



**Njoroge v Njoroge & 2 others (Environment and Land Appeal
E014 of 2021) [2022] KEELC 2322 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E014 OF 2021**

YM ANGIMA, J

MAY 19, 2022

BETWEEN

SAMUEL NDIRANGU NJOROGE APPELLANT

AND

MOHAMMED KARANJA NJOROGE 1ST RESPONDENT

JOYCE MUTHONI NJOROGE 2ND RESPONDENT

JOHN MUGO KANDI 3RD RESPONDENT

RULING

A. Introduction

1. By a plaint dated June 28, 2011 the Respondent sued the Appellants seeking the following reliefs:
 - (a) Permanent injunction restraining the defendants by themselves, agent and/or assignees from disposing, constructing, alienating and/or interfering in any manner whatsoever with the plaintiff's five acres land parcel LR No 9195 Sabugo Settlement Scheme.
 - (b) In the alternative, the defendants jointly and severally be evicted from the five acres in which the second defendant house is built on.
 - (c) Costs of this suit.
 - (d) Interest on (b) above at the court's rates.
2. The 1st Respondent pleaded that he and the Appellants were beneficiaries of the estate of the late Peter Njoroge Karanja (the deceased) and that he was entitled to 115 acres out of LR No 9195 Sabugo Settlement Scheme whereas the 2nd Respondent was entitled to 190 acres as per the Certificate of Confirmation of Grant issued in Nakuru High Court Succession Cause No 296 of 1989 (the Succession Cause). He further pleaded that during subdivision of the said land it was found that the



- 2nd Respondent's homestead fell within his entitlement and that in order to avoid her eviction, they agreed to have her retain the 5 acres comprised in her homestead in exchange for another the 5 acres within the portion meant for her.
3. It was the 1st Respondent's case that the consent of the relevant Land Control Board was obtained for the exchange but the Appellant and the 2nd Respondent had encroached upon his portion of 5 acres with a view to defeating his interest therein.
 4. The Appellant and the 2nd Respondents filed separate defences denying liability for the 1st Respondent's claim. The Appellant pleaded that the said exchange was null and void since the 2nd Respondent was holding the land the subject of the exchange in trust for her children. The Appellant further pleaded that the subject parcel of 5 acres was, in fact, meant for him since he had already settled thereon and developed it extensively. The 2nd Respondent pleaded that she was holding 190 acres out of LR No 9195 in trust for her 14 children. She denied any exchange of 5 acres as pleaded by the 1st Respondent and stated that the portion of 5 acres was neither sub-divided nor specifically identified on the ground.
 5. The record shows that upon full hearing of the suit, the trial court entered judgment for the 1st Respondent by granting a permanent injunction sought on 18.8.2021 with respect to the 5 acres the subject of the exchange. However, the trial court did not grant any order for the eviction of the 2nd Defendant from the location she had already settled on.

B. The Appellant's Application

6. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 02.09.2021 challenging the same. During the pendency of the appeal, the Appellant filed a notice of motion dated September 29, 2021 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap.21), Order 42 rule 6 of the *Civil Procedure Rules, 2010* (the Rules), and any other applicable provisions of the law seeking a stay of the decree of the trial court dated 18.8.2021 together with all consequential orders pending the hearing and determination of the appeal.
7. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on September 29, 2021 and the exhibits thereto. He challenged the exchange transaction between the 1st and 2nd Respondents and stated that it was done without his consent. The Appellant further contended that the portion of 5 acres which was the subject of exchange has always been under his occupation and use and that unless the stay sought was granted he stood to suffer irreparable loss and damage. The Appellant further contended that, in any event, the estate of the deceased was yet to be distributed pursuant to the confirmed grant hence it was impossible to ascertain the specific location of the 5 acres the subject of the exchange.

C. The Respondents' Response

8. The record shows that the 1st Respondent filed a replying affidavit sworn on January 21, 2022 in opposition to the application on his own behalf and on behalf of the 3rd Respondent. The 2nd Respondent did not file any response to the application. In his replying affidavit, the 1st Respondent contended that the application was defective, incompetent and an abuse of the court process since the Appellant had failed to demonstrate substantial loss. It was contended that the Appellant was a greedy and malicious person who had previously objected to distribution of the estate of the deceased without success. It was further contended that the Appellant was present before the Land Control Board at Ol Kalou but never objected to the exchange between the 1st and 2nd Respondents. It was further contended that the Appellant was an indolent litigant who did not deserve the interim orders sought. Consequently, the court was urged to dismiss the application.



