



**Kimulu v Kiilu (Environment and Land Appeal E012 of 2022)
[2023] KEELC 17231 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E012 OF 2022**

A NYUKURI, J

MAY 3, 2023

BETWEEN

JOSEPH MUTINDA KIMULU APPELLANT

AND

JOHN KYAMBI KIILU RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated 28th April 2022 filed by the Appellant seeking stay of execution of the judgment and decree in CMCC no 827 of 2014, pending the hearing and determination of this appeal as well as costs of the application.
2. The application is supported by the affidavit sworn by the Applicant on 28th April 2022. The Applicant's case is that judgment was in respect of parcel Machakos/Mua Hills/137, but on application by the Respondent claiming entitlement of two acres in title no Machakos/Mua Hills/1557, the court granted his prayer yet the Judgment debtor never owned that property. Further that the court failed to give the Applicant opportunity to be heard in the said application as the court stated that the application was unopposed when the respondent had filed a replying affidavit and submissions. The Applicant's position was that unless the execution of the decree is stayed, he will be deprived of his property. He attached copies of a replying affidavit dated 21st October 2021 and submissions dated 14th February 2022.
3. The application was opposed. The Respondent filed a replying affidavit sworn on 20th May 2022. It was the Respondent's case that land Parcel no Machakos/Mua Hills/ 137 was subdivided severally, ultimately leading to Parcel Number 1557. He explained that Parcel no 137 was subdivided into many titles among them Parcel no 900, which was subdivided to yield Parcel nos. 1170 and 1171; that Parcel no 1170 was subdivided into Parcel nos. 1273 and 1274; that Parcel no 1273 was subdivided into Parcel nos. 1557 and 1558. He produced a surveyor's report indicating that his two acres are situated on Parcel



no 1557. He maintained that as Parcel no 1557 emanated from Parcel no 137 which belonged to the deceased mother of the Appellant, who was the judgment debtor in the lower court, that therefore the said title is the deceased's asset and failure to confirm grant does not affect the decree herein. Further that the decree is against the deceased and her estate and not against the Appellant personally and that he should pay the debts of the estate.

4. The Respondent pointed out that there was no appeal against the decree yet the Appellant was trying to relitigate this matter. He stated that no security had been offered for due performance of the decree.

Analysis and Determination

5. I have carefully considered the application as well as the replying affidavit. The single issue for determination herein is whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal.

6. Order 42 Rule 6 provides for the jurisdiction of the court to grant stay of execution pending appeal as follows;

Stay in case of appeal [Order 42, rule 6.]

- (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 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.

7. Essentially therefore, to obtain stay of execution pending appeal, an applicant must demonstrate that they have filed an appeal against the decision they wish to stay and that if stay is not granted, they stand to suffer substantial loss. They should also demonstrate readiness to provide security for the due performance of the decree; and their application must be brought without undue delay.

8. In the instant application, judgment was delivered in the lower court on 1st September 2015 and a decree issued on 27th November 2015 to the effect that the defendant Monicah Mbithe Mutua was to transfer two acres of land to be excised from Parcel Number 137 Mua Settlement Scheme "B". Thereafter the Respondent having established that Parcel no 137 had been subdivided, obtained the services of a surveyor who ascertained the situation of his two acres as being situated on Parcel no 1557. He therefore successfully obtained orders to have his two acres excised from Parcel no 1557, which was a subdivision emanating from Parcel no 137.

9. I have perused the Memorandum of Appeal herein and it is clear that the Appellant who is the administrator of the estate of Monica Mbithe Mutua, appealed against the ruling of the lower court made on 24th March 2022 which allowed the excise of two acres in favour of the Respondent from Parcel no 1557. Therefore, this appeal is not against the judgment and or decree issued in the lower



court compelling the Appellant to transfer two acres from Parcel no 137 to the Respondent. That being the case, and as the Respondent has explained that Parcel no 1557 is a subdivision of Parcel no 137 and that his two acres falls within Parcel no 1557; an assertion not controverted by the Appellant, I do not find any basis or evidence that the Appellant stands to suffer substantial loss, if stay is not granted. Most importantly, the Applicant has sought to stay the judgment and decree when he has not appealed against the said judgment. It is my view that the Applicant cannot seek to stay a decision which he has not appealed against on the basis of Order 42 Rule 6, as that provision can only be invoked where there is a pending appeal on the decision which is sought to be stayed.

10. In the premises I find no merit in the application dated 28th April 2022 and I hereby dismiss the same with costs to the Respondent.

11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3RD DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Musyoki for the Respondent

No appearance for Appellant

Ms Josephine – Court Assistant

