Kingoina (Suing as the Legal Representative of Jeremiah Kingoina Obego - Deceased) v Kingoina & 3 others (Environment & Land Case 457 of 2013) [2023] KEELC 20819 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20819 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 457 OF 2013

M SILA, J

OCTOBER 18, 2023

BETWEEN

ARUSHA KINGOINA (SUING AS THE LEGAL REPRESENTATIVE OF JEREMIAH KINGOINA OBEGO - DECEASED) .... PLAINTIFF

AND

PETER OKARI KINGOINA .... 1ST DEFENDANT

HARUN ONYIMBO KINGOINA .... 2ND DEFENDANT

GLADYS NYANSARORA ONUKOH .... 3RD DEFENDANT

KENNEDY ZACHARIA MAKORI .... 4TH DEFENDANT

RULING

1. Before me is an application dated 21 July 2023 filed by the unsuccessful plaintiff. He seeks orders of stay of execution of the judgment pending hearing and determination of an intended appeal to the Court of Appeal. The application is opposed.

2. To put matters into context, the applicant commenced this suit through a plaint filed on 15 November 2013 as legal representative of the estate of his deceased father, one Jeremiah. His father was polygamous and had two houses. Whereas he is from the first house, the 1st and 2nd defendants are his step-brothers from the second house. In his plaint, he pleaded that his late father was the registered proprietor of the land parcels Nyaribari Chache/B/B/Boburia/2901 and 5787. He averred that during his lifetime, his late father subdivided his parcels of land to his two wives, each having a homestead and farming on distinct portions of the two parcels of land. He pleaded that in 2008, he discovered that the 1st defendant had obtained registration of the land parcel No. 2901 and the 2nd defendant registered as proprietor of the land parcel No. 5787 which he later subdivided and sold some of the subdivisions to the 3rd, 4th and 5th defendants. He contended that he is entitled to half of each of the two parcels No.

2901 and No. 5787 and that he was in use of the same. He raised issue that the 1st and 2nd defendants had obtained registration of his father's estate without first going through succession. The case of the 1st and 2nd defendants was that their late father voluntarily transferred the parcel No. 2901 to the 1st defendant on 4 December 2002 before he died on 15 November 2008. They asserted that the plaintiff, and his brothers of the first house, had been allocated other land and had no share in the suit properties. They had a counterclaim where they complained that the plaintiff had invaded their land parcels No. 2901 and 10186 and wished to have him evicted. As for the 3rd and 4th defendants, they pleaded to be owners of the land parcels No. 5070 and 5069 respectively and fully in possession of the same. The plaintiff withdrew his case against the 5th defendant who owned the parcel No. 5778.

3. In my judgment, I found that the parcel No. 2901 had been transferred to the 1st defendant on 5 December 2002 when Jeremiah was alive and well, and it could not be that the land was transferred without going through the succession process. I found that the land was properly transferred to the 1st defendant and I proceeded to dismiss the plaintiff's case against the 1st defendant.

4. On the land owned by the 3rd and 4th defendants, that is parcel Nos. 5069 and 5070, what I found was that Jeremiah owned a land parcel No. 4738 which he subdivided in the year 1992 to bring forth three subdivisions, being the land parcels No. 5068, 5069 and 5070. In 1993, he transferred the land parcel No. 5069 to one Thomas Oriosa and the parcel No. 5070 to one Johnson Ongoto Mogesa. Thomas then sold this parcel No. 5069 to the 4th defendant in 2003. As for the parcel No. 5070, it remained in name of Johnson Ongoto until it was sold to the 3rd defendant in 2009 and she became registered as proprietor in 2010. I did not find anything to suggest that these transfers were in any way fraudulent, as Jeremiah had not complained about the same since he transferred his interest in 1993. I therefore dismissed the plaintiff's case against the 3rd and 4th defendants.

