



Kayo v Nkolope; Ketere (Interested Party) (Environment and Land Appeal 15 of 2021) [2022] KEELC 4774 (KLR) (19 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 15 OF 2021
EM WASHE, J
SEPTEMBER 19, 2022**

BETWEEN

EMMANUEL LEKAKENY KAYO APPELLANT

AND

OLELIMPASO SAITOTI PETER NKOLOPE RESPONDENT

AND

NENKOKO NONKIPA KETERE INTERESTED PARTY

RULING

1. The application before the court is dated May 13, 2022 seeking for the following orders; -
 1. The instant application be certified urgent and the same be heard *ex-parte* in the first instance.
 2. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of stay of execution of the judgment and/or decree made and/or rendered on the June 27, 2019 together with the order issued on the March 4, 2021 and any other consequential orders issued *vide* Kilgoris PMCC ELC No 34 of 2018.
 3. Pending the hearing and determination of the instant application, the honourable court be pleased to arrest and/or stay the proceedings slated for the May 18, 2022 for the purposes of dealing with the instant application.
 4. The honourable court be pleased to review, rescind, vary and/or set-aside judgment and/or decree made and/or rendered on the June 27, 2019 together with the orders issued on the March 4, 2021 and any other consequential orders *vide* Kilgoris PMCC ELC No 34 of 2018.
 5. The honourable court be pleased to grant leave and/or liberty to the proposed interested party/applicant to be joined in the instant matter, owing to the fact that the proposed



interested party/applicant herein, is the lawful and registered proprietor of LR No TransMara/Olomismis/769 (herein referred to as the suit property) which is the subject of the appeal herein as well as the proceedings *vide* Kilgoris PMCC ELC No 34 of 2018.

6. The honourable court be pleased to remit the matter *vide* Kilgoris PMCC No 34 of 2018 to the Senior Principal Magistrate's Court, Environment and Land Court at Kilgoris for hearing *de novo* to determine the proposed interested party's/ applicant's claim over and in respect of the suit property.
 7. Costs of the instant application be borne by the appellant and the respondent jointly and/or severally.
 8. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is supported by various grounds contained in the body of the application as well as the supporting affidavit of Nenkoko Nonkipa Ketele sworn on the May 13, 2022.

The grounds upon which the applicants relies upon in summary are as follows; -

- a. The parcel of land known as Transmara/Olomismis/769 is the property of the applicant having been registered as the lawful owner on the May 21, 2013.
- b. The actions of the appellant in including the property known as Transmara/Olomismis/769 as part of the assets of the late Olekayeu Kiramba Chesirikan in the proceedings known as Kisii Succession Cause No 186 of 2013 was in error and unlawful.
- c. The appellant misdirected the court in the proceedings known as Kisii Succession Cause No 186 of 2013 on the true ownership of the property known as Transmara/Olomismis/769 thereby resulting to the court creating a second interest in favour of the appellant.
- d. The interested party was not aware of the proceedings known as Kilgoris PMCC ELC No 34 of 2018 between the appellant and the respondent until February 4, 2022 when a letter dated January 18, 2022 from the sub-county land registrar- Transmara West & East was served upon her.
- e. The contents of the said letter dated January 18, 2022 was to summon the interested party to appear before the sub-county land registrar- Kilgoris West and East and participate in the determination of the boundary creating the ten (10) acres to be hived off the property known as Transmara/Olomismis/769 in line with the decree issued in Kilgoris PMCC ELC No 34 of 2018.
- f. The interested party proceeded to instruct the firm of Messrs Ogutu Mboya, Ochwal & Partners, Advocates to peruse the court proceedings regarding the suit known as Kilgoris PMCC ELC No 34 of 2022 and upon the same being done, it was discovered that a judgement had been delivered on the June 27, 2019 alienating 10 acres of the property known as Transmara/Olomismis/769 to the respondent.
- g. The interested party's position is that both the proceedings and the resultant judgement delivered on the June 27, 2019 contravened the rules of natural justice and her constitutional rights to own property.
- h. In conclusion therefore, the interested party seeks for a prayer that this court set-aside the judgment delivered on the June 27, 2019 and the proceedings known as Kilgoris PMCC ELC No 34 of 2018 start *de novo* to accord her an opportunity to participate therein.



