



Buko v Atika (Civil Suit 27 of 2018) [2023] KEELC 15875 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15875 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 27 OF 2018
M SILA, J
MARCH 2, 2023

BETWEEN

SAMWEL BONUKE BUKO PLAINTIFF

AND

WILSON MISIA ATIKA DEFENDANT

((Application for stay of execution pending appeal; plaintiff having obtained judgment for part of the suit land; defendant aggrieved and filing an appeal; stay granted since if the decree is executed the land may be lost; status quo be maintained on both possession and title pending appeal))

RULING

1. The application before me is that dated December 5, 2022 though it was filed on 10 January 2023 more than one month later. The application first seeks an order to have the law firm of MW Magara & Company Advocates come on record for the defendant after judgment, and for the court to be pleased to issue an order of stay of execution of the judgment herein. The application is opposed.
2. To put matters into context, this suit was commenced through an Originating Summons which was filed on October 24, 2018 with the applicant herein being the defendant. The plaintiff in the Originating Summons sought orders that he is entitled to be declared owner, by way of adverse possession, of 0.94 Ha out of the land parcel Nyaribari Chache/Keumbu/1550 registered in the name of the applicant. The plaintiff contended to have purchased the suit land from the father of the applicant in the year 1996 but the transfer was never completed though he took possession of the land. The applicant appointed M/s JM Nyagwencha & Company Advocates and opposed the suit. The case was heard by my predecessor, Onyango J, who delivered judgment on 5 July 2022. She allowed the case of the plaintiff and directed that 0.94 Ha be carved out of the suit land and be registered in name of the plaintiff. Aggrieved, the applicant filed a notice of appeal on July 15, 2022. He has now also filed the appeal which has been registered in the Court of Appeal at Kisumu as Civil Appeal No E293 of 2022. He of course wants to formally change counsel and for the decree to be stayed pending appeal.



3. The plaintiff filed a replying affidavit to oppose the aspect of the application related to stay. He does not think that the judgment of the court will be overturned on appeal. He adds that the decree has been extracted and served upon the Kisii County Surveyor for execution and implementation.
4. I have considered the application. It is one for stay pending appeal and to allow the applicant to change counsel. I allow the change of counsel to M/s MW Magara & Company Advocates. On the issue of stay, this is covered in Order 42 Rule 6 (2) which states as follows :-
 - (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.
5. The court thus considers whether the applicant will suffer substantial loss if the decree is not stayed, and also takes into account whether the application has been made timeously. There also ought to be security for the due performance of the decree. I have considered these principles in light of what I have at hand. I would have expected such application to have been filed sooner but be that as it may, I have no evidence that the decree has been fully executed. I think that if the decree is executed and the plaintiff obtains title, there is risk of the land being lost in the event that the applicant succeeds on appeal. There is therefore danger of the applicant suffering substantial loss in case he emerges victor at the Court of Appeal. On security, I do not see anything to offer as the suit of the plaintiff succeeded but there was no order as to costs. I will only say that it is best that the current status quo be maintained until the appeal is heard and determined.
6. I thus allow this application. I order that there be a stay of execution of the decree. I further order that all parties maintain the status quo on both possession and title until the appeal is heard and determined. The costs of this application will be costs in the appeal.
7. Orders accordingly.

DATED AND DELIVERED THIS 2 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

