



**Gitonga v Ndichu (Suing as Administrator of the Estate of the
late Francis Ndichu Thaiya) (Environment and Land Appeal
E004 of 2023) [2023] KEELC 22567 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E004 OF 2023
AK BOR, J
DECEMBER 7, 2023**

BETWEEN

CHARLES MATHENGI GITONGA APPELLANT

AND

**NANCY NDICHU (SUING AS ADMINISTRATOR OF THE ESTATE OF THE
LATE FRANCIS NDICHU THAIYA) RESPONDENT**

RULING

1. The Appellant brought the application dated 22/8/2023 seeking stay of execution of the judgment, decree and consequential orders made on 18/7/2023 in Nanyuki CMC ELC Case No 189 of 2018 in respect of the 3 acres of land which he claimed were clearly delineated by his existing boundaries, pending hearing of his application for stay and the appeal.
2. The application was made on the grounds that the Learned Magistrate delivered a judgment vide which the Appellant is to evicted from the land known as Euaso Nyiro /Suguroi Block VIII/461 and is to pay the Respondent general damages for trespass in the sum of Kshs 500,000/=. The Appellant claimed that his family had built up and lived on 3 acres of the suit land where they have buried two of their family members. He contended that the decree for his eviction side stepped the provisions of Section 152A, B, C and E of the *Land Act* and was therefore illegal. He averred that the eviction would result in substantial loss before his appeal was heard on merit.
3. The Appellant swore the supporting affidavit in which he deponed that he was the defendant in the suit before the Magistrates Court where he filed an Amended Defence and Counterclaim in which he averred that he took possession of 3 acres of the suit land pursuant to an agreement of sale dated 14/11/1995 and counterclaimed for an order of adverse possession in respect of the 3 acres that he had been residing on. He averred that the Respondent found him in possession and only got registered as proprietor in 2013 after he had been on the land for more than 13 years and therefore contended



that the issue of trespass could not arise. He added that he had filed an appeal and that granting the orders sought would not prejudice the Respondent because she does not reside on the suit land. He expressed his willingness to be bound by any order appropriate which would enable him exercise his right of appeal. He exhibited a copy of the judgment delivered by Hon. B. Mararo, Senior Principal Magistrate on 18/7/2023.

4. The court notes that the Appellant filed an Amended Memorandum of Appeal on 4/10/2023 to correct the name of the Respondent. The Respondent filed a replying affidavit on 3/10/2023 in which she averred that the application was premature because execution had not been initiated. She argued that the Appellant had his day in court and the case was fully heard and a decision was made by the court. She contended that the application was merely meant to deny her the fruits of her judgment and added that the continued occupation of her land by the Appellant was occasioning her loss of use of the land. She averred that she was not a party to the agreement alleged to have been entered into on 14/11/1995 and as such, the Appellant could not make a claim against her based on that agreement.
5. The court directed parties to file written submissions which it has considered. The Appellant submitted that from the proceedings and judgment of the trial court there was a general consensus that he was in occupation of the suit land. He faulted the trial court for not delineating the extent of the area he occupies when it made the general order for his eviction from the land. He argued that from the evidence tendered, the suit land was purchased in 2013 yet he had been in occupation since 1995. He claimed that eviction would result in substantial loss and damage to him and his family who have known the suit land as their home for 28 years. He went further to point out that they were sentimentally attached to the land because they have buried two of their loved ones on the suit land unlike the Respondent who had not taken possession of the land. The Appellant contended that his claim was only in respect of 3 acres and should the Respondent be minded to utilise her other land, she could do so. He submitted that the award for general damages for trespass had no basis because the Respondent found him in possession. He submitted that the trial court disregarded the mandatory provisions of Section 152 A, B, C and E of the Land Act. He maintained that the loss he would suffer could not be compensated by damages and that there was little or no prejudice that will be occasioned by an order of stay.
6. The Respondent submitted that the court had a discretion to grant stay of execution based on conditions including: - that the applicant had to show that he had an arguable appeal; that there was sufficient cause for the grant of stay; the applicant must demonstrate with cogent evidence that if stay orders were not granted he would suffer substantial loss; the application was filed without delay; and security for costs.
7. The Respondent submitted that the Appellant was required to prove the substantial loss he would suffer if the court did not grant stay and that he needed to adduce evidence to show what substantial loss would occur and that it was not a question of mere loss or inconvenience. The Respondent urged the court to take into consideration the conduct of the Appellant who is seeking discretionary orders and pointed out that from the judgment, the Appellant admitted that he did not meet the threshold for proof in a claim for adverse possession and that he also admitted that he had entered into an agreement with the original owner of the land to vacate the suit land.
8. Regarding the issue of an arguable appeal or sufficient cause being disclosed for the grant of stay orders, the Respondent submitted that had the Appellant submitted documentary evidence of the substantial loss he was likely to suffer, it would have demonstrated that he had an arguable appeal. The Respondent relied on Machira & Co Advocates v East African Standard [2002] eKLR in which the court observed that to be obsessed with the protection of the Appellant in total disregard of the successful party was contrary to sound principles for the exercise of judicial discretion. The court went on to state that the



ordinary principle was that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any state. The Respondent submitted that the appeal was based on quick sand and reiterated that parties were bound by their pleadings and the evidence they tendered in support of their case. She added that the Appellant had his day in court and judgment was entered after a full hearing. She submitted that the provisions of Section 152 of the *Land Act* had not been breached and that there was no evidence tendered to support the assertion made by the Appellant. The Respondent submitted that judgment having been entered in the case, the next step was execution proceedings which would entail application for warrant of eviction. She added that at the time this application was filed, the Respondent had not applied to execute the decree and the apprehension by the Appellant therefore had no basis.

9. Regarding security for costs, the Respondent submitted that the Appellant was ordered to pay general damages for trespass in the sum of Kshs 500,000/=, costs of the suit and added that there would definitely be costs for the appeal yet the Appellant had not demonstrated that he would be in a position to pay costs and damages if his appeal fails. She urged the court to dismiss the application which she contended had no merit.
10. The issue for determination is whether the court should stay execution of the decree emanating from the judgment of the Senior Principal Magistrate delivered on 18/7/2023. Under Order 42 Rule 6 (2) of the *Civil Procedure Rule*, for an order for stay of execution to be made the court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application was made without unreasonable delay. The other condition is that the applicant must give security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant.
11. The Appellant argued that the trial court disregarded the mandatory provisions of Section 152A, B, C and E of the *Land Act*. The legal framework set out in those sections does not apply to cases such as this one which went through trial and a determination on ownership of land was made on merit by a court of competent jurisdiction.
12. The Appellant claimed that he would suffer substantial loss because he and his family reside on 3 acres out of the suit property. He went on to elaborate that they had buried two members of their family on the suit property. The Respondent maintains that she has not commenced execution proceedings and that the application for stay was premature. The Appellant is not likely to suffer substantial loss since there is no evidence to show that execution proceedings had been commenced. The Appellant has not demonstrated that there is any threat of his eviction from the suit land. The Appellant has not offered any security for the due performance of such decree or order that may ultimately be binding on him.
13. On the other condition for grant of stay dealing with bringing the application without delay, the court notes that the judgment was delivered on 18/7/2023 and the application was filed on 31/8/2023. The application was made without unreasonable delay.
14. The court declines to grant the order sought in the application dated 22/8/2023. The costs of the application shall abide the outcome of the appeal.

DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF DECEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Mr. James Nderi for the Appellant

Ms. Stella Gakii- Court Assistant



No appearance for the Respondent

