



**Mageka v Siocha (Environment & Land Case 70 of 2021)
[2022] KEELC 3958 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 70 OF 2021**

JM KAMAU, J

JULY 27, 2022

BETWEEN

DONALD ONSONGO MAGEKA PLAINTIFF

AND

JAPHET SIOCHA DEFENDANT

RULING

1. The application before court is dated May 12, 2022 for the following orders: -

- “(a) Spent
- (b) Spent
- (c) The honourable court be pleased to grant an order of stay of execution and/or enforcement of the judgment and decree issued on April 4, 2022 together with consequent orders arising thereafter and/or attendant pending the hearing and determination of the appeal in terms of the notice of appeal dated April 14, 2022.
- (d) Costs of this application do abide the appeal.
- (e) Such other and/or further orders as this honourable court may deem just and expedient be granted.”

2. The said application is grounded on the reasons that the plaintiff’s suit was dismissed on April 4, 2022 and the counter-claim allowed. The applicant says that an appeal has already been filed which has overwhelming chances of success and should execution be carried out causing the suit property to be transferred, the action shall place the suit property beyond the reach of the applicant and the decree shall be irredeemable and/or incapable of redemption in the event that the appeal succeeds. The



applicant commits himself to offer any security that the court may deem just, reasonable and expedient in the circumstances. He finally avers that the application has been made without unreasonable delay and that the respondent would not suffer any prejudice if the orders sought are granted. He pleads with the court to allow the prayers so that he is afforded a reasonable opportunity to pursue the appeal with some degree of guarantee. In his supporting affidavit, the applicant depones that he is the registered proprietor of LR No East Kitutu/Mwamangera/1471, that he was not satisfied with the judgment of this court and that a notice of appeal has already been lodged which raises salient, pertinent and plausible issues of law that are arguable and deserving to be ventilated before the Court of Appeal and the applicant fears that should these orders not be granted, the appeal if successful, would be rendered nugatory and the efforts of the Court of Appeal shall be rendered futile causing the applicant to suffer substantial loss but that in the converse the respondent would not suffer any prejudice save costs which can be awarded in compensation.

3. On his part, the respondent *vide* statement of grounds of opposition dated May 27, 2022 opposes the application as pre-mature, misconceived, incompetent and otherwise legally untenable. He says that the judgment was a split decision incapable of the order of stay of execution sought and that the same would otherwise confer upon the applicant undue leverage, which may possibly be used to alienate and/or dispose of the suit property, with a view of defeating and/or circumventing the realization of the judgment and the attendant decree and that the application does not meet the threshold set out by the provisions of order 42 rule 6 of the [Civil Procedure Rules, 2010](#), is devoid of merit and is otherwise meant to defeat the due process of the court besides being an abuse of the process of the court. He therefore asks the court to dismiss the said application with costs.
4. I did ask the parties to file and serve written submissions to be highlighted on July 21, 2022. Parties were given time allocation but never turned up for the same and the court therefore retired to write the ruling.
5. The decree of this court ought to have been attached to the application in order for the applicant to demonstrate to the court what it is that he is asking the court to stay. The applicant's suit that was dismissed with costs sought for the following orders: -
 - “(a) An order do issue compelling the defendant, his agents, employees, servants, representatives and/or assigns to vacate suit parcel No East Kitutu/Mwamangera/1471 by removing all buildings/structures erected therein within 30 days of the court's orders.
 - (b) A permanent injunction do issue restraining the defendants, his agents, employees, servants, representatives and/or assigns or whosoever from in any way dealing with suit parcel no East Kitutu/Mwamangera/1471.
 - (c) An order for compensation for trespass.
 - (d) Costs of the suit.”
6. This is what was dismissed.
7. The defendant's counterclaim which was granted on the other hand sought the following orders: -
 - “(a) A declaration that the plaintiff holds title No East Kitutu/Mwamangera/1471 in trust for the defendant exclusively.
 - (b) An order directing the defendant as above.



8. While allowing the counter-claim, the court rendered its judgment as follows: -

“.....on the counterclaim, the defendant has proved on a balance of probabilities that he bought the suit land from the plaintiff, though the latter’s brother and the lower court concluded that the sale agreement passing property rights from the plaintiff to the defendant was valid and not a forgery. The defendant then succeeds in the prayers in the counterclaim.”

9. Consequently, this court gave an order to the effect that a declaration was issued that the plaintiff holds title No East Kitutu/Mwamangera/1471 in trust for the defendant exclusively.

10. This is the decree that the applicant fears may be executed to his detriment.

11. Whereas I agree with the respondent that it may take a while before the realization of this execution takes place, it is obligatory for an applicant who seeks reprieve from the court to move without unreasonable delay. I therefore don’t think the application before the court is premature. And as I shall show later in this ruling, this application is equally to the respondent’s advantage. I say so because no one has bothered to extract the decree of this judgment dated April 4, 2022 nearly four months down the line. There is therefore nothing at the lands registry to show that this court has ordered the change of ownership of the suit land. What if the title changes hands? Will this not, in the words of the applicant, place the suit property beyond the reach of the respondent as well?

12. It beats logic for parties to get judgment and then sleep on it or waive the same to fellow village mates without extracting the decree and registering it at the land registry as a prohibiting safeguard against any further dealings with the land. In this particular case, the title to the suit property is still in the name of and in the hands of the applicant despite the court having declared that he holds the same in trust for the respondent. This is very lethal. What would prevent the applicant from transferring the land to someone else in the absence of any information as to the judgment of the court being available at the lands office? It would turn the entire proceedings herein into an academic exercise and later burden this court with a flurry of applications. I may be seen to be drifting from the point but it is of paramount importance for counsel representing parties to ensure realization of their clients’ fruits of litigation and that nothing complicates the matters after judgment.

13. Having made the above observations, the order given here must therefore take the interests of both parties into consideration. The court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. It is the business of the court, so far as possible, to ensure that any transitional motions before the court do not render nugatory the ultimate end of justice.

14. Consequently, taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful party, I make the following orders:

1. An order of stay of execution of the judgment and decree issued on April 4, 2022 together with consequent orders arising thereafter and/or attendant therefrom be and is hereby granted pending the hearing and determination of the intended appeal.
2. Should there be no appeal filed within ninety (90) days from the date hereof, these orders will automatically lapse.
3. The costs of this application are to await the outcome of the intended appeal.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF JULY 2022.

MUGO KAMAU



JUDGE

In the Presence of: -

Court Assistant – Sibota

Mr. Ooga for the Plaintiff/Applicant

N/A for the Defendant/Respondent

