



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC APPEAL NO. 1 OF 2021**

**JOHN MUGO.....1<sup>ST</sup> APPELLANT/APPLICANT**

**SAMUEL KARIUKI MUGO.....2<sup>ND</sup> APPELLANT/APPLICANY**

**VERSUS**

**BENSON NYAGA MUGO.....RESPONDENT**

**RULING**

1. Before the court is a notice of motion filed on 29.1.2021 and dated 28.1.2021. The application is filed by the Applicants and is expressed to be brought under Order 42 Rule (4) and (6), Order 43 Rule 1(d), 2,3 of the Civil Procedure Rules 2010, Section 3, 3A and 75 of the Civil Provisions Act and all other enabling provisions of the Law and the Constitution of Kenya.

**APPLICATION**

2. The Applicants are **JOHN MUGO & SAMUEL KARIUKI MUGO** the appellants in the appeal while the Respondent is **BENSON NYAGA MUGO** also the respondent in the appeal. The motion came with three (3) prayers but prayer 1 is moot now. The prayers for consideration are therefore one (1) – prayer 3 – and they are as follows:

Prayer 3: THAT the Honourable be pleased to additionally and/or in the alternative grant an order of maintenance of status quo as it is, such that no transfer, registration, charge or any other process shall be registered against L.R NO. MBEERE/MBITA/2656 pending the hearing and determination of the above appeal.

3. The application is anchored on grounds as set out in the supporting affidavit. Which affidavit is sworn by the two applicants and dated 28.1.2021. They aver interalia, that judgment in the suit was delivered on 14.1.2021, and that they filed the present appeal against that judgment. It is their prayer that the court issues stay of execution pending hearing and determination of the appeal to preserve the suit property which they claim to have resided on for over 18 years. They depose that if the orders sought are not granted they are likely to be evicted together with their families from the suit property and will suffer great injustice and irreparable damage before the appeal is dispensed with.

4. The application is said to have been brought without inordinate delay and that it's in the interest of justice to grant it pending the appeal. It is averred that this court is one of equity and justice and it has inherent powers to grant the orders sought being that the applicants have a prima facie case. The applicant further avers that the appeal has triable issues and grounds that merit judicial consideration. It is their contention that the appeal may be overtaken by events if stay of execution is not granted.

5. The respondent opposed the application via a replying affidavit dated 28.5.2021 and sworn by Benson Nyaga Mugo, the respondent. The respondent avers to be the registered owner of the Land parcel Mbeere/Mbita/2656. He denies that the applicants have been residing on the suit property for over 18 years. According to him, the applicants settle on a different parcel of land from the suit parcel. He alleges to be solely occupying the suit property since the year 2004 and that the applicants only trespassed on the property in March 2019.

6. He avers that the applicants are only aimed at engaging him in endless litigation to ensure that he does not enjoy the fruits of his judgment and further avers that this was evident from their actions of failing to file a defence in the lower court suit even upon been granted leave to do so. It is his assertion that the applicants have not demonstrated factors that execution will create affairs that will irreparably affect the success of the appeal. He further claims that the applicants have not demonstrated any substantial loss they will suffer in case he executes the appeal.

7. The applicant maintains that litigation must come to an end he terms the application as frivolous, trivial, an abuse of the court process and one that ought to be dismissed with costs. The application is further said not to have any chance of success for failing to raise any legal and actual issues for trial. According to the respondent the application has not met the conditions for grant of stay of execution as the applicants have not offered to deposit security for costs.

8. The respondent finally states that he will be prejudiced if the application is allowed as according to him, the applicants will continue to deny him the right to enjoy his proprietary rights over the suit property. It is said that it is in the interest of justice that the application is dismissed with costs.

9. The application was canvassed orally on 9.2.2022, by the applicants only. The 2<sup>nd</sup> applicant submitted on his behalf and on behalf of the 1<sup>st</sup> applicant who is his father. He submitted that his father had bought suit land in year 2002 when he was already of the age of majority. It is his claim that the respondent had accompanied his father while buying the land.

10. He further submitted that in the year 2014 the respondent tricked his father to surrender the sale documents to him for purposes of processing the title to the land for his father. It is alleged that the respondent further tricked the seller to sign some documents which signed after being informed that the 1<sup>st</sup> applicant had sent him. It is averred that the respondent registered himself as owner of the land and upon the discovery by the 1<sup>st</sup> applicant he reported the matter to the police at Kiriritiri, It is his claim that before investigations could be concluded the applicants were then sued before the court at Siakago.

11. It is his submission that despite hiring an advocate they were never represented and were only informed of the judgment before the court. It is the 2<sup>nd</sup> applicant's case that they are not trespassers and that the suit parcel of land belongs to them.

12. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. There is only one issue for determination which is whether an order of maintenance of status quo against land parcel number L.R NO. MBEERE/MBITA/2656 should be granted pending the hearing and determination of the above appeal. The **Black's Law Dictionary, Butter Worths 9<sup>th</sup> Edition**, defines Status Quo as a Latin word which means "**the situation as it exists**". The purpose of an order of status quo was articulated in the case of **Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR**, where the court stated,

*"When a court of law orders or a statute ordains that the **status quo** be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining **status quo** is meant to preserve existing state of affairs...**Status quo** must therefore be interpreted with respect to existing factual scenario..."*

13. In **TSS Spinning & Weaving; Company Ltd Vs Nic Bank Limited & another [2020] e KLR**, the unpacked the purpose of a status quo order as follows:

*"In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention."*

14. As enunciated above, an order for status quo is essentially one that seeks to preserve the subject matter pending determination of the issue in contention. The order is meant to maintain the state of affairs before the particular order was made by the court. The prayer for status quo has been sought pending determination of the appeal, in my view the order achieves the same purpose as that of stay of execution of the judgment. The purpose for seeking stay of execution pending appeal is also to preserve the subject matter as parties ventilate on the appeal.

