



REPUBLIC OF KENYA



Nyamwange & another v Ondoro & 5 others (Environment & Land Case 60 of 2021) [2024] KEELC 7489 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7489 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 60 OF 2021**

JM KAMAU, J

NOVEMBER 6, 2024

BETWEEN

YUNES BOERA NYAMWANGE 1ST PLAINTIFF

GEORGE NYAMWANGE 2ND PLAINTIFF

AND

RHODA MONGINA ONDORO 1ST DEFENDANT

JOHNSTON OMBANGI 2ND DEFENDANT

SAMUEL RAINI NYARUSA 3RD DEFENDANT

JAMES ONGERA KEMONI 4TH DEFENDANT

HELLEN ACHINGA MAKORI 5TH DEFENDANT

THE LAND REGISTRAR, NYAMIRA 6TH DEFENDANT

RULING

1. By a Plaint dated 31/10/2016 and amended on 27/2/2017 the Plaintiffs who are mother and sons respectively sought the Court's intervention that the Titles Gesima Settlement Scheme/337,338,340,341,342 and 344 be returned to the Lands office for cancellation and rectification.

2. On 9/5/2024, this Court pronounced itself as follows:

“Consequently, the Plaintiffs’ claim fails in its entirety, the 1st Defendant’s counter-claim succeeds to the extent that Gesima Settlement Scheme/342 does not belong to the Plaintiffs. In case the Plaintiffs had paid any money in respect of the plot numbers PIs 801 and 802



then they are entitled to compensation from the Settlement Funds Trustees Department which the court advises them to pursue. “

3. On 9/5/2024 this Court pronounced itself as follows:
 - a. An order of the Honourable Court be and is hereby issued directing the Defendants to return Title for plots Nos. Gesima Settlement Scheme/337, 338, 340, 341, 342 and 344 to the Lands Registry, Nyamira for rectification.
 - b. An order be and is hereby issued directing the Land Registrar Nyamira and County Surveyor, Nyamira to implement rectification of titles for parcels Nos. Gesima Settlement Scheme 337, 338, 340, 341, 342 and 344 to reflect the correct position status and acreage
 - c. An order be and is hereby issued for rectification of the Green Card for Gesima Settlement/5 to reflect the correct acreage.
 - d. An order of permanent injunction be and is hereby issued restraining the Defendants by themselves or agents from howsoever encroaching, trespassing or interfering with the Plaintiff's peaceful occupation, possession and enjoyment of land parcel No. Gesima Settlement/5.
 - e. Costs of the suit and interest.
4. Subsequently on 19/6/2024 the Plaintiffs/Applicants moved this court under certificate of urgency for the following orders;
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to order stay of execution of the Judgment and Decree of this Honourable Court given on the 9/5/2024 pending the Hearing and determination of the intended appeal to the Court of Appeal.
 4. That this Application be served on the Defendants/Respondents for Hearing inter partes on such date and time as this Court may deem fit.
 5. That the costs of this Application be provided for.
5. The same was grounded on the Applicants' fears that unless the same were granted, the Respondents would levy execution by evicting the Applicants from the residential houses situate on the suit land. The Applicants undertook to furnish and deposit security and/or other conditions attached to the order of the Court. Their other fear was that the Respondents are likely to dispose of and/or transfer the subject matter hence putting it beyond the reach of the Applicants in the event they succeed in the Appeal. They also told the Court that the Application was brought to Court without unreasonable delay. By the time of moving the Court, the Applicants had already filed the Notice of Appeal and requested for proceedings. The Respondents on the other hand vide Grounds of Opposition dated 5/7/2023 responded that the Application was pre-mature, misconceived, incompetent and legally untenable. They further opined that the Judgment was a Negative Decree/Order and therefore incapable of being stayed and that the same is an abuse of the process of the Court.
6. I invited Counsel from both sides to file and serve their written submissions.
7. Order 42 rule 6(1) and (2) of the Civil Procedure Rules provides as follows:



- (1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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.”
8. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause
9. As this Court held in the case of *Nyamira ELC Case No. 92 of 2021 Shadrack Nyaberi Mwakae Vs David M. Omoganda Ong’era*.

.....it is important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question or of the failure to do so. In other words, 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. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lies considering the fact that 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 ends of justice. The interest of the Court in stay of execution in the case of a non-monetary Decree such as this one is usually meant to serve the purpose of exclusively preserving the subject matter so that whoever succeeds in the Appellate Court will find the property still intact. The court therefore needs to be more cautious and interrogate the consequences of failure to preserve the subject matter. The orders issued in this case should therefore be in respect to the preservation of the subject matter itself until the outcome of the intended Appeal. Should we grant the orders as sought by the Applicants herein, what happens to the properties in issue? The Title Holders would be at liberty to dispose of the properties. Will this not, in the words of the Applicants, place the suit property beyond the reach of the Respondent as well? This Court therefore has an obligation to give orders that act as a prohibiting safeguard against any further dealings with the suit lands. In this particular case, the Titles to the suit properties are still in the names of and in the hands of the Applicants despite the court having declared that the Applicants acquired them unlawfully. This is very lethal. What would prevent the Applicants from transferring the suit lands to third parties in the absence of any information as to the judgment of the court being available to such third parties? It



would turn the entire proceedings herein and in the appellate court into an academic exercise and later burden this court and/ or the appellate court with a flurry of Applications. It is of paramount importance to ensure realization of the ultimate winners' fruits of litigation and that nothing complicates the matters after the final Judgment.....”

10. I agree with the opinion expressed in Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto that:

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss is”

11. As was stated by Kuloba, J in Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:

.....to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law.

12. The Applicants have assured this Court that they are ready to abide by any condition(s) given by the Court in order to secure the Orders. I agree with the Applicants that if the orders are not granted and the subject matter of the Appeal is disposed of or changes hands in any other way, the intended Appeal, if successful, would be rendered nugatory.
13. The law is that where the Applicant intends to exercise his undoubted right of appeal, and in the event it were eventually to succeed, it should not be faced with a situation in which it would find itself unable to justice.
14. A stay of execution in the case of a non-monetary Decree such as the one before the Court is usually meant to serve the purpose of preserving the subject matter so that in case the Appellant does succeed in the Appellate Court, the whole process is not turned into an academic exercise. This being a non-monetary Decree the court needs to be more cautious and interrogate the consequences of failure to preserve the subject matter.
15. 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 Appellant if at all, I will grant a conditional stay of execution to the Applicants which is that the Applicants do deposit in Court, the sum of Kshs. 100, 000/= as security for costs within the next 15 Days. And for the avoidance of doubt, the stay of execution is to the effect that pending the Hearing and determination of the intended or already filed Appeal from the Decree of this Court dated 9/5/2024, the Respondents should not in any way dispose of, transfer, waste and/or charge the parcel of land known as Gesima Settlement Scheme/342. However, the stay of execution does not restrain the Respondents from the continued use of the suit land.
16. The costs of this Application will await the outcome of the intended Appeal.



RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 6TH DAY OF NOVEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff: Ms. Nyaenya

Defendant: Ms. Ochwal for the 2nd Defendant

