the application for LCB consent to facilitate the partitioning of the suit land into two equal portions to enable the Appellant and Respondent each have their own distinct portion. In default, the court was requested to direct the Executive Officer of the court to execute the forms for LCB consent and other documents to facilitate the partitioning of the suit land into two portions. The Learned Magistrate considered the application made under Section 98 of the *Civil Procedure Act* and found that the letter which the Respondent relied on did not amount to an order or decree of the court. The court nevertheless referred to Article 40 of *the Constitution* and found that the Respondent's right to property was curtailed by the agreement drafted by Mr. Kiget which was unfavorable to the Respondent. The court went further to rely on Article 159 and 1A of the *Civil Procedure Act* regarding the expeditious disposal of suits by the court without undue regard to procedural technicalities.
10. When dealing with an application for stay of execution under order 42 rule 6 of the *Civil Procedure Rules*, the court has to be satisfied that substantial loss may result to the Appellant if the order is not



made, the application was made without unreasonable delay and lastly, that such security as the court may order for the due performance of the decree that may ultimately be binding on the application has been given.

11. The court is satisfied that the application was made without delay and the Appellant has expressed willingness to furnish security for the decree or order that may ultimately be binding on her. The Appellant contends that she will suffer substantial loss if the Respondent proceeds to partition the suit land and sell it to a third party. The Appellant's main concern is that it is untenable to subdivide the suit land measuring 0.08 hectares and that the resultant plots would contravene the sizes prescribed by the planning laws. The court notes that the Respondent's submission that the Appellant has been using the entire parcel of land for her own benefit even though it is jointly owned with the Respondent was not controverted. The Respondent may alienate her portion of the suit land once the partition is completed.
12. The court grants stay of execution of the orders made by the Learned Magistrate on 4/4/2023 pending hearing of the appeal on condition that the Appellant deposits the sum of Kshs. 300,000/= to be held in a joint interest earning account in the names of the advocates for both parties within 14 days of the date of this ruling.

The costs of the application will abide the outcome of the appeal.

**DELIVERED VIRTUALLY AT NANYUKI THIS 30<sup>TH</sup> DAY OF OCTOBER 2023.**

**K. BOR**

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**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

