



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. E032 OF 2021

JANE ACHIENG ODUNDO.....APPELLANT

VERSUS

STEVE HARRISON WEDA.....1ST RESPONDENT

ELIZABETH MUTILE MUNYAMBU.....2ND RESPONDENT

RULING

What is before Court for determination is the Notice of Motion application dated 23rd July, 2021 where the Appellant/Applicant seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to grant an order of stay of execution of the ruling and order issued against the Appellant/ Applicant, delivered by Honourable H. Onkwani, Principal Magistrate on the 14th July, 2021 pending the hearing and determination of this application inter-partes.

3. That this Honourable Court be pleased to grant an order of stay of execution of the ruling and order issued against the Appellant/ Applicant, delivered by Honourable H. Onkwani, Principal Magistrate on the 14th July, 2021 pending the hearing and determination of the Appeal filed herein.

4. Spent

5. That costs be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of JANE ACHIENG ODUNDO who deposes that on 14th July, 2021 Hon. H. Onkwani delivered her ruling and issued orders restraining her from accessing her parcel of land being Plot No. 500/272 Waswa Estate Lukenya Ranch, which is referred to by the Respondents as Mavoko Town 3/6252. Further, her land is on the same ground as Mavoko Town 3/6252. She claims she has been in possession of her plot since 1996. Further, she is dissatisfied with the said Ruling and filed a Memorandum of Appeal. She explains that there is no stay of execution granted and yet the trial Magistrate's orders amount to constructively evicting her from the land. Further, that the Respondents have never been in possession of the suit land and there is imminent danger they will take possession. She reiterates that the Appeal raises serious triable issues and unless the orders sought are granted, it will be rendered nugatory. Further, the Respondents stand to suffer no prejudice if the orders sought are granted.

The Respondents opposed the application by filing a replying affidavit sworn by the 2nd Respondent Steve Harrison Weda where he deposes that the said application is fatally defective, devoid of merit and an abuse of the court process. He contends that the Appellant is a total stranger to him in that the proceedings in the Magistrate's Court being ELC Civil Suit No. E 003 of 2021 filed by the 2nd Respondent and himself was against one Jane Masinde and not Jane Achieng Odundo. Further, he has never been engaged in any proceedings with the Appellant who has totally failed to demonstrate she has an arguable appeal. He contends that the Appellant has not offered any security for the due performance of the ultimate Decree and as such, the application must fail. Further, she has failed to demonstrate what substantial or irreparable loss she stands to suffer if stay of execution is not granted. He explains that the 2nd Respondent and himself are the registered proprietors of the suit land Mavoko Town Block 3/6252. Further, that the Appellant begun encroaching on the suit land in January, 2021, and being aware of the Court Order issued in MCELC No. E 003 of 2021 dated 20th January, 2021, ignored to obey it and proceeded to construct a permanent house so as to defeat their interest in the said suit land. He denies that orders issued by the Hon. H. Onkwani Principal Magistrate amount to eviction of the Appellant but the said orders are meant to preserve the suit land from further wastage as well as

interference by the Appellant pending the hearing including determination of the suit. Further, there is no nexus whatsoever between Plot No. 500/272 Waswa Estate Phase IV Lukenya Ranch sold to the Appellant and Land Reference Number Mavoko Town Block 3/6252. He reiterates that the Appellant has no demonstrable registrable and proprietorship interest in the parcel known as Mavoko Town Block 3/6252 and to grant a stay of the impugned Ruling would mean the Appellant continues to interfere with the suit land before the suit is heard and determined. Further, no amount of money would compensate the infringement of their rights to property lawfully owned. He sought for the Court to direct the Appellant to deposit Kshs. 1,500,000 in court as being the current market value of the plot.