3. The present application was duly served on both the appellant and the respondent.
4. The interested party/applicant thereafter filed an affidavit of service sworn by one Brian S Mulisa, advocate on the May 19, 2019.
5. On the May 27, 2022, the appellant filed a replying affidavit sworn on the May 27, 2022.
6. The appellant's replying affidavit in a summary confirms that the property known as Transmara/Olomismis/769 is indeed registered in the name of the interested party/applicant.
7. Secondly, the appellant indicated that the property which was subject of the claim by the respondent is Transmara/Olomismis/941 and not Transmara/Olomismis/769.
8. Consequently, the appellant indicated that it does not objection to the orders sought in the interested party's/applicant's application being granted.
9. On the May 24, 2022 when the present application came up for *inter-parte* hearing, the court allowed the joinder of the interested party and further issued an order of inhibition prohibiting the sub-county land registrar-Transmara West & East as well as the sub-county land surveyor Transmara West and East from interfering and/or tempering with the property known as Transmara/Olomismis/769 pending the hearing and determination of this suit.
10. The respondent has so far not filed any response to the present application despite proof that service has been done.
11. The court having gone through the present application, the supporting affidavit thereof, the annexures therein and the response by the appellant, the following issues have been identified for consideration; -
 1. Whether or not this court should order a stay of the execution regarding the judgement rendered on June 27, 2019?
 2. Whether or not this court should arrest the proceedings slated for May 18, 2022 pending the hearing and determination of this application.
 3. Whether or not this court should review, rescind and/or set-aside the judgment and decree issued on the June 27, 2019 in Kilgoris PMCC ELC No 34 of 2018?
 4. Whether or not this court should remit back the matter known as Kilgoris PMCC ELC No 34 of 2018 to the lower court for hearing *de novo*?

Issue No 1 – Whether or not this court should order a stay of the execution regarding the judgement rendered on June 27, 2019?

12. The present application through annexure NNK 11 indeed places before this court a decree issued on the March 5, 2021 emanating from the proceedings of Kilgoris PMCC ELC No 34 of 2018.
13. The decree dated March 5, 2021 directs the land registrar and land surveyor, Kilgoris land registry to visit the property known as Transmara/Olomismis/769 and hive out 10 acres of land to be occupied by the decree holder/applicant who is the respondent in this appeal.
14. The interested party/applicant has indicated that the property known as Transmara/Olomismis/769 indeed belongs to her and has annexed certified copies of the green card as annexures 1(a) & (b).



15. The appellant in the replying affidavit to the present application has also pleaded that the interested party/applicant is the rightful registered owner of the property known as Transmara/Olomismis/769.
16. The respondent in this appeal has not filed any documents to dispute the ownership of the interested party/applicant as appertains the property known as Transmara/Olomismis/769.
17. Referring to the certified copy of the green card and the certificate of postal search annexed as NNK 1(a) and (b), this court has no doubt that indeed the property Transmara/Olomismis/769 belongs to the interested party/applicant.
18. Section 24, 25 and 26 of the *Land Registration Act*, No 3 of 2012 confers ownership and legal rights on those persons whose names appear of registration records created by the ministry of lands.
19. It is therefore clear to this court that the property known as Transmara/Olomismis/769 is currently registered in the name of the interested party/applicant until or unless otherwise held by a court of proper jurisdiction.
20. The court having arrived at the above conclusion, the question which now requires to be addressed is whether the interested party/applicant is entitled to a stay of execution of the judgement rendered on the June 27, 2019
21. Order 42 rule 6(1) of the *Civil Procedure Rules* make provision of a party to apply for stay of judgment emanating from a decree or an order upon which is subject of appeal or has been appealed against.
22. Order 42 rule 6(2) of the *Civil Procedure Rules* further make provisions on the principles that the courts should evaluate when dealing with applications for stay of judgements and/or orders pending appeal or during the hearing and determination of appeals.
23. These two principles are namely; -
 - a. The court is satisfied that substantive 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 performance of such decree or order as may ultimately be binding on him has been given by the applicant.
24. The interested party/applicant in this present application did not participate at the hearing of this substantive suit known as Kilgoris PMCC ELC No 34 of 2018 at the trial court.
25. However, the judgment rendered in the suit known as Kilgoris PMCC ELC No 34 of 2018 directs that a portion of Ten (10) acres be hived off from the interested party's/applicant property known as Transmara/Olomismis/769.
26. The certified copies of the green card and the certificate of official search as well as the appellant's replying affidavit confirm that the property known as Transmara/Olomismis/769 belongs to the interested party/applicant.
27. The implementation of the decree issued on the March 5, 2021 would mean that the interested party/applicant would be deprived of her property without due process being observed.
28. The interested party's/applicant's rights especially under article 40 and 50(1) of the *Constitution* will be violated.



29. The violation of the interested party's/applicant's right under the Constitution coupled with the physical disposition on the ground can only be termed as irreparable loss which is more than the standard measure known as substantial loss.
30. On the aspect of the security, the court is hesitant to make such orders as the interested party/applicant did not participate in the proceedings at the trial court and only came to be aware of this matter after judgment and decree had been issued.
31. The court is therefore simply giving an opportunity to the interested party/applicant to access justice through a fair hearing as envisaged under article 40 and 50(1) of the Constitution.
32. These are rights which in the court's considered view should be given without conditions such as costs.

