



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC APPEAL NO.33 OF 2021

MWATHI MUTHAMI.....APPELLANT/APPLICANT

-VERSUS-

MBEERE MUTHAMI.....1ST RESPONDENT

JAMES MUSYOKA MATITI.....2ND RESPONDENT

RULING

1. The Appellant/Applicants Notice of Motion dated 10th May 2021 is brought under Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of any other law and it seeks the following orders:

I) Spent

II) That pending the hearing of this application interpartes, this Honourable Court be pleased to grant temporary stay of any further enforcement or execution of the decree of the court dated 23.7.2020 and all other consequential orders thereto to prevent defeat to the ends of justice.

III) That pending the hearing and determination of this appeal, this Honourable Court be pleased to confirm the orders granted in prayer number two(2) above to avoid rendering the appeal nugatory and the applicant's agitation for a full hearing in the matter in question.

IV) That the costs of this application be costs in the appeal or the cause.

2. The Application is supported by the affidavit of the applicant sworn on 10th May 2021, Supplementary Affidavit sworn on the 30th of September 2021 and a Further affidavit sworn on the 6th of October 2021. It is also based on the following grounds:

a) That the applicant was dissatisfied with the ruling of the trial court dated 21st April 2021 and has lodged an appeal simultaneously with the present application.

b) That the application in the lower court and the appeal before the court herein is about the applicant's agitation for a right to hear the case by the respondents against her, and the right to be heard in defence of the same.

c) That the respondents are spiritedly and speedily working in implementation of the decree of the court and the other related orders thereto, whereof, if the same are not stayed or stopped the appeal will be rendered nugatory, and if the latter happens, then, it may unlawfully justify the denial of the applicant's agitation for a right of a hearing.

d) That the applicant as such has a legitimate expectation that this appellate court in exercise of its wide discretion under Order 42 Rule 6 of the Civil Procedure Rules will do all that is necessary in the wider interests of justice to grant stay of the orders or decree in issue in order to allow a level and balanced field as between the parties before it determines the dispute.

e) That the respondents already have a decree in their favour and other enforcement orders, and the applicant's attempt to seek audience or right of hearing and stay of them were thwarted by the trial court in a manner that manifestly demonstrated unreasonable fetter of its wide discretion founded on misconception of the law and the facts.

f) That, as matters stand everything is in favour of the respondents and against the applicant in terms of the decree and the

enforcement orders from the lower court, so, unless this appellate court intervenes, the applicant is the only party that stands likely to suffer irreparably and more prejudice, and only *ex parte* orders can hold the balance of scale of justice both ways.

3. The background to the Appeal and the application is that in the original suit, Principal Magistrate's Court at Kyuso Environment and Land Case No. 14 of 2019 the Appellant was the Defendant while the Respondents were the Plaintiffs. Judgement in default of appearance and defence was entered against the Appellant and the suit proceeded undefended. The Respondents sought to sub-divide the suit Land Parcel No. Kitui/Kyuso B 1306 measuring 33.9 HA into 3 equal portions claiming that it was jointly owned by themselves and the Appellant who is the 1st Respondents co-wife in equal shares. The orders sought were granted by the Trial Magistrate the Hon. John Aringo in a judgment dated 23rd July 2020 which ordered as follows;

“The Defendant is hereby ordered to do and facilitate all that appertains to the subdivision of land parcel Kitui/Kyuso B 1306 measuring 33.9 HA into 3 portions for each of the registered owners with each co-proprietor getting a 1/3 of the total as set out in part “B” of the title deed. This must be done within 30 days of the judgment. In default the Executive Officer, Kyuso Law Courts do sign all the necessary documents and requisite papers to enable subdivision of the suit property and the registration of the respective parcels to the respective co-proprietors so that they may be issued with title deeds. The Defendant do pay costs of the suit”.

4. Subsequently the Appellant filed an application before the Trial Court dated 12th January 2021 seeking *inter alia*;

“The interlocutory judgement and final judgement entered on 23rd July 2020 be set aside and the Defendant be granted leave to defend the suit.

The annexed draft defence be deemed as dully filed and served upon payment of requisite court fees.”

5. In a ruling dated 21st April 2021, the trial court found that the defendant had not made out a sufficient case on merits to justify setting aside of the default judgement. The application was thus dismissed with costs. It is this ruling dated 21st April 2021 that forms the basis of this appeal. At the time of filing the Memorandum of Appeal the Appellant filed the Notice of Motion dated 10th May 2021 seeking stay of execution of the decree pending the hearing and determination of this Appeal.

6. When the Application came up for *inter partes* hearing on the 16th of November 2021, parties agreed to maintain the status quo pending the hearing and determination of the application, status quo being that the Appellant/Applicant should not be evicted from the suit premises.

The Appellant/Applicant's Case

7. The Applicant claims that enforcement of the Decree issued by the Trial Court was carried out during the Christmas to New Year period without any notice to her and to her detriment.

8. She stated that she was jointly registered together with the Respondents as owners of the suit property **land parcel Kitui/Kyuso B 1306** and the same was done during the adjudication process for the reason that the parties had not agreed on ownership and were left with the option of resolving the matter amicably. She claims that their clansmen assisted them by drawing a sketch map of how the families would be settled. It is her averment that sometime in the year 2018, it was discovered that the area where the land in question was located had some limestone deposits and as a result, the Respondents began agitating that the land be divided into 3 equal portions contrary to the clansmen decision. It is stated that the Respondents allegedly wanted to displace her and her children from the area they occupy.

9. According to the Applicant, she was not served with Summons to Enter Appearance before the Trial Court and the events around the case went on without her knowledge until the time she saw surveyors and police on the eve of Christmas 24th December 2020 coming to subdivide the land.

10. The Applicant further stated that the Respondents caused subdivision of the mother title in the manner that they wanted in order to sell their share to mining companies without any care for her rights and interests. She claims that as a result of the subdivision, some of her family members will be displaced or evicted from their homes.

11. She stated that as per the sketch map, she resides and occupies part A of the Land but as per the subdivision that was done, she is supposed to shift and relocate to part C, which amounts to displacing her from the portion that she has occupied for a long time. She states that the Respondents have allowed the miners to move in tractors and earth movers to commence excavation of the mineral rich rocks and earth and as such she and members of her family are being forced to move out and relocate which is inhuman and offensive to dignity.

12. Further, she avers that the act of excavating the rocks has a very big environmental impact and effect to them who live on the land.

13. The Applicant also notes that the Respondents have always been silent about the fact that they have already sold the part of the land that is mineral rich to the miners in total disregard of her rights to benefit or gain from the same and the manner in which they allocated themselves the mineral rich portion was inequitable and against the tenets of social justice and fairness.

14. The Applicant further stated that she was served with an application dated 4th October 2021 filed before the Trial court seeking to evict her and her family members and that she had been apprehensive about this all along.

1st and 2nd Respondent's Case

15. The 1st Respondent swore a replying affidavit on her own behalf and on behalf of the 2nd Respondent claiming that the three parties herein have equal rights over the suit property **land parcel Kitui/Kyuso B 1306** and the same was properly divided into three equal portions for each of the respective legal owners as per the entries on the Title Deed and Certificate of official search which show joint ownership.

16. She states that the Applicant was served with summons in ELC Case No. 14 of 2019 Kyuso Law Courts but she failed to enter appearance and file a defence. That the Applicant was aware of the process culminating into sub-division of the title in question but declined to participate because she wanted the biggest share of the suit land.

17. The 1st Respondent confirmed that the title deed has already mutated after sub-division from No.Kitui/Kyuso/B/1306 to No. Kitui/Kyuso B/1797,1798 and 1799. It is her averment that the decree herein has been executed and title deeds issued in the names of the parties thus stay of execution would be in vain if granted as there is nothing to hold in abeyance. The 1st Respondent further stated that they have sold their portions of the suit land to a third party but have left the Applicant's portion intact.

18. She stated that if the Applicant was aggrieved during the adjudication of the suit land then she should have raised an objection at that stage and that the allegation that the clan had to resolve the issue of subdivision of the property is unfounded and does not have any legal backing.

19. The Respondents further stated that an initiative to have the land sub-divided into three portions and summons was issued through Assistant Chief Kimangao sub-location to all the parties but the Applicant declined to facilitate the same. The Respondents denied that they caused sub-division of the suit property because they intended to sell it to the mining companies without care and interest of the Appellant.

20. The 1st Respondent states that they have no claim in the suit property, having sold their portion to a third party therefore their property rights have been extinguished. She states that the issue of excavation of rocks and environment impact effects should be directed to the relevant authority.

21. According to the Respondent, the Applicant has not shown which orders are to be conserved if the property had been subdivided long before it was presented to court and no follow-up has been done since 2016. The application is therefore not deserving of the interlocutory orders sought therein.

The Applicant's written submissions

22. The Applicant filed written submissions accompanied by authorities in support. The Applicant's counsel submitted on three issues namely substantial loss, lack of unreasonable delay, security as the court may order for due performance of the decree or order.

23. On substantial loss, the applicant submitted that failure of the court to issue stay orders will deny her right of hearing, because the appeal will be rendered nugatory and cited the case of **Savings & Loan Kenya Ltd v. Odongo (1987) KLR p294**. According to the Applicant, the miners have already moved into action with their excavators and are threatening to overrun the applicant's homesteads and they would have to construct new homes which is substantial loss.

24. Regarding lack of unreasonable delay, the applicant submitted that she lodged the appeal immediately and at the same time she lodged the application under consideration.

25. As to security, the Applicant submits that the orders that the court may make are for security for the due performance of such decree or order as may ultimately be binding on him. The orders herein involve subdivision of the land and eviction and performance of the decree will involve yielding vacant possession or voluntary relocation. The Applicant claims that performance of the decree herein has no monetary element save possibly for security for costs which they claim ought to be minimal.

26. They finally submitted the authorities of Beatrice Ndunguri Mwai & Another v. Sicily Wawira Titus & another (2020) eKLR, Daniel Tokali Mwamuye v Abdi Hassan Grue & 7 others (2018) eKLR, Paul Kamura Kirunge v. John Peter Ng'ang'a (2019) eKLR and Patrick Kithaka Borici & another v. Shadrack Nyaga Njeru (2019) eKLR.

The Respondents' Submissions

27. The Respondents submitted that there is no Decree to be stayed pending appeal as the Decree has already been executed and the property sold to third parties.

28. They submitted that the Applicant has not demonstrated which orders are to be stayed and if it is actually the judgment then it is done out of time and no leave was sought.

29. Further they submitted that the Applicant has not shown that she will suffer substantial loss if the application is not granted. The Respondent has also called on the court to seek to enforce the overriding objective of the court which is to ensure that in executing one party's right should not defeat or derogate the right of the other.

30. The Respondents relied on the following cases: Civil suit No.22 of 2015 in the High Court of Kenya at Eldoret, Civil appeal no. 20 of 2020 in the High Court of Kenya at Kakamega and Civil Appeal Application E038 of 2021 in the High Court of Kenya at Meru.

Analysis and Determination

31. I have considered the application herein, supporting affidavits, replying affidavits, submissions and authorities in support. The Application is brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules 2010 which deals with stay of execution pending Appeal. It provides that,

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”,

(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.

33. An applicant for stay of execution of decree or order pending appeal, is under obligation to satisfy the conditions set out in the above Rule 6(2) of Order 42 aforementioned, namely:

“[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay;

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.”

34. Further, the Court of Appeal in **Butt vs. Rent Restriction Tribunal [1979] Eklr** made pronouncements on what the court takes into account when considering the grounds for granting or refusing to grant stay pending appeal. The Court considers the following:

a) *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;*

b) *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 the appeal court reverse the judge’s discretion;*

c) *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; and*

d) *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

35. Will the Applicant suffer substantial loss unless the order is made?The Court observed as follows concerning what substantial loss is in the case of **James Wangalwa & Another vs. Agnes NaliakaCheseto [2012] eKLR**

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

36. In the present case the Applicant has stated that the Respondents subdivided the suit land in such a way that the land she occupies does not form a part of the portion that was allocated to her. She thus claims that if execution proceeds she stands to be evicted together with her family from the said land. According to her such eviction will render her and her family homeless and render the appeal nugatory. The Applicant has further shown photographs of tractors and earthmovers which are ready to commence excavation of the land in dispute.

37. It is further observed that the Respondents have confirmed that the decree has been substantially executed to the extent that the land was subdivided as directed by the trial court and title deeds issued for the resultant portions with the Appellants title deed pending collection from the land’s office. The Respondents claim that they transferred their portions to third parties and they no longer have any interests in the land.

38. The purpose of stay orders pending appeal is to preserve the subject matter of the appeal so as to not render it nugatory. This position was found by the court in **RWW vs. EKW [2019] eKLR**, where the court stated the purpose of stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

39. The court is of the view that the Applicant will suffer substantial loss if there is further execution of the decree of the trial court. Removal of the Applicant from the portion of land she occupies which she claims was allocated to the Respondents and which they have already sold, this in my view on its own may not amount to substantial loss since the same was carried out in execution of a lawful decree as found in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto (supra)**. However, the same may completely change the subject matter of the appeal and the appeal is likely to be rendered nugatory. I find that it is in the interest of justice that the remaining subject matter of the appeal be preserved and Applicant be allowed to remain in the land she occupies as she pursues her right of appeal.

40. The 2nd condition to be met is whether the application has been made without unreasonable delay. What amounts unreasonable delay is dependent on the surrounding circumstances of each case. In this case judgement was entered on 23rd July 2020. Execution commenced in December 2020 which is the time the Applicant alleges to have become aware of the suit. The application to set aside judgement was filed on 14th January 2021 and the ruling dismissing the application to set aside judgement was made on 21st April 2021. The Memorandum of Appeal and the present application were filed on 17th May 2021. I find that the period taken to file the application herein cannot be said to be unreasonable.

41. The third condition to be met is what payment of security for due performance of the decree can be imposed. With regard to security, it was said in **Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, that:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.”

42. In **Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR**, the court stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

43. Under Order 42 Rule 6 the security envisaged is for the due performance of such decree or order as may ultimately be binding on the Applicant. The decree in this appeal involves subdivision of the suit land into three portions, registration of the portions in the respective parties' names, issuance of titles and possession of the individual portions by the parties. The only part of execution that remains is the removal of the Applicant from the portion she occupies to the portion allocated to her. The question to be addressed is whether the applicant will vacate the suit premises in the event that her appeal is not successful and what security is appropriate for due performance of her obligation under the decree.

44. As stated earlier, the purpose of stay orders pending appeal is to preserve the subject matter of the appeal so as to not render it nugatory. I have considered that an order of stay of execution is discretionary. I have further considered the purpose of preserving what is left of the subject matter of the suit herein pending hearing of the appeal and considering that the suit may involve third parties who have acquired interests in the suit land. I conclude that an order that is most appropriate in the circumstances of this case to preserve the suit land as the appeal is heard that the status quo prevailing at the moment remain in force pending hearing and final determination of the Appeal herein.

45. The Court in the **High Court of Kenya at Mombasa Civil Appeal 129 of 2020 Classic Building Works Limited v Pansons Construction Co. Limited [2021] Eklr** granted the Applicant status quo pending appeal and pronounced itself as hereunder:

*“Having considered all the pleadings and written submissions by the parties, the only issue for determination arising from the application is whether status quo can be maintained pending the hearing and determination of the Appeal against the Ruling of Hon. E. Makori delivered on 10th December, 2020 In the case of **Ujagar Singh vs Runda Coffee Estates Limited [1966] EA 263**, the court therein invoked its jurisdiction and ordered for the preservation of the status quo pending the hearing and determination of the appeal.*

46. In the case of Vishram **Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that;

*“To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions.*

Arising from the above findings of the Court the following orders are hereby made:

- A) The status quo pertaining to the suit property be maintained pending hearing and final determination of the appeal herein. The current status quo being that the Applicant should not be evicted from the portion of the suit property she occupies.
- B) The above order is issued on condition that the Applicant deposits as security with the Court the sum of Shillings Two Hundred Thousand Only (Kshs 200,000/=) within 30 days from the date hereof failure to which the orders herein will automatically lapse.
- C) The Appellant is hereby directed to file a record of appeal in accordance with Order 42 Rule 13 of the Civil Procedure Rules within 21 days from the date hereof.
- D) The Appeal will be mentioned on 17th March 2022 for further directions on the hearing of the appeal.

DELIVERED, DATED AND SIGNED AT KITUI THIS 15TH DAY OF FEBRUARY, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

C. Nzioka.....Court Assistant

Kilonzi Advocate.....for the Appellant/Applicant

Mbaluka Advocate.....for the Respondent