



**Muriuki v Kariuki (Environment and Land Appeal 21 of 2021)
[2022] KEELC 3010 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 21 OF 2021**

EC CHERONO, J

MAY 27, 2022

BETWEEN

ROSEMARY WANJIRU MURIUKI APPELLANT

AND

JOHN MURIITHI KARIUKI ALIAS KAIMBI RESPONDENT

RULING

1. The Appellant/applicant vide a Notice of Motion dated 29/11/2021 seeks the following orders-;
 1. Spent.
 2. That there be a stay of execution of the Decree of the lower Court dated 1/11/2021 pending the hearing and final determination of this appeal.
 3. That in the alternative, the appellant/applicant be granted access to the suit Rice holding Number 3232A Wamumu Section to harvest her paddy thereon which paddy is ready for harvesting.
 4. That the costs of this application be in the appeal.
2. The application is supported by grounds shown on face of the said application and the affidavit of the appellant/applicant sworn the same date. The said application is opposed with a replying affidavit sworn and filed by the Respondent on 08/12/2021.

Applicant's Summary of Facts

3. The applicant in her supporting affidavit has deposed that she had filed a suit in Wang'guru PMELC NO. 29 of 2019 against the Appellant seeking for orders to stop him from interfering with the possession and cultivation of the suit rice holding. After the case was heard, the court dismissed her suit and allowed the counterclaim in favour of the Respondent. She stated that some of the prayers



which the respondent had sought and which was allowed in the counterclaim is an equitable relief of an injunction restraining her from entering, remaining on, cultivating and/or in any other manner interfering with the respondent's use of the rice holding in question.

4. The Applicant further stated that She has been in occupation and cultivating the rice holding in question since 2014 and that the paddy growing on the fields which is now ready for harvesting belongs to her and unless the orders sought herein are granted, she will suffer double tragedy as she stands to lose the rice holding as well as the paddy crop which is ripe and ready for harvesting.
5. She stated that she is aggrieved by the judgment and decree of the lower court and has lodged an appeal, a copy of which is annexed to her supporting affidavit and marked "RMMIII".
6. She stated that she is willing and ready to abide by any terms this honourable court may impose in granting the orders sought.

Respondent's Summary of Facts

7. While opposing the said application, the Respondent stated that the application lacks merit and that the same is based on falsehood as the former suit which is the subject of this appeal being C.M ELC Case No. 29/2019 was instituted by the Appellant and the same was dismissed with costs and his counterclaim allowed. He stated that upon delivery of judgment, the Applicant/Appellant proceeded secretly and harvested all the rice paddy crop growing thereon for the 2021/2022 crop season and there is no rice crop now in the suit land.
8. He stated that the trial magistrate in the impugned judgment delivered on 1st November 2021 was clear that the applicant/appellant had no right to his rice fields because she had forged ownership documents from the allocating Authority and upon discovery, the forged documents were revoked by the National Irrigation Board and she attempted to sue for reinstatement vide PMCC NO. 123 of 2017 but the suit was dismissed vide a ruling delivered on 10/07/2018.
9. He stated that rice holding No, 323A Wamumu section measuring approximately 2.0 acres was awarded to one Moses Ngari Gachoki who later surrendered the same to him vide Wang'uru D.M. Misc. Succession Cause No. 3 of 1998 whereas the Appellant's brother Joseph Muriithi Jairo was awarded 2.0 acres later registered as holding No. 323B.
10. He said that the application lacks merit as the Applicant has not demonstrated substantial loss she will suffer unless the orders sought are granted.
11. That, upon revocation of the Appellant's licence after being found to have committed forgery, the new licensee namely Moses Ngari Gachoki was issued with a Tenant card and a licence for the suit land.

Analysis and Decision

12. I have considered the Notice of Motion, the rival affidavits both in support and in opposition thereto, the submissions by counsel as well as the applicable law. The application before me is brought under Order 42 Rule 6 (2) *CPR*. The same 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-----’
13. The three ingredients required before granting a stay pending appeal under Order 42 Rule 6 are as follows-;
- i. The applicant must show that he/she will suffer substantial loss unless the application is allowed
 - ii. The application has been brought without unreasonable delay and
 - iii. The applicant has given security for the due performance of the decree as may ultimately be binding on him.
14. The impugned judgment/Decree which is the subject of this appeal was delivered on 1st November,2021 and this application was filed on 30/11/2021. It took the applicant 29 days to file this application. A period of three weeks in my view is not unreasonable. I am satisfied that the application has been brought without unreasonable delay.
15. On the second ground, the applicant stated that unless the orders sought are granted, she will suffer double tragedy in that she will lose the rice holding and the paddy crop which is ripe for harvesting.
16. Looking at the pleadings and the impugned judgment and/or decree, it is clear that the subject of this appeal is a rice holding which is a public property owned by the National Irrigation Authority. The Respondent is a licensee and has been issued a licence to the suit property by the Government. Should the Applicant/Appellant be successful in appeal, the appeal will not be rendered nugatory since the subject matter
17. which is a public property will revert back to her. I also note that the National Irrigation Authority which is registered as owner of the suit property has not been joined as a party in this suit. The Applicant cannot be seeking injunctive orders in respect of a property without joining the National Irrigation Authority who is the registered owner. An order cannot issue against a party or his /her property without being heard.
18. The orders which the Applicant is seeking in my respective view cannot issue without involving the National Irrigation Authority who is the registered owner.
19. Regarding the third ground, the applicant has deposed that she is ready and willing to abide by any terms which this court may impose. I am satisfied that her averments on oath is sufficient undertaking as security for the due performance of the decree as may ultimately be binding on her.
20. Having failed to demonstrate what substantial loss she will suffer which is the cornerstone for the grant of stay pending appeal, the application dated 29th November, 2021 fails.

Final Order

21. For all the reasons stated herein above, the Notice of Motion dated 29th November, 2021 is hereby dismissed with costs. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 27TH MAY, 2022.

HON. E.C. CHERONO



ELC JUDGE

In the presence of;

Macharia Wambui H/B for Kinyua Kiama for Applicant - present

M/S Wambui H/B for Kahigah for Respondent - present

Kabuta, C/A – present.

