



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E119 OF 2021

BENJAMIN MULUKI.....1<sup>ST</sup> APPELLANT/APPLICANT

MWIKAMBA EDWARD ....2<sup>ND</sup> APPELLANT/APPLICANT

JOHN MEEME.....3<sup>RD</sup> APPELLANT/APPLICANT

VERSUS

ONESMUS KILONGI M'MAUTA..... RESPONDENT

RULING

1. The application before the court is the one dated 11.11.2021 seeking for a temporary injunction restraining the Sub-County surveyor – Igembe North from enforcing the orders issued pursuant to the ruling delivered in **Maua ELC No. 143 of 2015** on 27.10.2021 regarding **L.R No. Amwathi/Maua/268** and in the alternative an order for THE maintenance of the status quo prevailing currently on the suit land pending the hearing and determination of the appeal. The application is supported by the applicant's affidavit sworn on 11.11.2021.
2. The grounds are that the applicants are in occupation of the suit premises with various developments thereon; resurveying of the land was based on an incompetent registry index map as the final maps are yet to be supplied by the land registrar; there is likelihood of the destruction of the applicants' developments hence the need for preservation otherwise there will be prejudice to the applicants' appeal.
3. The respondent has opposed the notice of motion through a replying affidavit sworn on 8.12.2021.
4. It is averred the complete and finalized map for the area was duly produced as evidence and the applicants given an opportunity to cross-examine the Sub-County surveyor on 25.8.2021 hence the applicants' assertions that the registry index map is incomplete are untrue.
5. Secondly, it is averred the trial court relied on two surveyor reports dated 29.1.2016 and 28.8.2021 all which formed the same conclusion that the appellants had blocked the road of access.
6. Thirdly, it is averred the trial court visited the scene on 29.1.2016 and made observations and findings that the road of access had been blocked.
7. Fourthly, it is averred there is no iota of evidence that the consent was made by mistakes through fraud or is against public policy since the parties had willingly agreed to have a status report and the ruling adopted as the judgment of court.
8. For an applicant to be entitled to the grant of stay of execution pending appeal, he or she has to demonstrate there would be substantial loss and damage: that the application has been brought within reasonable time; that security is offered for the due performance of the decree should the appeal fail and that it is in the interest of justice that the orders be granted.
9. Expounding on the above principles, **Muriithi J in Obadiah Mugambi –vs- Joyce Ncori [2021] eKLR** held a party must demonstrate that he is likely to suffer substantial loss should the stay not be granted and a willingness to offer security must be made.
10. In **James Kamau & 42 others –vs- Leonid Limited [2021] eKLR** the court held it was incumbent upon an applicant to inform the court exactly what loss he stood to suffer if stay was not granted.
11. In this case, the applicants aver they are aggrieved by the manner in which the case was summarily determined without a full hearing and that if execution ensues, the substratum of the appeal would be affected hence the likelihood of grave injustice and prejudice to them.

12. On the other hand, the respondent avers the applicants were given sufficient time to call an independent surveyor to counter the two reports availed before the court but failed to comply with court directives on time or at all.

13. What is at stake is the access road allegedly blocked by the applicants. There appears to be dispute on whether it exists or not on the maps and on the ground; and if the maps relied upon were complete and or final as per the law.

14. In my considered view, the appeal appears to raise issues requiring the determination of the court and which in essence can only be determined if the property in dispute is preserved.

15. Consequently, my finding is that the application was brought within reasonable time and there is demonstration of substantial loss and lastly it is in the interest of justice that there be the maintenance of status quo subsisting at the time of filing of this application.

16. I order that the lower court file to be availed and the appeal be listed for hearing on priority basis.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

No appearance for parties

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**