The Appellant filed a further affidavit where she reiterated her averments above and avers she was the Defendant in Mavoko MCELC No. E 003 of 2021 and the Respondents' claim that she is not the one sued is misinformed as well as a non issue. Further, that even in the subordinate court, she defended the application appealed from in the same name and the Respondents never raised an issue therein. She insisted she has an arguable appeal and avers that the issue of depositing security does not arise in this case since the subject matter herein is not a liquidated claim. She stated that she has built a permanent house on the suit land which building was undergoing finishing when the injunctive orders herein were issued and there are still some costly and unused building materials on the ground which risks being stolen. She claimed that it is misleading for the Respondents to argue that she took possession of the suit land in 2021 yet by the time they purportedly bought the said land in October 2020, she had already dwelt thereon for 24 years. She explained that apart from the Allotment Letter issued to her in 1996, she had instituted another suit against the Respondents' predecessor in title back last year where even a Decree was issued in her favour, before the Respondents herein purportedly bought the suit land. Further, the photos used by the Respondents as annexure 3 of their Replying Affidavit were part of her evidence in the trial court.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 23rd July, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether the Appellant is entitled to orders of stay of execution pending appeal.

The Appellant in her submissions contends that she has an arguable appeal on record and it will be rendered nugatory if the stay is not granted. Further, that there is no need for her to furnish security for due performance of the Order. To buttress her averments, she has relied on the following decisions: *Nairobi Women's Hospital V Purity Kemunto (2018) eKLR* and *Sarah N. Sakwa V Elizabeth Wamwanyi t/a Namukhosi Ltd & Another (2017) eKLR*.

The Respondents in their submissions insist there is no arguable appeal since there are the owners of the suit land. Further, that no substantial loss will result to the Appellant if the orders of stay are not granted. They contend that the Appellant should furnish security if the stay of execution is granted. To support their arguments, they have relied on the following decisions: *James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR*; *James David Gathuri V Elaine Njeri & 8 Others (2020) eKLR*; *Charles Kariuki Njuri V Francis Kimaru Rwara (Suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased) (2020) eKLR* and *Patrick Kithaka Borici & Another V Shadrack Nyaga Njeru (2019) eKLR*.

Order 42 Rule 6(2) provides that:

“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.’

In the case of *Butt v Rent Restriction Tribunal [1982] KLR 417* the Court of Appeal provided thus:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.’

See also the case of *James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR*.

In the current scenario, the Appellant seeks a stay of execution from the injunctive orders granted by the lower court in respect to the suit land, which has been vehemently opposed by the Respondents. Both parties admit that the Appellant has been on the suit land with the Respondents contending that she trespassed thereon, constructed a permanent structure, yet the same has been registered in their names. From a perusal of the pleadings in the lower court including the annexures thereon, it has emerged that the Respondents were registered as owners of suit land since the year 2020. Further, there had been a dispute between the Appellant and the previous person who claimed the suit land one Christine Awino, which person had actually been sued by the Appellant and the Court had issued a Decree to that effect. The

Respondents insist the Appellant has not demonstrated the substantial loss she stands to suffer to warrant the orders of stay pending appeal. I note the Appellant brought the instant application without unreasonable delay and also filed an Appeal. Order 42 Rule 6 is clear that filing an Appeal alone does not operate as a stay of execution. Since it is the Appellant who has been on the suit land, constructed permanent structure thereon, holds Letters of Allotment to the land since 1996 and had a dispute with the person who sold the Land to the Respondents, I opine that these are triable issues which cannot be wished away and ought to have been taken into consideration by the lower court before granting orders restraining her from the suit land; I find that she is indeed the disadvantaged party herein. Since a right of Appeal is a Constitutional right of an aggrieved party and a right to fair hearing can only be guaranteed if stay pending appeal is granted to the Appellant, while associating myself with the decisions cited above and applying them to the circumstances at hand, I find that the Appellant has met the threshold for stay of execution. Further, since the dispute herein revolves around immovable property, I hold that it is unnecessary to make an order for security for the due performance of such decree or order.

It is against the foregoing that I find the Appellant's Notice of Motion dated the 23rd July, 2021 merited and will allow it. I will proceed to make the following final Orders:

i. An order of stay of execution of the ruling and order issued against the Appellant/Applicant, delivered by Honourable H. Onkwani, Principal Magistrate on the 14th July, 2021 be and is hereby granted, pending the hearing and determination of the Appeal filed herein.

ii. That costs of this application be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE