



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NANYUKI

ELC APPEAL NO. 5 OF 2021

SABASKY MITHAMO.....1ST APPELLANT

PAUL GITARI.....2ND APPELLANT

ISAAC KARONJI.....3RD APPELLANT

MARTHA MUTHONI.....4TH APPELLANT

VERSUS

STEPHEN MUKONO MAMBO.....1ST RESPONDENT

PETER KIHANDO.....2ND RESPONDENT

JEREMIAH MURIITHI.....3RD RESPONDENT

SAITA KITONGA.....4TH RESPONDENT

(SUED ON BEHALF OF NGARE NDARE WATER PROJECT)

RULING

The Appellants brought the application dated 29/11/2021 seeking to stay the execution of the judgement of the Honourable Mr. V. M. Masivo, Resident Magistrate in **Nanyuki CMCCC No. 36 of 2019** pending hearing of their appeal. In the alternative, they seek to have the *status quo* which was prevailing at the time when they filed the appeal maintained to the effect that the 1st Respondent remains unconnected with water from the Ngare Ndare Water Project.

The application was made on the grounds that in his judgement, the Learned Magistrate directed that the 1st Respondent was to be connected with water on plot number 899 which the Appellants contend belongs to Silas Mburugu Mucena and not the 1st Respondent. The Appellants urged that if the orders for stay were not granted and the 1st Respondent connected the water to his plot the appeal would be rendered nugatory.

The application was supported by the Affidavit of Mercy Kaume, counsel for the Appellants who attached copies of the judgment and the titles for plot numbers 899 and 889 to show that these plots are owned by different people and not the 1st Respondent. She averred that the Appellants' contention before the trial court was that the 1st Respondent failed to prove ownership of plot number 899 to justify being connected with water from the project. She stated that the 1st Respondent was preparing to connect water to the disputed plot which would be to the detriment of the Appellants and the other members of the water project. Further, she averred that the project constitution stipulated that for one to be connected with water they had to prove that they owned the plot where the water was to be connected. She deponed that the 1st Respondent colluded with some of the defendants in the suit who gave evidence in his favour yet the water project belonged to the members and not those defendants. She attached some pages of the project constitution to her affidavit and an illegible copy of the impugned judgement.

Stephen Mukono Mambo, the 1st Respondent swore the Replying Affidavit in opposition to the stay application. He averred that the Appellants had made a similar application which was dismissed by the Learned Magistrate. He deponed that the decree from the Magistrate's court had been complied with and that water had already been connected to his plot number 894 and that there was therefore nothing to stay. He argued that the Appellants had previously made a similar application which the Learned Magistrate dismissed and urged this court to also

dismiss the instant application.

Parties made oral submissions. The Appellants argued that to get water connected to a member's plot, the Water Project constitution stipulated that one had to be a landowner and that the committee had to approve the connection. Counsel for the Appellants maintained that the judgement delivered by the Learned Magistrate had not yet been executed. She pointed out that plaint gave the parcel number as 899 which land does not belong to the Plaintiff. She mentioned that the 1st Respondent had already been connected with water from the project to another plot.

The 1st Respondent's counsel submitted that the Appellants' Advocate was not properly on record because she did not seek the court's leave to take over conduct of the matter at the appeal stage as enjoined by Order 9 Rule 9 of the civil Procedure Rules. He stated that the decree had been executed and water connected to the 1st Respondent's plot number 894. He stated that the 2nd to 4th Respondents were officials of the water project and were the ones who connected water to the 1st Respondent's property.

Ms Kaume Advocate contended that Order 9 Rule 9 of the Civil Procedure Rules did not apply to their case since her firm came on record at the appeal stage. She urged that the crux of the appeal was the Learned Magistrate's order for water to be connected to plot number 899. She referred the court to the 1st Respondent's statement to the effect that water had been connected to plot number 894 and faulted the 1st Respondent for not stating who connected water to plot number 894.

A party who wishes to change his advocate after judgment is enjoined by Order 9 Rule 9 of the Civil Procedure Rules to obtain an order of the court to effect the change by either through making an application and giving notice to all parties or filing a consent between his outgoing advocate and the incoming advocate. The court notes that the Memorandum of Appeal was drawn and filed by Goko Gichuhi & Co Advocates who presumably represented the Appellants at the trial before the judgment was rendered by the Learned Magistrate. M.G. Kaume & Company Advocates filed their Notice of Change of Advocates on 25/11/2021. In this court's view, the 1st Respondent's contention that M.G. Kaume & Company Advocates is not properly on record is misplaced for Order 9 Rule 9 does not expressly state that it applies to appeals.

An applicant seeking stay of execution is enjoined by Order 42 Rule 6 (2) of the Civil Procedure Rules to satisfy the court that substantial loss may result to him if the order for stay is not made and that he has made the application timeously. Such applicant must give such security as the court may order for the performance of the decree which may ultimately be binding upon him.

The dispute revolves around the connection of water from the project to plot number 899 which was the subject matter of the suit before the Magistrate's court. It has not been shown what irreparable loss the Appellants stand to suffer if the 1st Respondent connects water to that plot. The 1st Respondent contended that following the judgement of the Learned Magistrate, water had been connected to his plot whose number he gave as plot no. 894. This plot was not the subject matter of the suit and is not the subject of this appeal.

The court is not persuaded that the appeal will be rendered nugatory if an order for stay of execution of the judgment of the Learned Magistrate is not made. If the appeal succeeds, the water can be disconnected. The water may also serve the actual owner of the disputed plot.

The court declines to grant the orders sought in the application dated 29/11/2021. The 1st Respondent is awarded the costs of the application.

DELIVERED VIRTUALLY AT NANYUKI THIS 14TH DAY OF FEBRUARY, 2022

K. BOR

JUDGE

In the presence of: -

Mr. William Bwonwong'a for the 1st Respondent

Mr. W. Bwonwong'a holding brief for Mr. Wanjohi for the 2nd to 4th Respondents

Ms. Stella Gakii- Court Assistant

No appearance for the Appellants