



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E115 OF 2021

NAFTALY MWITI IRUKI.....1ST APPELLANT/APPLICANT

JULIUS MWONGERA NKIRITI.....2ND APPELLANT/APPLICANT

VERSUS

KAIMBA MAGAARA.....RESPONDENT

THE DISTRICT LAND REGISTRAR.....1ST INTERESTED PARTY/RESPONDENT

THE DISTRICT LAND REGISTRAR.....2ND INTERESTED PARTY/RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD INTERESTED PARTY/RESPONDENT

RULING

1. The applicant seeks for an order of stay of execution of the decree issued by the lower court pending hearing and determination of this appeal. The application is supported by an affidavit sworn on 26.10.2021 by Naftaly Mwiti. The grounds are that upon the delivery of judgment on 14.10.2021, an appeal was lodged; that 1st appellant has a permanent structure on the subject land where he operates a business which is his source of livelihood and if the orders are not granted the property may be disposed off rendering this appeal nugatory.
2. The application was opposed by the respondent through a replying affidavit sworn on 12.11.2021 on the basis that the judgment found him as the genuine allottee of the suitland which he had been deprived off unlawfully for a long time; the appeal shall prolong his enjoyment of the fruits of the judgment and that the structures were hurriedly constructed, while there were court orders in place against such dealings and that the application lacked merits.
3. With leave parties filed written submissions dated 24.1.2022 and 27.1.2022 respectively.
4. The applicants submit that they have satisfied the requirements under order 42 rule 6 Civil Procedure Rules and rely on **RWW vs EKW (2019) eKLR** on the proposition that stay preserves the property in order for parties to exercise a right of appeal which has to be balanced against the right of a successful litigant and **Stanley Kiplagat Rono & another vs William Kiprotich Chesus (2021) eKLR**.
5. On the other hand, the 1st respondent submitted that the trial court found the occupation by the appellants was illegal and therefore it was not enough for the appellants to allege they live or reside on the suit land but must go further and demonstrate substantial loss as held in **Charles Wahome Githi vs Angela Wairimu Gethi; (2008) eKLR, David Kipkoshe Kimeli vs Titus Barmasai (2019) eKLR while citing with approval Madhiva t/a Machira and co. advocates vs East African Standard (2002) KLR 63 and another c. Sharma vs Ashina Raikudallia T/a Raivundalia and co. advocates.**
6. Order 42 rule 6 Civil Procedure Rules requires a party seeking for astay of execution to establish substantial loss if the orders are not granted, to file the application without inordinate delay, to offer security for the due performance of the decree and lastly to show that it was in the interest of justice to grant the orders sought.
7. In expounding the above principles the Supreme Court of Kenya in **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR** the purpose of a stay was preserve the subject matter and ensure its state was not altered or substantially diminished pending the hearing and determination of the appeal.
8. **In Board of Governors Moi High School Kabarak & another vs Malcom Bell (2013) eKLR**, the court furthers stay of execution was

aimed at forestalling a situation where it may make the appeal an academic exercise. On what amounts to substantial loss, the court in James Wangalwa & another vs Agnes Naliaka Cheseto (2013) eKLR, held that an execution was a legal process and that a party must demonstrate substantial loss with cogent and tangible evidence that the execution will create a state of affairs that will irreparably affect or negate the very right to the property to the applicant as a successful party in the appeal.

9. In this application the 1st appellant avers he stands to suffer loss on the basis that he has permanent structures on the land where he ekes his livelihood from. No valuation reports have been attached on the estimate of the loss of income likely to be suffered.

10. From the lower court's judgment, it was clear the 1st appellant herein was a buyer for the 2nd appellant now allegedly found to have been illegally allocated the suitland which he eventually sold to the 1st appellant.

11. In my view therefore I find no substantial loss demonstrated since the 1st appellant was given time to remove his structures on the land by the trial court and secondly that on the event the appeal is successful there can as well be reversal of the transfer if any.

12. The applicants have not denied the assertion that there were interim orders stopping construction of permanent structures on the land but went ahead to hurriedly erect them.

13. Similarly the applicants have not stated the nature of security they would like to deposit before court for the due performance of the decree could the appeal be unsuccessful.

14. Given the circumstances, I find it is not in the interest of justice to grant the orders sought.

15. The application dated 25.10.2021 is hereby dismissed with costs. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 6TH DAY OF APRIL, 2022

IN PRESENCE OF:

MISS KIYUKI FOR APPELLANT

MRS. MUIA FOR RESPONDENT

HON. C.K. NZILI

ELC JUDGE