5. On the case against the 2nd defendant, I found that after subdividing the land parcel No. 4738, and having sold the subdivisions No. 5069 and 5070, Jeremiah retained the parcel No. 5068. He then proceeded to subdivide this land into several parcels, one of which was the parcel No. 5787. This land got registered in name of the 2nd defendant on 5 December 2002. The 2nd defendant then subdivided it into the parcels No. 10186 and 10187. He remained with the parcel No. 10186 and disposed the parcel No. 10187. The parcel No. 5787 thus ceased to exist and the owner of the parcel No. 10187 was never sued. I did not find any evidence that the parcel No. 5787 was wrongfully acquired or that it was illegally subdivided. I did not find any substance in the case of the plaintiff regarding this parcel No. 5787 or the subdivision No. 10186 that remained in name of the 2nd defendant. I thus dismissed the case of the plaintiff against the 2nd defendant. I did not find substance in the contention of fraud by the plaintiff.

6. The plaintiff had a second angle to his suit, that the registration of the defendants was in trust for him as he was in possession. I did not find any evidence to suggest a trust. As to possession, the plaintiff never provided any evidence of a surveyor or valuer to show exactly what he was in possession of. I certainly could not find any proof of possession regarding the parcels No. 5069 and 5070 which had permanent structures developed by the 3rd and 4th defendants. I found that if there was any possession, then it can only be within the land parcels No. 2901 and 10186 and I ordered him to give vacant possession within 30 days.

7. Aggrieved, the plaintiff filed a notice of appeal and has followed it up with this application for stay pending appeal. In this application, he specifically seeks orders of stay of execution of the order requiring him to vacate the land parcels No. 2901, 5069, 5070, 5778 and 10186. He is afraid that if stay is not granted, he may be evicted and this will cause him substantial loss. He annexed what he termed as "a bundle of photographs" which he alleged show his activities on these properties.

8. The 1st, 2nd and 4th defendants filed Grounds of Opposition. Inter alia they aver that the appeal has no chances of success and insist that the applicant should vacate the land parcels No. 2901 and 10186 as ordered. It is averred that in terms of Order 42 Rule 6 (2) (a) no substantial loss will be occasioned, and without prejudice, that the applicant ought to provide adequate security for the due performance of the decree. The 3rd defendant did not file anything to oppose the motion.

9. Mr. Wafula, learned counsel for the applicant, filed written submissions, whereas Mr. Bigogo, learned counsel for the 1st, 2nd and 4th defendants relied on the Grounds of Opposition as filed. I have considered all these before arriving at my decision.

10. This is an application for stay of execution pending appeal and I stand guided by Order 42 Rule 6 (2) of the *Civil Procedure Rules*, 2010, which provides as follows:-

> (2) No order for stay of execution shall be made under subrule (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 may ultimately be binding on him has been given by the applicant.

From the above, it will be noted that the court ought to consider three issues when addressing an application for stay of execution pending appeal. These are :-

> (i) That the application has been made without unreasonable delay;
>
> (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
>
> (iii) That there is provision of security as the court may order for the due performance of the decree.

11. I will be guided by the above principles in my assessment of this application.

12. Starting with delay, I do not think that the application has been filed after any unreasonable delay. The judgment was delivered on 29 June 2023 and this application was lodged on 24 July 2023. That dispenses of the first issue.

13. The second, and most important, is whether the applicant has demonstrated that he stands to suffer substantial loss if the order of stay is not made. Now, what this means is that the applicant needs to satisfy two points. First, he needs to actually demonstrate the loss that he stands to suffer if the decree is executed. Secondly, he needs to go further and establish that this loss is going to be substantial. In other words, mere loss is not sufficient to bar execution of the decree. It is almost always inevitable that a decree has consequences that will bring about some sort of loss to the person who has lost the suit and it must also be borne in mind that the decree holder has a right to enjoy the fruits of his judgment. That, I believe, is why the law sets the rather high threshold of 'substantial loss' rather than simple 'loss.' This is a high hurdle, and it therefore behoves the applicant to be very particular about the loss that he is bound to suffer, and he must show that it meets the threshold of substantial loss.

