



Oganga & another v Ayienda & 3 others (Environment & Land Case 466 of 2015) [2023] KEELC 22221 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22221 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 466 OF 2015**

M SILA, J

DECEMBER 14, 2023

BETWEEN

EDWARD MAKORI OGANGA 1ST PLAINTIFF

STEPHEN AMOLMA MAGORO 2ND PLAINTIFF

AND

JOHNSON AYIENDA ALIAS ORANGI 1ST DEFENDANT

JACQUES ORANGI AYIENDA 2ND DEFENDANT

DONALD BOSIRE AYIENDA 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The application before me is that dated 21 June 2023 filed by the 2nd and 3rd defendants. The application is one brought under Order 42 Rule 6 of the *Civil Procedure Rules*, and seeks stay of execution pending hearing and determination of an appeal that the applicants have filed to the Court of Appeal. The application is opposed.
2. To put matters into context, the 1st defendant (now deceased) was father to the 2nd and 3rd defendants/ applicants. He owned the land parcel West Kitutu/Mwakibagendi/1395. He subdivided it into four portions being the parcels West Kitutu/Mwakibagendi/2858, 2859, 2860, and 2861. He transferred the parcel No. 2858 to the 1st plaintiff/respondent and the other three subdivisions to the 2nd plaintiff/respondent. The applicants, as sons of the 1st defendant, filed a suit before the Marani Land Disputes Tribunal, Case No. 38 of 2011, to contest the decision of their father. The tribunal held in their favour and ordered the cancellation of the titles No. 2858 – 2861. The respondents were however not parties before the said tribunal. They thus commenced this suit seeking a declaration that the decision of the tribunal which revoked their titles was null and void, and for a further declaration that they are



innocent purchasers of the subdivisions No. 2858 – 2861. On the other hand the applicants filed a counterclaim seeking a declaration that the 1st defendant held title in trust for them on the basis that they were his sons and that the sale of the land to the respondents was illegal. I heard the case and held for the respondents in a judgment delivered on 22 March 2023. I found that the Marani Land Disputes Tribunal did not have jurisdiction to hear the dispute or order cancellation of their titles and ordered the Land Registrar to reinstate their titles No. 2858 – 2861. I did not think that the applicants’ counterclaim was merited and I dismissed it with costs.

3. Aggrieved, the applicants lodged a notice of appeal on 29 March 2023 and subsequently filed their appeal before the Court of Appeal in Kisumu. Through this application, they now seek stay of execution of the decree, pending hearing of the appeal. The supporting affidavit is sworn by Jacques Orangi Ayienda, the 2nd defendant/applicant. He has deposed that he and the 3rd defendant are dissatisfied with the judgment and have lodged an appeal. He avers that the land in dispute is registered in name of the 1st defendant under the parcel No. 1395. He is apprehensive that the registration will revert to the plaintiffs/respondents and they can dispose or transfer the same to third parties. He believes that the only remedy is to stay execution of the judgment.
4. The respondents filed a replying affidavit sworn by Edward Makori Oganga, the 1st plaintiff. He avers that the application is devoid of merit. He does not think that the applicants have met the principles for getting stay pending appeal. He points out that the application was filed three months after the judgment. He adds that the applicants have not pointed out what substantial loss they are bound to suffer. He avers that they are in physical possession of the land and have been in possession throughout since purchase. He also avers that his counsel has never been served with a notice of appeal.
5. I invited counsel to file written submissions towards the application and I have seen the submissions filed on behalf of both the applicants and the respondents. In his submissions, Mr. Soire, learned counsel for the applicants called for *status quo* to be maintained. He acknowledged that the respondents are the ones in possession of the land and it would appear that all he was asking for was maintenance of the status quo regarding the title. For the respondents, Mr. Ochoki, learned counsel, submitted that it cannot be said that the action of implementing the decree is not reversible and that if the applicants succeed on appeal the records at the Lands office will be rectified. On security, he was of opinion that the applicants should be ordered to pay costs within 30 days of taxation.
6. I have considered all the above.
7. This is an application for stay pending appeal and I stand guided by the principles outlined in Order 42 Rule 6 (2) 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.
8. From the above, three issues emerge, being :-
 - (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.
9. Starting with delay, in our case, the judgment was delivered on 22 March 2023. This application was filed on 22 June 2023, exactly three months later. I have gone through the supporting affidavit and nowhere is it explained why the applicants had to wait for three months before lodging this application. In my opinion, three months is a considerable amount of time, and without there being an explanation, I hold the view that this application has been filed after unreasonable and unexplained delay. The application would fail on that ground alone.
10. Assuming I am wrong on the above, the next issue is to ask whether the applicants stand to suffer any substantial loss. The fear of the applicants is that if the register is reflected to be in accordance with the judgment, the respondents may deal with the land. I think that can be remedied by directing the applicants not to enter into any dealings after the register is rectified to their name. If I had been persuaded that the application has been filed timeously, this is the order that I would have made. However, I have held that the application was filed late, after unreasonable delay, and because of that, this application stands dismissed with costs.
11. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 14 DAY OF DECEMBER 2023.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

