



**Mbogo v Mbogo (Environment and Land Appeal 17 of 2021)  
[2022] KEELC 3854 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3854 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 17 OF 2021  
EC CHERONO, J  
JUNE 10, 2022**

**BETWEEN**

**BIBIANA NJERIR MBOGO ..... APPLICANT**

**AND**

**NANCY WAIRIMU MBOGO ..... RESPONDENT**

**RULING**

1. Bibiana Njeri Mbogo (the applicant herein) filed an application dated 16<sup>th</sup> December 2021 seeking a stay of execution of the trial court's judgement and decree dated 13<sup>th</sup> August 2021 in Gichugu ELC No. 14 of 2020 pending the hearing and determination of the Appeal.
2. The crux of the Trial Courts suit relates to Baragwe/Kariru/2617, a subdivision of Baragwe/Kariru/180. The land was registered in the names of James Mbogo Sebastino (deceased) and the Respondent. The appellant is a daughter of the deceased while the Respondent is a widow of the deceased. The appellant claimed half a share based on constructive trust. The Respondent denied this claim and filed a counterclaim that she is entitled to the whole land as a surviving joint tenant.
3. The trial court found in favour of the Respondent. By its judgement dated 13<sup>th</sup> August 2021, the trial court issued a declaration that the Respondent is the absolute owner of the suit premises and further issued an order removing the caution placed on the title.
4. The appellant, being aggrieved by the trial courts determination, lodged her appeal on 20<sup>th</sup> August 2021 stating that the trial magistrate failed to consider the element of constructive trust and the fact that she is in possession of the suit premises.
5. In support of the application, the applicant avers that she resides in the suit premises where she has built a three-bedroomed house and where her parents graves sites are. That there is reasonable fear that the Respondent will sell the suit premises, evict her from the suit premises, and thereby render the appeal herein nugatory.



6. The Respondent opposed the application vide a Replying Affidavit sworn on 31<sup>st</sup> January, 2021. She averred that the suit land is a resultant subdivision of L.R No. Baragwe/Kariru/18 Measuring Approximately 7.8 Acres. That Baragwe/Kariru/180 was subdivided into eight portions that were granted to the sons and daughters of the deceased during his lifetime while the suit premises was issued to her as a widow of the deceased. She denied that the applicant resides on the suit premises since she lives in church institutions for she is a catholic nun attached to assumption sisters of Nairobi. She also denies

that the applicant's mother was buried on the suit land. It was her averment that the applicant's mother was buried on land parcel No. Baragwe/Kariru/2623. She also averred that if there existed a constructive trust, the same ought to affect all the pre-existing titles that were as a result of the subdivision of L. R. No. Baragwe/Kariru/180.

7. The applicant filed a supplementary affidavit on 4<sup>th</sup> February 2022 and averred that her father resided with her mother in a three-bedroomed house within the suit premises. Upon the demise of her mother, their father remarried and relocated to a separate house within the suit premises. She is the one who is in possession of the suit premises occasionally issuing the same to the custody of Pauline, her sister.
8. That she is the only one whose interests were held by the joint registration of L.R. Baragwe/Kariru/2617 in the name of her late father and the Respondent because of the interest of her mother's house thereon and the grave. That the reason why she was not issued a portion in the subdivision of Baragwe/Kariru/180 was that her interest lay in the remaining portion since he took care of her father. That their father categorically left out half a portion of the suit premises where their mother's house and gravesite. She also stated that her grandfather, grandmother, mother and father are all buried on the suit premises urging the Court if necessary to conduct a site visit.
9. On 8/2/2022 the court directed the parties to canvass the application through written submissions. Both parties filed their respective submissions.
10. On her part, the appellant submitted that she has an interest in the suit premises by virtue of her mother's house and the gravesites of her parents and grandparents. That the Respondent has not denied the averment that she would seek to sell the suit premises against the interest of the applicant. That there are no known assets of the Respondent hence there is reasonable apprehension that she may not pay any damages issued if this court does not issue the stay Orders herein. That this being a land claim the issuance of security for the due performance of the decree does not apply. He cited the cases of *Isack M'Inanga Kiebia v Isaaya Theuri M' Lintari & Another* [2018] e KLR, *M. Mbutt Vs The Rent Restriction Tribunal* Civil Application No. 6 of 1979.
11. The Respondent submitted that the applicant has not proved substantial loss. That the applicant did not claim a portion of the suit premises while his father was alive. That there is no indication that the applicant was to benefit from the suit premises. That the Respondent should not be denied the fruits of her judgement and should enjoy the rights and interests envisaged in Section 24 of the *Land Registration Act*. He relied on the following Authorities;

