



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 90 OF 2021

ELIZABETH KATHAMBI1ST APPELLANT

SILAS MWANGI 2ND APPELLANT

DESDERIO MURIUNGI3RD APPELLANT

PETER MWITIA4TH APPELLANT

MORRIS MURANGIRI5TH APPELLANT

VERSUS

JOSEPH KINYUA1ST RESPONDENT

M'ARIMI MAGIRI 2ND RESPONDENT

RULING

1. By an application dated 5.10.2021, the appellant seeks for stay of execution of the lower court decree following the judgment delivered on 2.2.2018 pending the hearing of this appeal. The motion is supported by a sworn affidavit of Silas Mwangi sworn on 5.10.2021.
2. The reasons given implementing the decree will involve interference with boundaries and beacons fixed in 1977 and render the appeal nugatory hence the need to preserve the status on the ground.
2. Further, it is averred there will be substantial loss and damage if the decree was to be implemented.
4. The appellants aver they were denied an opportunity to participate in the lower court suit hence the decree was made ex-parte and could not therefore demonstrate where their house, beacons and permanent developments were even though the surveyor's report was made. They have attached as **SM "2"** indicates as such.
5. Further, the appellants aver that the implementation of the decree shall involve the shifting of or changes of the existing boundaries of the three parcels of land and beacons hence destroying crucial evidence to be relied upon if the appeal was to be successful.
6. Additionally, the appellants aver developments on the subject land has been carried out for over 30 years on **Land No. Abothuguchi/Igane/1044**.
7. In a further supporting affidavit sworn by Silas Mwangi on 22.11.2021, the appellants averred their request for stay in the lower court was declined, they are currently in occupation of the suit land, service of summons was disposed, they could not dispute the surveyor's report since they did not have an opportunity to do so and that there was no evidence of encroachment on the respondents' **Parcel No's 1042 and 1043**.
8. The respondents have opposed the application through a replying affidavit sworn by Joseph Kinyua on 9.11.2011 on the basis that similar orders were sought in the lower court, the orders sought will infringe on the respondents rights, the appeal was against a ruling and not the judgment; the application raises new issues not the subject of the ruling in the lower court; the surveyor's report does not touch on the area encroached; the appellants attended the surveyor's visit on 21.1.2019 and raised no objection since in 1978, their late father had raised similar issues which were determined leading to the land registrar's report in 2004 whereof the appellants' father filed **Civil Suit No. 1732 of**

2004, and later **Meru CMCC No. 276 of 2012** was filed and later transferred to Githongo Law Courts and summons were duly re-served again; the report by the land surveyor of 21.1.2019 has never been disputed, the delay, laxity and lethargy of the appellants between 2017 and 2021 has not been explained hence the application was a delaying tactic given his age medical condition and lastly that if the court were to consider any stay, it should be conditional/monetary stay.

9. With leave of court, parties filed written submissions dated 10.12.2021 and 24.1.2022.

10. The appellants rely on **Bernard Mugo & 8 others –vs- Kagaari South Farmers Co-op Society Ltd & 4 others [2016]**. the 1st respondent submitted that the appellants had failed to meet the threshold of a stay of execution pending appeal under **Order 22** since they had no arguable appeal and the defence raises no triable issues.

11. For an appellant to be entitled to grant of stay of execution under **Order 42 Rule 6 of the Civil Procedure Rules**, it must demonstrate substantial loss, that the application has been made without inordinate delay that there is an offer for security for the due execution of the decree and lastly that it was in the interest of justice to grant the orders sought.

12. In **James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2012] eKLR**, the court held that execution was a lawful process and once put into motion by itself cannot amount to substantial loss.

13. A party alleging substantial loss must demonstrate the same with cogent and sufficient evidence. It is not enough to allege that there will be substantial loss. Material must therefore be placed before the court given that the successful litigant has a right to enjoy the fruits of its judgment whereas on the other hand, a losing litigant has a constitutional right to appeal. See **Partreitz Maternity –vs- James Kahenya Kobia Civil Appeal No. 63 of 1997**.

14. What the appellants complain is that should be implementation of the decree happen, the appeal herein shall be rendered nugatory and substantial changes would occur on the suit land as to adjustment of boundaries and beacons.

15. In this appeal, the appellants were operating against the ruling delivered on 26.7.2021. The 1st respondent in his replying affidavit has stated the judgment was rendered in this matter. So, there is a regular decree of the trial court which it is not clear if the appellants have appealed against it.

16. There is no indication if there has been any threatened execution of the decree. The onus was on the appellants to demonstrate there is imminent danger of substantial loss. The order appealed against is not by itself a decree for execution.

17. As regards delay, the order was made on 20.7.2021 and the appeal filed on 3.8.2021, whereas this application was filed on 6.10.2021. The deal is said to have been occasioned since similar application was filed before the trial court. My finding is that the delay of 3 months is not inordinate and has been sufficiently explained.

18. Turning to the issue of security, the appellants have not made any offer for security for the due performance of the decree should the appeal not succeed.

19. In **Gianfranco Manenti & another –vs- Africa Merchant Assurance Co. Ltd [2019] eKLR**, the court held that the purpose of security is to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals and that the issue of security was not a matter of willingness of a party but for the court to determine.

20. The respondents have explained the history of this matter and how there have been several efforts to resolve the issue both in court and outside court over the alleged encroachment and reports to that effect by the land surveyor stretching from 1979 and 2004, which reports have been conclusive on the alleged encroachment.

21. The appellants have not stated what they are willing to offer as security to guarantee the due performance of the decree. In absence of that, I find the application lacking merits.

22. The court is also expected to look at **Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution**, on the element of interest of justice.

23. In this application, the court on 30.11.2021 admitted the appeal for hearing and made an order for the record of appeal to be filed within 60 days from that day following the delivery of the lower court file on 15.11.2021. To date, the appellants have not bothered to comply with those orders in order to fast track the hearing of the appeal.

24. Similarly, when this application was filed, there was no request for stay of lower court proceedings. Instead, the matter proceeded for hearing and a decree has been issued which the appellants have not challenged by way of an appeal.

25. In my view therefore and under the circumstances, it will not be in the interest of justice to issue the order sought. Consequently, I find the application dated 5.10.2021 lacking merits. The same is dismissed with costs.

26. The appellants to comply with the orders made on 3.11.2021 within 21 days from the date hereof failure of which the appeal shall stand dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF MARCH, 2022

In presence of:

Miss Atieno for appellant

HON. C.K. NZILI

ELC JUDGE