



**Njenga & another v Muchemi & another (Environment & Land Case
23 of 2017) [2023] KEELC 17329 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 23 OF 2017**

YM ANGIMA, J

MAY 4, 2023

BETWEEN

PETER NDUNGU NJENGA 1ST PLAINTIFF

RACHAEL WANGECHI NDUNGU 2ND PLAINTIFF

AND

ELIUD KARIUKI MUCHEMI 1ST DEFENDANT

JOSEPH WAHOME MUCHEMI 2ND DEFENDANT

RULING

A. Introduction

1. The Plaintiffs and the Defendants are neighbours who are owners of Title Nos Nyandarua/Simbara/2 (Parcel 2) and Nyandarua/Simbara/3 (Parcel 2) respectively. By a judgment dated October 13, 2022 the court found and held that the 2nd Defendant and her family had unlawfully entered and occupied a portion of parcel 2 in 2003 as a result of an irregular alteration of the boundaries between the two parcels by a government surveyor who had no legal authority to do so. As a result, the court directed the 2nd Defendant to vacate from the portion occupied in 2003 and for the Land Registrar to ascertain, mark and fix the boundaries of the two parcels in accordance with the provisions of Sections 18 and 19 of the [Land Registration Act](#), 2012.

B. The 2nd Defendant's Instant Application

2. Being aggrieved by the said judgment, the 2nd Defendant filed a notice of appeal intimating his intention to appeal against the entire decree dated October 13, 2022. He then filed a notice of motion dated October 21, 2022 under Section 3A of the [Civil Procedure Act](#) (Cap 21), Order 22 rule 22(1) and Order 51 rule 1 of the [Civil Procedure Rules, 2010](#) (the Rules) and all enabling provisions of the



law seeking a stay of execution of the decree and all consequential orders pending the hearing and determination of his intended appeal to the Court of Appeal.

3. The application was based upon the grounds set out on the face of the motion and the supporting affidavit sworn by Eliud Kariuki Muchemi on October 21, 2022 and the exhibits thereto. It was contended that unless the stay sought was granted the 2nd Defendant shall suffer substantial loss and that the outcome of the intended appeal might be rendered nugatory if successful. In particular, it was contended that the Defendants stood the risk of being rendered homeless and destitute and that it would be difficult for them to recover the disputed portion of land should the intended appeal be successful. The court was consequently urged to allow the application.

C. The Plaintiffs' Response

4. The 2nd Plaintiff filed a replying affidavit sworn on November 07, 2022 in opposition to the application. It was denied that the Defendants shall be rendered homeless and destitute if they were to vacate the disputed portion of land which measures about 20 acres since the Defendants' Parcel 3 measured 19.5 ha which was approximately 48.18 acres which they have always occupied.
5. The 2nd Plaintiff stated that there was no justification for the Defendants to continue occupying his 20 acres of land any longer and that should the Defendants ultimately succeed on appeal they could still recover that portion of land. It was, therefore, contended that the Defendants had not demonstrated any substantial loss or that the intended appeal shall be rendered nugatory in the absence of a stay. The court was consequently urged to dismiss the application.

D. Directions on Submissions

6. When the application was scheduled for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Defendants' submissions were filed on December 20, 2022 whereas the Plaintiffs' submissions were filed on January 11, 2023.

E. The Issues for Determination

7. The court has considered the Defendants' notice of motion dated October 21, 2022, the Defendants' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination is whether or not the Defendants have made out a case for the grant of a stay of execution of the decree pending appeal.

F. Analysis and Determination

8. The court has considered the material and submissions on record on the issue determination. Both sides were agreed that the applicable provisions of the law are to be found in Order 42 rule 6 of the Rules and counsels on both sides cited those provisions in their respective submissions. It is on the application of those provisions to the circumstances of this case where parties held opposing views.
9. The Defendants submitted that they had satisfied all the requirements for the grant of a stay of execution of the decree. They relied upon the cases of *Butt -vs- Rent Restriction Tribunal* [1982] KLR 147; *Trustees Chrisco Church Nakuru -vs- Samuel Kibowen Towett & 4 Others* [2017] eKLR; and *Consolidated Marine -vs- Nampijja & Another* Nairobi Civil Application No. 93 of 1989 (unreported) in support of the application. The Plaintiffs, on the other hand, submitted that the Defendants had failed to demonstrate the elements of substantial loss or that the intended appeal stood



the risk of being rendered nugatory in the absence of a stay. They relied on the case of *Kenya Shell Limited –vs- Kibiru & Another* [1986] KLR 410 in opposition to the application.

10. The provisions of Order 42 rule 6(2) of the Rules on stay of execution pending appeal stipulate as follows:

“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.”

11. It is evident from the evidence tendered at the trial that the Plaintiffs were the ones in occupation of the disputed portion of about 20 acres prior to the irregular alteration of the boundaries between parcels 2 and Parcel 3 in 2003 by a government surveyor who had no authority to do so. The Defendants only took possession of the said portion in 2003 after the irregular action by the government surveyor named in the judgment.

12. The material on record further shows that whilst the Plaintiffs’ parcel 2 measures approximately 15.5 ha, the Defendants’ parcel 3 measures approximately 19.5. ha. The Defendants, therefore, appear to have a bigger portion of land than the Plaintiffs hence restoration of the portion of about 20 acres which they gained after the alteration of boundaries in 2003 cannot result into substantial loss or render them homeless. It was a gross exaggeration for the Defendants to claim that giving back the portion of 20 acres they occupied in 2003 would render them homeless 13 destitute. At the trial of the suit the 2nd Defendant asserted that their land had always been 74 acres whereas records from SFT indicated it was 19.5 ha (approximately 48 acres). Again, that was a gross exaggeration of their true acreage.

13. The court is far from satisfied that the Defendants may find it difficult or impossible to recover the disputed portion of about 20 acres from the Plaintiffs should the intended appeal ultimately succeed. There is no allegation or demonstration that the Plaintiffs shall alienate or dispose of that portion during the pendency of the intended appeal. Needless to state that if the disputed portion truly falls within parcel 3 then the Plaintiffs shall not be legally able to undertake any transactions on it.

14. The court is also not persuaded that there is a legitimate reason to stop the Land Registrar from determining, marking and fixing the boundaries of the two parcels of land in accordance with Sections 18 and 19 of the *Land Registration Act*, 2012. Should the Defendants’ appeal be successful, nothing would prevent the appellate court from setting aside the exercise and handing the disputed portion to the Defendants. In a nutshell, the Land Registrar’s exercise would not render the outcome of the appeal nugatory.

G. Conclusion and Disposal Order

15. The upshot of the foregoing is that the court is satisfied that the Defendants have demonstrated a case for the grant of a stay of execution of the decree dated October 13, 2022 pending the lodging, hearing and determination of the intended appeal to the Court of Appeal. Consequently, the 2nd Defendant’s notice of motion dated October 21, 2022 is hereby dismissed with costs to the 2nd Plaintiff.

16. It is so ordered.



RULING DATED AND SIGNED AT NYAHURURU THIS 4TH DAY OF MAY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Wangari for the Plaintiffs

Ms. Ndegwa for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