D. Appellant's Rejoinder

9. The Appellant filed a supplementary affidavit sworn on 11.02.2022 in response to the replying affidavit. It was contended that the suit property was held in trust by the 2nd Respondent hence it could not be the subject of an exchange without the consent of all the beneficiaries or the sanction of a court order. It was contended that the appeal had high chances of success and that the delay of 45 days in filing the application was as a result of the trial court's delay in providing a copy of the judgment.

E. Directions on Submissions

10. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their submissions. The record shows that the Appellant's submissions were filed on 11.02.2022 whereas the 1st and 3rd Respondents' were filed on February 21, 2022. The 2nd Respondent did not file any submissions.

F. The Issues for Determination

11. The court has considered the application for stay of execution, the replying affidavit in opposition thereto, the supplementary affidavit as well as the material on record. The court is of the opinion that the main issue for determination is whether or not the Appellant has satisfied the requirements for the grant of a stay pending appeal.

G. Analysis and Determination

12. The court has considered the material and submissions on record. Under the provisions of Order 42 rule 6(2) of the Rules, the Appellant is required to demonstrate that substantial loss shall result unless the stay sought is granted; that the application has been made without undue delay; and that security for due performance of the decree has been provided.
13. It is apparent from the material on record that LR No 9195 Sabingo Settlement Scheme was the property of deceased whose estate was the subject of the Succession Cause. It would further appear that whereas the 1st Respondent was allocated 115 acres, the 2nd Respondent was given 190 acres to hold in trust for herself and her 14 children. It would appear that during distribution of the estate, the 2nd Respondent's homestead fell within the area of 115 acres meant for the 1st Respondent. The two Respondents appear to have agreed to have an exchange of 5 acres in order to avoid demolition of the 2nd Respondent's houses. The 1st Respondent sued the Appellant and the 2nd Respondent before the trial court to enforce the exchange.
14. It is obvious that the Appellant is against the exchange which he said took place without his consent. He stated in his application that he was entitled to a share of 60 acres out of the 190 acres held by the 2nd Respondent. According to the Appellant's supplementary affidavit, the estate of the deceased has not yet been distributed even though the certificate of confirmation of grant was issued on March 4, 2005. According to him, it is not possible to identify who shall occupy which portion of LR No 9195 upon sub-division and distribution. If the Appellant's argument were to be taken to its logical conclusion, then it would mean that even his claim to hold onto the disputed 5 acres the subject of the exchange would be untenable for the same reason. He would have no legitimate claim to the 5 acres he claims to have developed and utilized.
15. The court is thus of the opinion that the Appellant has failed to demonstrate the element of substantial loss over the disputed 5 acres since the location of his entitlement of 60 acres within the larger parcel



No. 9195 is incapable of ascertainment in the absence of distribution of the estate of the deceased. It would still be possible for the Appellant to get his claimed entitlement of 60 acres out of parcel No. 9195 without taking into account the disputed portion of 5 acres.

16. The court has noted that whereas the impugned judgment was delivered on 18.08.2021, the instant application was not filed until 30.09.2021. The Appellant did not render any explanation for the delay of about 45 days. It was only upon the 1st and 2nd Respondents raising the issue of delay that the Appellant claimed that the application was filed late because he was waiting for copies of the proceedings and the judgment. The court does not accept that as a valid excuse since there is no legal requirement for copies of certified proceedings to be filed together with the application for stay of execution. The court is thus not satisfied that there was a reasonable explanation for the delay in filing the instant application. Since the Appellant has failed to satisfy the two key requirements for grant of stay it shall not be necessary to consider the provision of security for due performance of the decree.

H. Conclusion and Disposal

17. The upshot of the foregoing is that the court finds no merit in the Appellant's application for stay pending appeal. Accordingly, the Appellant's notice of motion dated September 29, 2021 is hereby dismissed. Costs shall be costs in the appeal.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF MAY, 2022.

In the presence of:

Ms. Wanjiru Muriithi for the Appellant

Mr. Kibet for the 1st and 3rd Respondents

N/A for the 2nd Respondent

C/A - Carol

Y. M. ANGIMA

JUDGE

