



**REPUBLIC OF KENYA**

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

**ELC APPEAL CASE NO. 9 OF 2021**

**FRANCIS MATHEKA KATA.....APPELLANT/APPLICANT**

**VERSUS**

**BETTY KAMENE KIMOTE.....1<sup>ST</sup> RESPONDENT**

**FRANCISCA YULA MUTUKU *Alias***

**FRANCISCA YULA KINGOO..... 2<sup>ND</sup> RESPONDENT**

**COUNTY LAND REGISTRAR MAKUENI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion Application dated 6<sup>th</sup> of October 2021 brought under Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules, Section 3A and 63(c) and (e) of the Civil Procedure Act, the Applicant is seeking for the following orders: -

**1) Spent.**

**2) That there be a stay of execution of the judgment and orders of the lower court dated 8<sup>th</sup> of September 2021 pending the hearing of this application.**

**3) That there be a stay of execution of the judgment and orders of the lower court dated 8<sup>th</sup> of September 2021 pending the hearing and determination of the 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. These grounds are: -

**a) That the trial court granted a stay of execution for thirty days from the date of the judgment and did not grant the Appellant/Applicant stay pending the Appeal.**

**b) That the Appeal raises serious issues touching on the ownership of the suit property.**

**c) That the Appeal has a high probability of success and would be rendered nugatory if orders of stay are not granted.**

**d) That the Appellant will suffer substantial and irreparable harm if the orders of stay are not granted.**

3. The application is further supported by the affidavit of the Applicant sworn on the same day. The Applicant averred that the 2<sup>nd</sup> Respondent vide a Counter Claim sought for a declaration that she was the registered owner of three acres of land situated within his ten acres which he had purchase from the 1<sup>st</sup> Respondent. He averred that he opposed the Counter Claim and filed a reply to the Defence and Defence to the Counter Claim on the grounds that he was the legitimate owner of the ten acres of land which he had purchased from the 1<sup>st</sup> Defendant.

4. That during the pendency of the suit, the 1<sup>st</sup> Defendants sub divided the land, transferred and registered three acres of land comprised in Makueni/Unoa/79 in the name of the 2<sup>nd</sup> Defendant. That the 3 acres were then registered in the name of Makueni/Unoa/3135. He further averred that the lower court vide its judgment delivered on 8<sup>th</sup> of September 2021, dismissed his suit and allowed the 2<sup>nd</sup> Defendant's

Counter Claim on the grounds that he had sold 3 acres of land to the 2<sup>nd</sup> Defendant.

5. He argued that the judgment by the lower court disregarded the fact that he was the legitimate owner of the suit property and the fact that the 1<sup>st</sup> Respondent did not have title which he could pass to the 2<sup>nd</sup> Respondent. The Applicant further averred that being aggrieved by the decision of the lower court, he lodged an Appeal but for some unknown reasons, the trial court only granted a stay of execution pending his appeal before this court. He further averred that he was apprehensive that the 2<sup>nd</sup> Respondent would execute the judgment and have him evicted from the suit property no Makueni/Unoa/3135 and as a result he would suffer irreparable loss. He maintains that his appeal has a high probability of success.

### **RESPONDENTS CASE**

6. The application was opposed vide the replying affidavit of the the 2<sup>nd</sup> Respondent Francisca Yula Mutuku sworn on 19<sup>th</sup> of October 2021 on her own behalf and on behalf of the 1<sup>st</sup> Respondent. The Respondent argued that the application is frivolous, a non -starter, a misdirection and anchored on false assertions. The Respondent averred that she is the registered owner of the suit property and as such she has every right to enjoy quiet possession of her property.

7. The Respondent argued that the judgment could not be executed in any way and that it was apparent that the Applicant was out to deny them the fruits of their judgment. She further averred the Applicant had not demonstrated the damages that he would suffer if the orders sought are not granted or that he had an arguable appeal for the court to exercise discretion in his favour.

8. In response, the Applicant in his supplementary affidavit sworn on 22<sup>nd</sup> of October 2021 averred that he purchased 10 acres of land from the 1<sup>st</sup> Respondent which was to be excised from the 1<sup>st</sup> Respondent's land parcel No. Makueni/Unoa/70.

