



**Magata v Oyaro (Environment & Land Case 53 of 2013)
[2023] KEELC 18635 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 53 OF 2013**

M SILA, J

JULY 5, 2023

BETWEEN

CONCEFUTA KEMUNTO MAGATA PLAINTIFF

AND

DORCAS KWAMBOKA OYARO DEFENDANT

RULING

(Application for stay pending Appeal; court in its judgment nullifying title of applicant; applicant filing appeal; in the circumstances best that the *status quo* be maintained pending appeal but costs may be taxed and deposited in a joint interest earning account).

1. The application that is subject of this ruling is that dated 6 March 2023 filed by the unsuccessful defendant. She now seeks an order of stay of execution of the judgment delivered on 28 February 2023 pending hearing and determination of her intended appeal to the Court of Appeal. Specifically, she seeks an order to stay cancellation of her title to the land parcel West Kitutu/Bogeka/3950 (the suit property) until the appeal is determined.
2. The application is opposed by the plaintiff/respondent who filed a replying affidavit. She believes that the application is filed to derail the conclusion of the matter and to deny her the fruits of judgment. She points out that this suit has been in court for over ten years. It is also deposed that the applicant has not annexed a copy of the Memorandum of Appeal to see what grounds may be raised and that she has not shown how her appeal will be rendered nugatory if the judgment is executed.
3. I invited both counsel for the applicant and the respondent to file written submissions which they did and I have taken these into consideration before arriving at my decision.
4. By way of background, the respondent filed this suit seeking orders to have cancelled the applicant's title over the suit property. Her case was that she had applied to subdivide her land parcel West Kitutu/Bogeka/1476 into two portions, being the parcels West Kitutu/Bogeka/3724 and 3725, but



the applicant caused a fraudulent mutation form to be prepared indicating that the land was being subdivided into three portions and not two. That third portion which the respondent contended was fraudulently created is the suit parcel West Kitutu/Bogeka/3950. I heard the case and agreed with the respondent in a judgment delivered on 28 February 2023. I found that this title was fraudulently created and nullified it. I also issued an order for the Registry Index Map (RIM) to be amended to remove this parcel of land and I also awarded the respondent costs of the suit.

5. Aggrieved, the applicant filed a notice of appeal and has followed it up with this application.
6. What is before me is an application for stay of execution pending appeal and I stand guided by the principles laid down in [Order 42 Rule 6 \(2\)](#) which provides 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."

7. From the above, three principles are discernible, that is :-
 - (i) The application needs to be made without unreasonable delay;
 - (ii) The applicant needs to demonstrate that he will suffer substantial loss if stay is not granted.
 - (iii) The applicant should be ready to offer security for the due performance of the decree.
8. Starting with delay, I do not think that it can be argued that this application was filed after delay, for judgment was delivered on 28 February 2023, and this application was filed on 6 March 2023, barely a week later.
9. The other issue is whether the applicant has demonstrated that she stands to suffer substantial loss if the decree is executed. It will be recalled that in the judgment, I nullified the title of the applicant and directed that the Registry Index Map be amended to remove this parcel of land from the maps. If this is done the respondent may enter into dealings with the other two subdivisions, which, if the appeal succeeds, may invite significant costs and serious complications in trying to reverse and this may occasion substantial loss to the applicant. I think that in order to preserve the subject matter, the *status quo* in respect of the title in issue and the possession of the land, need to be maintained, in the manner that was prevailing at the time of judgment, until the appeal is disposed of. I do so order.
10. I had made an order for costs in favour of the respondent. These may be taxed, and once taxed, the amount thereof be deposited within ninety (90) days in a joint interest earning account to be held in the joint names of counsel for the applicant and respondent, until the appeal is finalized. If not so deposited, execution on the costs may proceed.
11. I believe I have settled the application save for its costs. The costs of this application shall abide the outcome of the appeal.
12. Orders accordingly.



DATED AND DELIVERED AT KISII THIS 5 DAY OF JULY 2023
JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

