



Musyimi & another ((Sued in his own Capacity and also as the Administrator/Personal Representative of the Estate of Muoti Musyimi Ndolo - Deceased)) v Kaumbulu (Environment and Land Appeal E040 of 2023) [2024] KEELC 444 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEELC 444 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E040 OF 2023
A NYUKURI, J
FEBRUARY 1, 2024

BETWEEN

DAVID MUSYIMI 1ST APPELLANT

PATRICK KINYOLO MBITHI 2ND APPELLANT

**(SUED IN HIS OWN CAPACITY AND ALSO AS THE ADMINISTRATOR/
PERSONAL REPRESENTATIVE OF THE ESTATE OF MUOTI MUSYIMI
NDOLO - DECEASED)**

AND

ELIZABETH NGINA KAUMBULU RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated 13th December 2023 filed by the appellants seeking stay of execution of the judgment and decree of the Kangundo Chief Magistrates Court ELC Case No. E030 of 2021 delivered on 27th November 2023, pending determination of the appeal herein. They also sought costs.
2. The application is premised on the supporting affidavits dated 13th December 2023 sworn by David Musyimi and Patrick Kinyolo Mbithi who are the appellants herein. The applicants' case is that on 27th November 2023, the trial court delivered a judgment in Kangundo CMC ELC No. E030 of 2021 allowing the respondent's claim of injunction and declaratory orders; prompting the instant appeal from the appellants who are dissatisfied with the lower court judgment. They stated that their appeal has high chances of success.



3. They stated that having obtained Parcel No. Kangundo/Muisuni/2027 (suit property) at a consideration by way of purchase, the 2nd appellant took possession thereof and has been in occupation since 4th August 2016 and has been farming on the said property. They also stated that the 2nd appellant had developed the suit property in the tune of Kshs. 1,200,000/- by digging trenches, planting bananas and investing in pesticides, fertilizer and drip irrigation. They also stated that the suit property has mature coffee bushes where the 2nd appellant harvests coffee beans. They stated that if the orders sought are not granted, they stood to suffer substantial loss. They attached pleadings and documents filed in the lower court, the impugned judgment and Memorandum of Appeal.
4. In a supplementary affidavit filed by the 1st appellant, he stated that his advocate was served with a draft decree on 10th January 2024 and that therefore, it is apparent that the respondent intends to execute the decree. He attached a letter dated 11th January 2023 and a draft decree from the respondents' counsel.
5. The application is opposed. Elizabeth Ngina Kaumbulu, the respondent in this matter, filed a replying affidavit sworn on 9th January 2024. It was her case that the trial court allowed her claim and awarded her costs and that an application for stay ought to have security for due performance of the decree which the appellants have failed to provide. She stated that the 1st appellant admitted selling the suit property to her and that she is entitled to it. She faulted the application for want of written authority from the 2nd appellant. She stated that the appeal lacks merit; and that she should be allowed to enjoy the fruits of her judgment.

Submissions

6. On the hearing date of 18th January 2024, only the counsel for the applicants attended court and made oral submissions in regard to the application. There was no appearance for the respondent, although counsel for the respondent was served on 20th December 2023 as demonstrated by the return of service filed on 11th January 2024.
7. Mr. Kitonga, counsel for the applicant, submitted that the applicants stand to suffer substantial loss if the application is not allowed as the 2nd applicant has spent substantial amount developing the suit property in the sum of Kshs. 1.2 million. Counsel urged the court to allow the application. Counsel asserted that the applicants were willing to provide security for the due performance of the decree.

Analysis and determination

8. The power of the court to grant stay of execution pending appeal is provided for in Order 42 Rule 6 of the *Civil Procedure Rules* as follows;
 - 6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 2. No order for stay of execution shall be made under subrule (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.
3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
9. Therefore for an applicant to succeed in an application for stay of execution pending appeal, they must demonstrate that they stand to suffer substantial loss. It is not enough for an applicant to show that execution is imminent as execution is a lawful process which ought to proceed upon grant of a decree or order.
10. In the instant matter, the appellants state that the 2nd appellant is in occupation of the suit property which she has developed using substantial amount of money of about Kshs. 1.2 million. The respondent did not dispute the allegation that the 2nd applicant is in occupation of the suit property. Her position is that the appeal has no chance of success and that the applicants have not provided security. As the 2nd applicant's occupation and investment in the suit property is not disputed, I find and hold that the applicants have demonstrated stand to suffer substantial loss if execution proceeds as the 2nd applicant stands to lose his investment of over Kshs. 1.2 million together with the mature coffee bushes and banana plantation on the suit property.
11. As the disputed land will remain and will not be taken away by an order of stay of execution of judgment, my view is that an order for security is not necessary.
12. The upshot is that the Notice of Motion dated 13th December 2023 is merited and the same is allowed. Therefore, I order that the judgment and decree of Kangundo Chief Magistrate Court in ELC Case No. E030 of 2021 delivered on 27th November 2023 be and is hereby stayed pending hearing and determination of this appeal. The costs of the application shall abide the outcome of the appeal.
13. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1ST DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Nzioka for respondent

Mr. Gitonga for applicants

Josephine - Court Assistant