Issue No 2 – Whether or not this court should arrest the proceedings slated for May 18, 2022 pending the hearing and determination of this application.

33. The interested party/applicant in prayer No 3 in this present application seeks to arrest and/or stay the proceedings slated for the May 18, 2022.
34. Unfortunately, the interested party/applicant did not specifically indicate which proceedings were to be stayed through this court.
35. According to the proceedings in this file, there was no mention or hearing slated for the May 18, 2022.
36. The grounds contained in the body of the present application and/or the affidavit of the interested party /applicant have also not made any reference to this particular prayer.
37. In addition to the fact that May 18, 2022 has since passed, this court can not grant such a prayer as the same is spent.

Issue No 3 – Whether or not this court should review, rescind and/or set-aside the judgment and decree issued on the June 27, 2019 in Kilgoris PMCC ELC No 34 of 2018?

38. The interested party/applicant through prayer No 4 seeks to review, rescind and/or set-aside the judgement and/or decree issued on the June 27, 2019 from the proceedings of Kilgoris PMCC ELC No 34 of 2018.
39. The grounds in support of this prayer is that the interested party/applicant was denied an opportunity to be heard and/or participate in the proceedings yet they affected her property known as Kilgoris PMCC ELC No 34 of 2018.
40. The judgement rendered on the June 27, 2019 and the subsequent decree thereof violated her fundamental rights to a fair hearing and right to property as enshrined in the Constitution.
41. The interested party/applicant placed before this court certified records from the ministry of lands as well as the pleadings, proceedings and the resultant judgement rendered in Kilgoris PMCC ELC No 34 of 2018.
42. The court has indeed gone through all their documents as well as the replying affidavit of the appellant dated May 27, 2022.
43. It is clear that indeed, the interested party/applicant was not a party in the pleadings thereof or participated during the hearing thereof.



44. In essence therefore, the interested party/applicant being the registered owner of the property known as Transmara/Olomismis/769 at the time filing the proceedings known as Kilgoris PMCC ELC No 34 of 2018 in the year 2015, her present and participation thereof was fundamental especially keeping in mind that the determination would affect her ownership and/or rights on the property known as Transmara/Olomismis/769.
45. Be as it may, can this court grant such a prayer through this application?
46. The proceedings before the court are appellate in nature pursuant to the memorandum of appeal dated July 8, 2019.
47. The appellant is seeking to set-aside the entire judgment delivered on June 27, 2019.
48. This appeal is still pending for hearing and determination as parties are yet to file their submissions thereof.
49. Indeed, if this court is to grant this particular prayer, then the appellant's appeal will be fundamentally determined and there will be no issue for determination at the hearing.
50. In conclusion therefore, this court is of the considered view that this prayer can not be granted in this present application as prayed.

Issue No 4 – Whether or not this court should remit back the matter known as Kilgoris PMCC ELC No 34 of 2018 to the lower court for hearing de novo?

51. The interested party/applicant in prayer No 6 seeks for an order that the lower court proceedings in Kilgoris PMCC ELC No 34 of 2018 be heard afresh.
52. The basis of this prayer is that the proceedings conducted earlier and the subsequent judgement thereof deprived him of the right to be heard and enjoy a fair hearing.
53. It is indeed true that the interested party/applicant should have participated in the proceedings undertaken in the lower court in Kilgoris PMCC ELC No 34 of 2019, it is also important to appreciate that these proceedings were concluded by the judgment delivered on June 27, 2019.
54. The court is of the considered view that an order for hearing of the lower court *de novo* known as Kilgoris PMCC ELC No 34 of 2018 can only be pronounced after this appeal has been heard and determined.
55. In conclusion therefore, the court hereby makes the following orders as appertains the application dated May 13, 2022 by the interested party/applicant; -
 1. That the judgment dated June 27, 2019 and the subsequent decree issued on the March 5, 2021 be and are hereby stayed pending the hearing and determination of the appeal filed in this matter.
 2. That the sub-county land registrar, Transmara West and East is hereby directed to maintain the inhibition orders issued by this court on the May 24, 2022 until the hearing and determination of pending appeal before the court.
 3. That appellant be and is hereby directed to prepare, file and serve their written submissions on the main appeal within 14 days from today's date.



4. That the respondent and the interested party shall also prepare, file and serve their submissions within 14 days upon service by the appellant or lapse of the 14 days granted to the appellant.
5. Each party shall bear its own costs.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THIS 19TH DAY OF SEPTEMBER, 2022

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT:

ADVOCATES FOR THE APPLICANT:

ADVOCATES FOR THE RESPONDENT:

ADVOCATES FOR THE INTERESTED PARTY