9. He argued that it was only after the 2<sup>nd</sup> Respondent gave him Kshs 350,000 to scout land for her to purchase that she started claiming that he had sold three acres out of his 10 land to her. He stated that the 2<sup>nd</sup> Respondent declined to accept back her money and instead reported him at the Makueni police station where he was made to sign documents which indicated that he had no objection to his land being sub divided and transferred to the 2<sup>nd</sup> Respondent. He further averred that after consent to sub divide the land was given, he filed an application and sought for restraining orders against the Defendants not to interfere with the suit property. That subsequently, the parties recorded a consent to preserve the suit property pending the hearing and determination of the case.

### **SUBMISSIONS**

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

11. The Applicant's written submissions were filed on 19<sup>th</sup> of November 2021. Counsel for the Applicant submitted that the Applicant had satisfied the conditions for the grant of stay of execution set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

12. Counsel submitted that the Applicant would suffer substantial loss if 2<sup>nd</sup> Respondent would on the strength of the judgment to sell or transfer the disputed land to third parties. Counsel maintains that the Applicant would be deprived of his property. Counsel further submitted that the Appeal would be rendered nugatory and an academic exercise if the stay orders are not granted as the Applicant would be evicted from the disputed land. To buttress this point, Counsel placed reliance on the following cases: -

a) **Kenya Shell Vs Kibriu (1986) KLR 410**

b) **Tom Odege Vs Edich Peter Omondi Ayanga & 2 Others (2017) eKLR.**

13. Counsel further submitted that although it was not a condition for the grant of stay, the Applicant's Appeal has overwhelming chances of success.

14. On the issue of security for costs, Counsel submitted that the Applicant was ready to provide security as determined by the court. Reliance was placed in the case of **Facin Motorcycle Co limited Vs Ann Wambui Wangui & Another (2018) eKLR.**

15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents written submissions were filed on 28<sup>th</sup> of November 2021. Counsel for the Respondent s identified the following issues for the court's determination;

a) **Whether the Applicant stands to suffer substantial loss if the orders sought are not granted.**

b) **Whether the Applicant has furnished security as required.**

16. As regards the first issue for determination, Counsel for the Respondent submitted that in an application for stay of execution, the Applicant has to demonstrate to the satisfaction of the court that he will suffer substantial loss if the orders sought are not granted. Counsel submitted that it was not enough for the Applicant to merely state that he would suffer irreparable loss without demonstrating how. Counsel further submitted that the court in its judgment declared that the 2<sup>nd</sup> Respondent as the rightful owner of 3 acres out of the ten of the suit land. He submitted that there was no threat of eviction as the Respondent had not extracted the decree. To buttress this point, Counsel placed reliance on the following authorities;

- a) Mukuma Vs Abuoga (1988) KLR 6455.
- b) Kenya Shell Limited Vs Kibiru (1986) KLR 410.
- c) Daniel Chebutui Rotich & 2 Others Vs Emirates Airlines Civil Case No. 386 of 2001.

17. On the issue as to whether the Applicant had provided security for costs as required by the law, Counsel submitted that it was a requirement in an application for stay of execution for an Applicant to provide security for the due performance of the order. That in the present case, the Applicant had failed to disclose security as provided by the law. To support his submissions on this point, Counsel placed reliance on the following authorities: -

- a) Kenya Commercial Bank Limited Vs Suncity Properties Ltd & 5 Others (2012) 3KLR.
- b) Equity Bank Ltd Vs Taiga Adams Company Ltd (2006) eKLR.
- c) Machira T/A Machira & Co Advocates Vs East African Standard (2002) KLR 63.
- d) Kenya Tanzania Uganda Leasing Co Ltd Vs Mukenya Ndunda (2013) eKLR.
- e) Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co Advocates.

#### ANALYSIS AND DETERMINATION

18. Having considered the application, the affidavits and the rival submissions, I find that the issue for determination is: -

- i) *Whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of stay of execution pending appeal.*

19. 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*
- b) such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by Applicant.*

20. In considering an application for stay of execution, I am guided by the case of Butt Vs Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal gave the following guidelines;

*“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings. The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

21. The grant of an order of stay of execution is a discretionary one. In the case of RWW Vs EKW (2019) eKLR the court held that;

*“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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. However, in doing so the court should weigh the right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of damages.”*

22. The court is therefore called upon to balance both the successful party so as not to hinder him from his fruits of judgment and those of the appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted.

23. Going by the above provisions of the law, it is clear that in an application for stay of execution pending appeal the applicant must satisfy

the following three conditions: -

- a) **The court is satisfied that substantial loss may result to the Applicant unless the order is made.**
- b) **The application has been made without unreasonable delay.**
- c) **Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.**

24. The Applicant is seeking to stay execution of the judgment delivered on 8<sup>th</sup> of September 2021.

25. The court will now determine whether the Applicant has satisfied the conditions upon which the orders can be granted.