15. This was as stated in the case of **RWW vs. EKW [2019] eKLR**, where the court stated as follows:

*"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."*

It therefore follows that the conditions for stay of execution pending appeal must be abided with in determination of this application.

16. The law governing stay of execution pending appeal is Order 42 Rule 6(2) of Civil Procedure Rules, 2010, which provides as follows:

*"No order for stay of execution shall be made under sub rule (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."*

There are three pre-conditions that are to be met before an order for stay of execution is granted, the first being whether the applicant(s) will sustain substantial loss, the second whether the application is brought without unreasonable delay and lastly grant of security for due performance of the decree.

It is trite law that an application such as this one, for stay of execution invokes the court to exercise its discretionary powers which of course ought to be exercised judiciously. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** provided guidance on how a court should exercise discretion and held that:-

**'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 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 or rent in dispute and the appellant had an undoubted right of appeal.*

*5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse'.*

The first condition to be satisfied for grant of stay of execution is that an applicant must prove that substantial loss may result unless the order is made. What is substantial loss was discussed in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR*, where the court stated that:

*“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.”*

17. The applicants have filed this suit seeking orders for stay of execution pending appeal. It is not in dispute that judgment was delivered in Siakago ELC Case No. 26 of 2019 against the applicants to which they have now preferred the present appeal against that judgment. They aver if any dealing, registration or charge is effected on the suit parcel by the respondent they will suffer irreparable loss and damage for reason that they have been residing on the suit parcel of land for over 18 and are likely to be evicted from the land if the orders sought are not granted.

18. The respondent has opposed the application, he denies that the applicants are in occupation on the suit land and argues that he has been solely occupying the land until the year 2004 when the applicants committed acts of trespass against the property and in particular they are accused of unlawfully cutting down trees, bushes and cultivation.

19. It is evident that the issue of occupation by the applicants though denied by the respondent he acknowledges their presence on the land, but terms such presence as trespass. In my view such presence on the suit parcel is what the applicants are seeking to preserve. According to them they reside on the land with their families and are apprehensive that unless this court orders status quo then they stand to be evicted by the respondent. They aver that they would be prejudiced and suffer substantial loss if the court does not make the order for status quo.

20. From the applicants case and by the respondent's own admission of some sort of presence by the applicants either as trespassers or otherwise on the suit parcel of land. It is evident that in the event the appeal proceeds and the applicants are evicted from the land and probably even have the land disposed then this would render the present appeal nugatory and an academic exercise. It is trite law that the purpose of status quo is to preserve the subject matter and in land cases preserving the suit parcel of land which may easily exchange hands pending the appeal and of course ensuring that the appeal is not rendered nugatory or an academic exercise. I accordingly find that the applicant has established substantial loss.

21. The second element is whether the appeal has been filed without unreasonable delay. The judgment the subject of this appeal was delivered on 14.1.2021 and the present application filed on 29.1.2021. The application was filed barely two weeks after judgment was delivered and therefore there was no delay whatsoever in filing of the application.

22. The third condition is on deposit of security. Order 42 Rule 6(2) require that a person seeking stay of execution, to furnish such security as the court may order for due performance of the decree. The respondent has argued that the application should not be allowed for reason that the applicants have not expressed their willingness to provide security for due performance of the decree. The pre-condition for provision of security for due performance of the decree is capped in mandatory terms that any person wishing to be granted stay of execution must provide security.

23. The court in the case of **Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates, Nrb Misc. Civil Application No. 802 Of 2010** pronounced itself on the purpose of security of costs and stated as follows; *'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.'*

24. The purpose therefore of deposit of security is to guarantee due performance of the decree or order as may ultimately be binding on the applicants. I note that though the applicants have not expressed their willingness to furnish security the court can order deposit of security.

This is especially for reason that the court needs to balance the interests of both parties. Even as the court considers the likely plight of the applicants it is mindful of the respondent who has a right to enjoy the fruits of his judgment. It has been held that courts should balance the interest of an appellant who seeks a right to have the suit property preserved as he litigates the appeal and that of the respondent who has the undoubted right to enjoy the fruits of his judgment.

25. I believe deposit of security will best balance this interest and having already found that the applicants have established that they will occasion substantial loss if the order for stay is not granted. I proceed to grant stay on condition that the applicant shall deposit security for due performance of the decree.

26. It is trite law that the amount of security to be provided is discretionary upon the court. I therefore find that an amount of Kshs. 50,000/= would be adequate security. Accordingly, I grant stay of execution on condition that the security of Kshs.50,000/= be deposited in court within 30 days and for the applicants to file the record of appeal within 60 days, in default the stay lapses. Costs of this application shall be in the appeal.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22<sup>ND</sup> DAY OF MARCH 2022.**

**A.K. KANIARU**

**JUDGE**

**22.03.2022**