



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO 43 OF 2017

JUSTUS MUNUVE KILONZO.....PLAINTIFF

VERSUS

JOSEPH MUNG'UTU MUNUVI.....DEFENDANT

RULING

1. By a Notice of Motion Application dated 15<sup>th</sup> of July 2021 brought under Sections 3A, 3B, 6 and 63(e) of the Civil Procedure Act, Order 42 Rule 6 (6) and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the Applicant is seeking for the following orders: -

**1. Spent.**

**2. That the Honourable Court do restrain the Respondent either by himself, his servants and/or agents or otherwise from entering, evicting the Applicant, remaining, leasing, disposing off in any way, transferring, dealing with and/or interfering with the Applicant's quiet possession of the suit property pending the hearing and determination of this application.**

**3. That the Honourable Court do restrain the Respondent either by himself, his servants and/or agents from entering, evicting the Applicant, remaining, leasing, disposing off in any way, transferring, dealing with and/or interfering with the Applicant's quiet possession of the suit property pending the hearing and determination of the intended appeal.**

**4. That the cost of this application be provided for.**

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on the 15<sup>th</sup> of July 2021.

3. A summary of the grounds and the averments is that the Applicant has at all material times been in actual possession of the suit property. The Applicant averred that immediately the court dismissed his suit on 28/05/2021, the Respondent made attempts to evict him and take possession of the suit property. That being dissatisfied with the judgment of the trial court, the Applicant preferred an Appeal before the Court of Appeal in Nairobi on 03/06/2021. The Applicant further averred that unless the Respondent is restrained by an order of the court, the Appeal would be rendered nugatory and a mere academic exercise. The Applicant argued that he was ready to abide by any conditions set by the court.

4. The application is opposed vide the replying affidavit by the Respondent sworn on 23<sup>rd</sup> November 2021 and the further affidavit sworn on 10/12/2021. The Respondent contends that the application is frivolous, scandalous, vexatious and an abuse of the court process. The Respondent argued that the application has been overtaken by events since he took possession of the suit property on 28<sup>th</sup> of May 2021 upon being successful vide the court judgment. The Respondent further argued that the Applicant had failed to demonstrate that he would be prejudiced if the orders sought are not granted. He further averred that the Applicant had failed to demonstrate that the draft Memorandum of Appeal has high chances of success or a *prima facie* case.

5. In his undated further affidavit, the Applicant averred that he had sunk a borehole and planted crops on the suit property. He further averred that he was exercising his right of appeal and therefore he should not be evicted from the suit property until the appeal is heard and determined. He urged the court to maintain the *status quo*.

6. In response, the Defendant/Respondent vide his further affidavit annexed photographs showing the crops that he had planted on the suit property.

## **SUBMISSIONS**

7. The application was canvassed by way of written submissions.

8. The Applicant's written submissions were filed on 23<sup>rd</sup> November 2021. Counsel for the Applicant submitted that the Respondent had sold the suit land to the Applicant who had for the last 12 years developed the land. Counsel submitted that the Applicant had even sought for a declaration that the land was acquired by adverse possession. Counsel argued that the trial court ought to have ordered the excision of the portion of land sold to the Applicant as it was identifiable. Counsel argued that the judgment of the trial court denied the Applicant refund of the purchase money paid to the Respondent. He further submitted that the court did not give the Applicant time to vacate the suit land hence the present application. He submitted that the Applicant's Appeal would not serve any purpose if the orders sought are not granted.

9. The Respondent's written submissions were filed in court on 18<sup>th</sup> of December 2021. Counsel for the Respondent submitted that, the Defendant is the registered owner of the suit property and that after the court delivered the judgment in his favour he evicted the Applicant and took possession of his land. Counsel further submitted that although 60 days had elapsed since the filing of the Notice of Appeal, the Applicant was yet to file an appeal and that there was no evidence that the Applicant had sought for leave to file an appeal out of time. Counsel contends that the court cannot act in a vacuum or on speculations or intended actions to be done by the Applicant. Counsel argued that a mere desire to appeal cannot supersede a lawful judgment.

10. Counsel argued that the application had been overtaken by events as the Respondent was already in occupation of the suit land. Counsel contends that the Applicant had failed to demonstrate the prejudice that he would suffer if the application is not granted or that his appeal had high chances of success.