26. As regards the first condition, the Applicant should not only state that he is likely to suffer substantial loss, he must prove that he will suffer substantial loss if stay orders are not granted.

27. In **Mukuma Vs Abuoga (1988) KLR** where the court held that;

***“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”***

28. In **Tropical Commodities Suppliers Ltd and Others Vs International Credit Bank Ltd (in Liquidation)** the court defined substantial loss as follows;

***“substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal....”***

29. The Applicant averred that he is apprehensive that the Respondent will execute the judgment and evict him from the suit property which would cause him irreparable loss. The Applicant submitted that he was apprehensive that the 2<sup>nd</sup> Respondent would sell or transfer the suit property to third parties if the orders of stay are not granted. He contends that if the subject matter is transferred or sold to third parties the appeal would be rendered nugatory and an academic exercise.

30. I have read the judgment delivered by Hon. Mwaniki on 8<sup>th</sup> of September 2021; The court in its findings stated as follows;

***“The court finds merit in the Defendants counter claim and makes a declaration that the 2<sup>nd</sup> Defendant is the rightful owner of a 3 acre plot situated within the Plaintiff’s 10 acre portion of land in Makueni/Unoa/79 and an injunction be and is hereby issued against the Plaintiff from in any way interfering with the 2<sup>nd</sup> Defendant’s portion of land.”***

31. The Applicant in his supplementary affidavit averred that despite the existence of a consent order to preserve the disputed 3 acres of land within the Makueni/Unoa/79 pending the hearing and determination of the case, the 1<sup>st</sup> Respondent went ahead and subdivided the land and transferred the 3 acres of land which were then registered in the name of the 2<sup>nd</sup> Respondent.

32. The order issued by the court on 8<sup>th</sup> of May 2014 provided as follows;

***“Both the Respondent and Applicant were restrained from trespassing, transferring, entering, using by cultivating, clearing or otherwise dealing with the subject land measuring 3 acres forming part of LR NO Makueni/Unoa/79 until the suit is heard and determined.”***

33. Going by the judgment delivered on 8<sup>th</sup> of September 2021, it is evident that the 2<sup>nd</sup> Respondent was issued with the title comprising of three acres during the pendency of the matter. It is also clear from the record that the 2<sup>nd</sup> Respondent’s title was processed while the interim orders were still in existence. That being the case, I find that the Applicant’s fears that the 2<sup>nd</sup> Respondent may sell or transfer the suit land to 3<sup>rd</sup> parties are not baseless as the subject matter of the appeal can be interfered with.

34. The trial court having declared that the 2<sup>nd</sup> Respondent is the rightful owner of a three acre plot situated in the Applicant’s ten acre portion of land within land parcel number Makueni/Unoa/79, I find that it is the duty of this court to preserve the subject property of this Appeal.

35. I find that the Applicant has satisfied this court that he is likely to suffer substantial loss if the substratum of the appeal is sold or transferred to third parties.

36. As regards the second requirement which requires that the application be made without unreasonable delay, it is not in dispute that the judgment was delivered on 8<sup>th</sup> of September 2021. The Applicant averred that he was granted a stay of execution pending his appeal before this court. The present application was filed on 7<sup>th</sup> of October 2021. I find that the application was brought without undue delay.

37. On the last condition as to the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in

mandatory terms to the effect that the Applicant must furnish security for the performance of the order or decree. In the case of Arun C Sharma Vs Ashana Rikundalia T/A Raikundalia & Co. Advocates, the court held that;

*“The purpose of the security under Order 42 is to guarantee 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 applicant 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 a security for the 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.”*

38. The Applicant has expressed his willingness to provide security as directed by the court.
39. In the end I find that the Applicant has satisfied the conditions required for the grant of an order of stay of execution pending appeal.
40. The upshot of the foregoing is that the application dated 6<sup>th</sup> of October 2021 is allowed in the following terms;
  - i) Stay of execution of the judgment/decree herein is granted pending the hearing and determination of the Applicant’s Appeal.
  - ii) The Applicant shall deposit Kshs 300,000/= as security for costs in court within 21 days from the date of delivery of this ruling in default the stay orders shall automatically lapse.
  - iii) Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

**RULING SIGNED, DATED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF APRIL 2022.**

**IN THE PRESENCE OF: -**

Court Assistant – Mr. Mohammed.

Kimeu for the Appellant.

Ms Kyalo for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.