14. I venture to present the hypothesis that substantial loss can be demonstrated in at least two ways. The first is for the applicant to show that if stay is not granted, and he was to succeed on appeal, then his

success would be rendered worthless and all he will have is a paper judgment. In other words, whatever he is intended to enjoy in the judgment of the appellate court will have been vapourised, or its quality extensively compromised, if the decree is executed while the appeal is pending. A simple example can be demonstrated in a money decree. If the applicant shows that if he were to pay the money as ordered in the decree then he will never get it back, then clearly, he will have demonstrated that if he manages to overturn the judgment, it will be worthless, since he will have already made payment which will never be recovered. The second way of demonstrating substantial loss, is for the applicant to show that if the decree is executed and he succeeds on appeal, despite being able to receive the fruits of his judgment as pronounced on appeal, he will have suffered so substantially while awaiting that judgment, that on a balance, it is better not to have the decree executed while the appeal is pending. An example that flies off my mind is a judgment for eviction from a residential house where the applicant shows that he has no alternative accommodation, so that he will literally be rendered homeless and street bound for the duration of the appeal, which given the circumstances, it may not be humane to have him undergo. He may of course succeed on appeal and go back to the residence, but he will have suffered so much while the appeal is pending, that it is not fair for the court to risk him undergo such pain. In such cases, where there is assurance that the decree can still be performed if the appeal is lost, and there is security to safeguard any loss that may be visited upon the decree holder, then stay may be granted, mainly on some conditions. These are just but two examples and there can be a myriad of permutations depending on the circumstances of each case.

15. So, within the context of this case, has the applicant demonstrated what loss he stands to suffer if the decree is executed and has he also demonstrated that this loss is going to be substantial ? I am not persuaded from the material before me.

16. I have pored through the supporting affidavit to find out what loss the applicant has stated he will suffer if the decree is executed and I have found none. Other than merely making a deposition that he stands to be evicted and that he will not be able to cultivate crops, he has not stated what loss he stands to suffer if he is evicted or he no longer cultivates crops. Will it be a loss of income or will it be a loss of residence, or a loss of food ? It does not mean that in all evictions, a person stands to suffer substantial loss. One may very well have alternative accommodation or alternative sources of food, in which case, if ever there is loss, it cannot be said to amount to substantial loss. The applicant has not even pointed out where he lives or where he cultivates these alleged crops given that we have four properties in dispute. He has not, in his affidavit, stated in which plot his residence is, if any, and in which plot he is cultivating crops. It would probably have assisted him immensely if he had filed some sort of expert report, say from a surveyor or land valuer, to show what activities he has on the suit properties, but he has filed none. All he has presented are mere photographs of what he claims to be the land parcels No. 2901 and 10186. 17. The photographs show some houses and crops but he doesn't go further to elaborate whether these are his houses or crops. They could very well be the houses and crops of the defendants. It was the applicant's burden to be very clear on what is depicted in these photographs but he has not taken the trouble to elaborate them. Whatever the case, he has not given anything regarding the land parcels No. 5069 and 5070.

18. In the same way that he was vague while he conducted his suit, he is also being very vague within this application. This vagueness cannot be to his benefit but can only be to his detriment. It is not for a court to try and imagine the loss that an applicant is going to suffer; the burden is on the applicant to actually be very clear on the sort of loss that he stands to suffer and show that this loss is substantial enough so as to enable the court exercise its discretion in his favour.

19. For the above reasons, I am not persuaded that the applicant has demonstrated any substantial loss, if the decree is executed. Having failed this test, it is not necessary for me to make any order regarding

security as the applicant has failed in providing a key ingredient to support an application for stay pending appeal.

20. The result is that this application is dismissed with costs. The decree may be executed.

21. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 18 DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND

AT KISII