



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELCA CASE NO. 013 OF 2021

NIXON KAMAITHA WAITITU.....PLAINTIFF

-VERSUS-

LEONARD KIARIE KINUTHIA.....DEFENDANT

RULING

1) This application is apparently undated and was filed on 13th August, 2021 at Meru. It seeks the following orders:

1. **THAT** this Honourable court be pleased to hear the Application during High Court Vacation.
2. **THAT** this Application be certified urgent and be heard *ex parte* in the first instance and service of the same be dispensed with in the first instance.
3. **THAT** there be stay of execution of the ruling and order **entered** against the Appellant on 13th July 2021 in **Isiolo CMCC ELC Case No. 15 of 2021** pending the *inter partes* hearing and determination of this application.
4. **THAT** there be a stay of execution of the ruling and order entered against the Appellant on 13th July 2021 in **Isiolo CMCC ELC Case No. 15 of 2021** pending the *inter partes* hearing and determination of the Appeal herein.
5. **THAT** the honourable Court be pleased to grant the orders sought subject to any condition as the court may deem just.

2) The application is supported by the affidavit of NIXON KAMAITHA WAITITU, the applicant, and has the following grounds;

1. That the Respondent has obtained an injunction against the Applicant herein at the Magistrate's Court at Isiolo Vide a Ruling delivered by the Honourable S. M. Mungai (C.M) ON 13th July 2021, effectively preventing the Applicant from interfering with Plot Number KAMBI JUU/1549, Isiolo, in a bid to dispossess the Applicant and other beneficiaries of the estate of the lawful owner, now deceased, of the same.
2. That the Applicant, being dissatisfied with the Ruling and Order of the Honourable Court (Hon. S.M. Mungai (C.M) delivered on 13th July 2021, has filed a Memorandum of Appeal dated 6th August 2021 before this Honourable Court.
3. That the Applicant stands exposed as the injunction obtained by the Respondent herein paralyzes the Applicant in his attempt of preserving the suit property.
4. That the Respondent herein has made an application for registration as owner of the suit property at the Isiolo County Department of Lands, and continues to present himself as owner to all and sundry.
5. That the Applicant is apprehensive that, should the order sought herein not granted, the Respondent may transfer the suit property to a third party with a view to defeating the course of justice.
6. That that the Applicant's Appeal is arguable with high chances of success as the lower court misapplied the law on the grant of injunction and the legal principle of *nemo dat quid non habet* as enshrined in Section 23 of the Sale of Goods Act Cap 31 of the laws of Kenya.
7. That he instant application has been made in good faith and without delay, and the Applicant is ready to comply with any reasonable conditions that may be imposed by his Honourable Court, for instance **the deposit of any security deemed fit in court**

or in an interest earning bank account in the name of counsels for both parties herein

8. That in those premises, it is in very best interest of justice that an order of stay of execution be granted pending, the hearing and determination of the present application and indeed, the Appeal.

9. That the Applicant herein has sufficient cause for seeking the orders sought.

3) On 30th September, 2021, the Hon. Justice C. K. Nzili sitting at Meru granted an order for Maintenance of Status Quo. On 24th January, 2022 before this Judge at Isiolo, the parties consented to the extension of the order for Status Quo.

4) The parties canvassed the application by way of written submissions.

5) In his written submissions, the appellant states that he is the registered owner of the suit land. In his view, he would suffer substantial loss if stay of execution is not granted. He also indicates that this application was filed without undue delay. He also says that he is willing to furnish security for the due performance of the decree being appealed from.

6) The Respondent counter argues that the applicant has not demonstrated that he would suffer substantial loss if stay of execution is not granted. He also says that he has not explained why he filed this application around a month after the date of the ruling. He also says that the applicant has not furnished security.

7) I do note that the order for stay sought by the applicant is to facilitate the hearing of his appeal without the threat of loss of the substratum. I do find that filing the application about one month after the date of the ruling cannot by any stretch of imagination, amount to unreasonable delay. I also find that being the registered owner of the suit land, the applicant stands to suffer substantial loss if an order of stay is not granted if his appeal finally succeeds. I do note that in ground 7 of his application the applicant is unequivocal that he is ready to furnish security deemed fit by the court.

8) In the circumstances, I find that this application evinces merit. It is hereby allowed and the following orders are issued:

a) Prayer 4 for stay of execution is granted pending hearing and determination of the appeal PROVIDED that the applicant will deposit with court within 30 days of today as deposit the sum of Kenya Shillings Five Hundred Thousand (KSH. 500,000/=) FAILING WHICH the stay granted herein shall automatically lapse.

b) Costs shall be in the cause.

c) Directions on 30/5/2022.

Delivered in Open Court at Isiolo this 14th day of March, 2022 in the presence of:

Court Assistant: Balozi

M/S Nyasani h/b Mrs. Waititu for the Appellant

Ashava h/b Manasses Kariuki for the Respondent

HON. JUSTICE P. M. NJOROGE

JUDGE