*Isack M'Inanga Kiebia vs Isaaya Theuri M' Lintari & Another* 2018 e KLR, *Samvir Trustee Limited vs Guardian Bank Limited, Macharia T/A Macharia & Co. Advocates vs East Africa Standard* (2002) e KLR 16.



## Analysis and Determination

12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which 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 High Court’s jurisdiction is fettered by three conditions namely, the establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay.
14. The application herein was filed on 16<sup>th</sup> December 2021. This is three (3) months after the delivery of the trial court judgement. The application was therefore filed without unreasonable delay.
15. The next issue is whether the applicant shall suffer a substantial loss. The applicant’s appeal is based on the establishment of a constructive trust. The appellant argues that based on her occupation of the suit premises and relations with the deceased, who was the registered owner of the suit premises, the element of a constructive trust was established.
16. In *Isack M’inanga Kiebia Vs Isaaya Theuri M’lintari & another* [2018] e KLR, the Supreme Court underpinned the registration of trusts when it held as follows;

“...These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered Land Act (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.....”

17. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;

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

See also; Pamela Awuor Ochieng & another v Elisha Odari Ogony [2021] e KLR.



18. In the case of *Samvir Trustee Limited v Guardian Bank Limited* Nairobi HCCC No. 795 of 1997, Warsame J. stated:

“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention”.

19. The applicant has made a claim that there is a reasonable fear that the Respondent may proceed to sell the suit premises, which would be to her detriment. The Respondent did not make any averment to rebut this averment.

20. The applicant has stated that she resides in the suit premises albeit on her visiting the same from her abode in church institutions as a nun. There is clear evidence that the applicant has a dwelling place in the suit premises. Again, it is the applicant’s reasonable fear that the Respondent may evict her from the suit premises. This she establishes by the averment that removal of the caution placed on the titles gives the respondent unmitigated access over the use, title and occupation of the suit premises.

21. Whereas this Court acknowledges that, the Respondent ought to be left to enjoy the fruits of her judgement, the applicant has raised considerable grounds in her memorandum of appeal. There is also reasonable apprehension that her occupation of the suit premises may be hindered by the actions of the Respondent. The applicant has therefore proved that she may suffer substantial loss and the appeal herein may be rendered nugatory.

22. The purpose of deposit of security is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant and this being a land matter such security serves to preserve the subject matter as the parties litigate on the appeal. See *Nepbat Njiru M’kuma & 8 others Vs Mwaniki Mutbee* [2022] e KLR. In this case, the title has been transferred to Respondent. The decree has been substantially performed. As for preservation, the Respondent has actual possession of the premises. This being a non-liquidated claim and there being performance of the decree, I hold that it is unnecessary to make an order for security for the due performance of such decree or order.

23. Section 13 of the *Environment and Land Court Act* grants this court the mandate to grant interim preservation orders and Status quo orders regarding the property. In the emerging scenario, the merited interim preservation order is the maintenance of the prevailing status quo in respect of the suit property.

24. The Court therefore makes an order that the application dated 20th April 2021 be and is hereby allowed in the following terms;

- a. That an order of stay of further execution of the judgement and ruling delivered in the CM’s ELC Case Number 14 of 2020 by the Honourable L.W. Kabaria, PM on 13.8.2021 be and is hereby granted pending hearing and determination of the appeal herein.
- b. Status quo order over the suit property is hereby issued and in particular, the Respondent shall not evict the Applicant from the suit premises, shall not sell or dispose of in any manner the suit property or any part thereof pending the hearing and determination of the appeal.
- c. Costs of the Application shall be in the cause.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10<sup>TH</sup> JUNE, 2022.**



**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

Ms Wambui holding brief for Maina Kagio for Respondent

Ms Kiragu holding brief for Wambugu Kariuki for the Applicant

Kabuta – Court Assistant.

