



Kasamu & another (Suing as the personal representatives of David Kasamu Musembi (Deceased)) v Nyagoto Investments Limited (Environment & Land Case 144 of 2010) [2023] KEELC 16430 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 144 OF 2010**

**A NYUKURI, J
MARCH 8, 2023**

BETWEEN

**ANNAH NG'ONDU KASAMU 1ST PLAINTIFF
LYDIA KASAMU MUSEMBI 2ND PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES OF DAVID KASAMU
MUSEMBI (DECEASED)**

AND

NYAGOTO INVESTMENTS LIMITED DEFENDANT

RULING

1. Before court is a Notice of Motion dated March 18, 2022 filed by the Plaintiff seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to grant a stay of execution of the orders/judgment delivered on January 20, 2022 pending hearing and final determination of the appeal.
 - d. That in the alternative and/or subject to granting prayer (2) hereinabove, this Honourable Court be pleased to issue orders maintaining status quo regarding the property known as LR No 108 measuring 10 Ha (now known as LR No 20507 as at the date of delivery of the judgment to be maintained pending hearing and final determination of the appeal.
2. The application is anchored on the affidavit in support sworn by Lydia Kasamu Musembi, the 2nd Plaintiff. The Applicant's case was that the judgment was delivered herein, on January 20, 2022 and



that the Plaintiff is aggrieved with the said judgment and has since lodged a notice of appeal dated January 31, 2022. That in the judgment, the court noted that the Plaintiff was the first allottee, but that the court found in favour of the Defendant. The Applicant averred that the Defendant had fenced the suit property and that he may sell, develop, subdivide or charge the same, and that the appeal may be rendered nugatory and a mere academic exercise.

3. The Applicant stated that in a ruling of an interlocutory application, this court was satisfied that the Plaintiff had been in possession of the suit property since 1994, but that the final decision was made in favour of the Defendant.
4. The Applicant asserted that the application and the appeal had been brought without unreasonable delay and that no prejudice shall be suffered by the Respondent. The Applicant stated that she was willing to comply with any directions in regard to security.
5. The application was opposed. The Defendant/Respondent filed grounds of opposition dated April 8, 2022. It was the Respondent's contention that there is no substantial loss shown that the Plaintiff may suffer if the orders sought are not granted. Further, that no security has been offered for the due performance of the decree.
6. The Defendant maintained that the affidavit evidence given at the interlocutory stage that the deceased Plaintiff was in possession of the suit land was found to be false during hearing. He also stated that the appeal was not arguable and had no chance of success as a mere letter of allotment does not confer title to an allottee and that the application was an afterthought and an abuse of the due process.
7. The application was disposed by way of written submissions. On record are the Defendant's submissions dated October 4, 2022.

Submissions

8. The Defendant's counsel submitted that in the judgment delivered herein on January 20, 2022, the Plaintiff's suit was dismissed with costs and the Plaintiff restrained from trespassing onto the suit property and the Plaintiff ordered to pay costs of the suit and the counterclaim. Counsel argued that no positive order was made by the court capable of being stayed as the Plaintiff's suit was dismissed and a dismissal cannot be stayed.
9. On whether there can be stay in respect of the order made in respect of the counterclaim restraining the Plaintiff from trespassing on the suit property, counsel submitted that the Plaintiff was not in possession of the suit property and the court had already determined that the land belongs to the Defendant and therefore this court cannot stay the injunction.
10. Counsel argued that neither the Plaintiff nor her late husband have ever been proprietors of the suit property and therefore they are not being deprived of the property. Counsel's position was that Article 40 of the Constitution protects the Defendant and not the Plaintiff.
11. On whether this court had jurisdiction to grant orders of status quo or injunction pending appeal, counsel argued that this court cannot grant an injunction pending appeal of its judgement.
12. On whether the Applicant stood to suffer substantial loss, counsel argued that this court found that even as at the time of hearing this matter, the Plaintiff had not honoured the terms of the allotment letter dated December 3, 1993 or paying Kshs 45,317/- and therefore the Plaintiff cannot talk of loss when he did not even comply with the requirements of allotment.
13. According to the 1st Defendant there was inordinate delay in filing the application as there was a delay of 57 days.



Analysis and Determination

14. I have carefully considered the application, the grounds of opposition and submissions. In my considered view, the issues that arise for determination are;
- a. Whether the Plaintiff/Applicant has met the threshold for grant of stay pending appeal.
 - b. Whether the Plaintiff deserves orders of status quo as at the date of judgment pending hearing of the appeal.
15. Order 42 Rule 6 provides for stay of execution pending appeal as follows;
1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from 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.
16. Therefore, the court whose judgment has been appealed from, has power to grant stay of execution where the Applicant has demonstrated that he stands to suffer substantial loss if the stay is not granted, the application has been made without unreasonable delay and security for the due performance of the decree is availed.
17. The import of substantial loss was discussed in the case of [James Wanyalwa & Another vs Agnes Naliaka Cheseto \[2012\] eKLR](#), as follows;
- No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not itself amount to substantial loss under Order 42 Rule 6 of the [Civil Procedure Rules](#). This is so because execution is a lawful process. The Applicant must establish other facts which will 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. The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
18. Having considered the judgment herein, I note that the court dismissed the Plaintiff's claim and issued an injunction restraining the Plaintiff from trespassing on the suit property. I have taken note of the Plaintiff's assertions and there is no averment on how the injunction granted herein will cause her substantial loss. The fact that this court found at the interlocutory stage in favour of the Plaintiff on the basis of the allegation of possession, cannot be proof of the Plaintiff's claim. Orders made at the interlocutory stage have no advantage of a full interrogation of the facts as the allegations in the



affidavits are ordinarily not subjected to cross examination. Suffice to say that a court's findings at the interlocutory stage are merely preliminary findings and that does not stop the court from making a contrary finding upon presentation of viva voce evidence. In view of the above, I am not convinced that the Plaintiff/Applicant has satisfied this court for grant of stay pending appeal.

19. On whether the court should grant status quo obtaining in respect of the suit property as at the date of judgment, I note that the Applicant has not satisfied the court on the nature of the loss she may suffer. Besides, while Order 42 Rule 6 (6) grants this court the jurisdiction to grant a temporary injunction while exercising its appellate jurisdiction, there is no provision in law that grants this court the power to grant an injunction where an appeal has been preferred against its decision in the Court of Appeal. As a status quo order is a restraining order limiting the exercise of property rights by the person in whose favour a decree is made, in my view, it is an order in the nature of a temporary injunction, which this court has no jurisdiction to grant.
20. In the premises, I find that the Plaintiff's application dated March 18, 2022 lacks merit and the same be and is hereby dismissed with costs to the Defendant.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Kwamboka holding brief for Mr. Nzei for Plaintiff/Applicant

Mr. Masore Nyangau for Defendant/Respondent

Court Assistant – Josephine