11. To buttress his submissions, he placed reliance on the following cases: -

**a. Vishram Ravji Halal Vs Thornton & Turpin (1990) KLR 365.**

**b. Century Oil Trading Company Ltd Vs Kenya Shell Limited Nairobi HCMCA No. 156 of 2007.**

**c. Samvir Trustee Limited Vs Guardian Bank Limited Nairobi Milimani HCCC 795 of 1997.**

**d. Kenya Shell Limited Vs Kibiru (1986) KLR 410.**

**e. Machira T/A Machira & Co Advocates Vs East African Standard (2002) KLR 63.**

**f. Misc Application No. 42 of 2011 – BUNGOMA James Wangalwa & Another Vs Agnes Naliaka Chesto.**

**g. Civil Application No. 238 of 2005 National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike.**

**h. John Gachanja Mundia Vs Francis Murira Alias Francis Muthika & Another (2016) eKLR.**

12. Through the supplementary submissions filed on 11<sup>th</sup> of February 2022, Counsel for the Applicant submitted that the Applicant had met the threshold required for the grant of stay of execution pending appeal. Counsel further submitted that the court upon considering the factors set out in Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act, it could issue orders of status quo.

## **ANALYSIS AND DETERMINATION**

13. Having considered the application, affidavits, and the rival submissions, I find that the issue for determination is whether the Applicant is entitled to the orders sought.

14. The Applicant through an Originating Summons dated 27<sup>th</sup> of January 2005 sought for the following orders against the Defendant/Respondent:-

a. An order of declaration that the Plaintiff/Applicant has acquired by adverse possession a portion measuring approximately 0.75 Hectares comprised in the parcel of land known as Nzau/Kalamba/551 measuring approximately one (1) Hectare situated at Kalamba Makeni District.

b. An order directing the Land Registrar to transfer to the Plaintiff the ownership of the said portion measuring approximately 0.75 Hectares comprised in the parcel of land known as Nzau/Kalamba/551 which the Defendant/Respondent has been holding in trust for the Plaintiff.

c. An order of permanent injunction be issued to restrain the Defendant/Respondent by himself, his agents or servants from entering, working or trespassing into, alienating, charging, selling, subdividing the said parcel of land and/or in any other manner interfering with the Plaintiff's use and enjoyment of the suit land.

d. An order for temporary injunction be issued to restrain the Defendant/Respondent by himself, his agents or servants from entering, trespassing onto, working on, alienating, charging, selling, subdividing the said parcel of land and/or in any other manner interfering

with the Plaintiff's use and enjoyment of the suit land until the suit is heard and determined.

15. The matter was heard on merit and subsequently the court delivered its judgment on 28<sup>th</sup> of May 2021.

16. The Applicant has sought for a stay of execution of the judgment delivered on 28<sup>th</sup> of May 2021 pending the hearing and determination of the Appeal. Order 42 Rule 6 (1) and (2) of the Civil Procedure rules outlines the guiding principles to be met for the grant of stay and provides that;

**6(1) 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.**

**6(2) 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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.**

17. The court in its judgment found that the Plaintiff had not satisfied on a balance of probabilities that he has a cause of action and proceeded to dismiss the Plaintiff's suit with costs to the Defendant. This Court notes that the order sought to be stayed is a decision that dismissed the Plaintiff's suit. In the case of Western College Arts and Applied Sciences Vs Oranga & Others (1976) KLR 63, the Court whilst considering whether an order for stay can be granted in respect of a negative order stated as follows;

**“But what is there to be executed under the judgment, the subject of the intended appeal the high court has merely dismissed the suit with costs. An execution can only lie in respect of costs.....”**

18. Similarly, in the case of Kaushik Panchatia & 3 others Vs Prime Bank Limited & Another (2020) e KLR the court stated and I fully adopt;

**“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed by the applicants.”**

19. This Court notes that the order sought to be stayed is a decision that dismissed the Originating Summons. In its judgment on 28<sup>th</sup> of May 2021, the court dismissed the Plaintiff's Originating summons with costs to the Respondent. The court did not issue any positive order capable of being stayed pending the hearing and determination of the Appeal. It is therefore a negative order. It is trite law that a negative order is incapable of being stayed. The court has no power to stay a negative order or dismissal as was found by the Court of Appeal in the case of Oliver Collins Wanyama v Engineers Board of Kenya (2019) eKLR.

20. Accordingly, there is nothing to stay in the present Originating Summons. The only execution that can flow from the said judgment is costs since the Court did not order any of the parties to do anything or refrain from doing anything or from paying any sum.

21. The upshot of the foregoing is that the application dated 15<sup>th</sup> July 2021 is devoid of merit and the same is dismissed with costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF APRIL, 2022**

**IN THE PRESENCE OF: -**

Munyasya for Plaintiff.

Mwinzi for Defendant