



REPUBLIC OF KENYA



KENYA LAW
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Akhula & another v Mutua & another (Environment and Land Appeal E41 of 2022) [2023] KEELC 20828 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20828 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E41 OF 2022
LL NAIKUNI, J
OCTOBER 9, 2023

BETWEEN

COSMAS KODI AKHULA 1ST APPELLANT

ROSE MKAMWAKONDO SALAMA 2ND APPELLANT

AND

BONIFACE NZUKU MUTUA 1ST RESPONDENT

SAMMY KISOMBE MWAKANGALU 2ND RESPONDENT

RULING

I. Introduction

1. The Application for determination by this Honorable Court is the one dated 4th October 2022. It was brought by the Appellants/Applicants herein Cosmas Kodi Akhula and Rose Mkamwakondo Salama under the provision of Order 42 Rule 6 (6) of the *Civil Procedure Rules*, 2010.

II. The Appellants/Applicants' case

2. The Appellants/Applicants sought for the following orders:
 - a. Spent.
 - b. An injunction be and is hereby issued to bar the 1st Respondent (Plaintiff by original action in the court below) from evicting the Appellants from suit premises at Birikani- Voi Taita Taveta county in the coast region initially for 14 days and thereafter for as long as the court may order or parties agree, pending hearing and determination of this appeal.
 - c. Directions on service are given.



3. The application is premised on the grounds on the face of the application, testimonial facts, averments of the 17 Paragraphed Supporting Affidavit of Cosmas Kodi Akhula sworn and dated on 21st September 2022 in the civil case of Voi ELC CM 18 of 2018 *Boniface Nzuki Mutia v Cosmas Kodi Akhula and 2 others*. The Appellants/Applicants maintained that Judgement was delivered on 5th September 2022 and a 30 - day stay was granted.
4. However, before the lapse of the 30 - day stay order, the Appellants/Applicants herein claimed that, the 1st Respondent moved all his merchandise to the suit premises in an effort to take over the suit premises. Just before the interim stay order lapsed, the Appellants/Applicants moved to court for stay of execution and the said application was certified urgent and set down for hearing on 3rd October 2022. On the said 3rd October 2022, the matter was mentioned at about 9.40am and Learned Counsel for the Appellants/Applicants requested to be heard at 12.30pm in order to have completed a physical hearing before Justice Yano at Meru ELC. At 12.30pm. While the Learned Counsel for the Appellants/Applicants, Mr. S.K Kimani was still addressing Judge Yano and Mr. Gocho Kimani, who held his brief requested the Lower Court Magistrate to have the time for hearing to be pushed until 1.00pm when the Judge would take a lunch break. Instead, the Magistrate adjourned the application for stay of execution to 17th October 2022 for “inter parte” hearing. The Appellants/Applicants urged court to grant a further stay, as the orders issued on 5th September 2022 had expired and the respondents would take physical control of the suit premises and this appeal would be rendered nugatory and the appellant would suffer substantial and irreparable loss and damage.

III. The Replying Affidavit by the Respondents

5. The Respondents opposed the application vide a 14 Paragraphed Replying Affidavit sworn by Boniface Nzuki Mutia on 28th October 2022. He deponed that:-
 - a. The application was frivolous, vexatious and an abuse of the court’s process, as the Appellants/Applicants were denied the stay orders by the Lower Court on 3rd October 2022 when the application for stay of execution came up in the said Court.
 - b. In the said application, the Appellants/Applicants admitted that they were conned by the 2nd Respondent and they were only interested in a refund of the money paid to the 2nd Respondent and not the suit premises.
 - c. The 1st Respondent argued that the Appellants/Applicants had no business seeking an injunction against the suit premises which they had no interest in or had ever occupied.
 - d. The deponent maintained that he had been in occupation of the suit premises and had been using the same to carry out his business.
 - e. He urged court to find that his use and occupation of the suit land did not prejudice the appeal in any way as he had no intention of parting with his business premises in the near future.
 - f. He further argued that the application was only meant to deny him the fruits of his Judgement and urged court to disallow the application.

IV. The Supplementary Affidavit by the 1st & 2nd Appellants/Applicants

6. On 14th November, 2022, the Appellants/Applicants filed an 8 Paragraphed Supplementary Affidavit sworn by Cosmas Kodi Akhula on 12th November 2022. He deponed that:-



- a). This application was neither frivolous nor vexatious and was based on this court's jurisdiction to supervise the lower court.
- b). Further to that he maintained that he had approached this Court after being denied an extension of an interim stay orders by the lower court in Voi on 3rd October 2022.
- c). He deponed that though he and his wife (the 2nd Appellant) admitted on trial of being conned by the 2nd Respondent and only interested in a refund of their money;
- d). They were still in possession of the suit premises and not the 1st Respondent as he had deponed in his Replying Affidavit.
- e). He deponed that the 1st Respondent moved his shop merchandise from his shop which borders the suit premises to the veranda and road frontage of the suit premises and had issued threats of eviction to their caretaker who was in possession.
- f). He argued that the 1st Respondent moved his merchandise during at the time when the stay orders were in force and should not be allowed to remain in that position that was acquired in contravention of stay orders.

V. Submissions

7. On 3rd November, 2022 while all the parties were in Court they were directed to have the application dated 4th October, 2022 be canvassed by way of written submissions. Pursuant to that parties obliged. Thereafter Court reserved a date to render the Ruling accordingly.

A. The Written Submissions by the Appellants/Applicants

8. On 14th November 2022 learned counsel for the Appellants/Applicants through the law firm of Messrs. S.M.K Advocates filed their submissions dated 10th November 2022. Mr. S. M Kimani Advocate commenced his submission by stating that the provision of Order 42 Rule 6 (6) of the *Civil Procedure Rules*, 2010 empowered the court to issue stay orders where the procedure for instituting an appeal from a subordinate court had been complied with. The Learned Counsel contended that before the 30-day stay orders issued on 5th September 2022 lapsed, the 1st Respondent moved his merchandise to the frontage of the suit premises, occupied the veranda and the road reserve in front of the suit premises.
9. Before the said orders could lapse on 4th October 2022, the Appellants/Applicants rushed to Court on 3rd October 2022 to seek an extension of the same but the Learned Magistrate declined to extend the said orders. The said denial prompted the Appellants/Applicants to file this application urging court to stay execution pending the hearing and determination of the appeal.
10. The Learned Counsel argued that the Appellants/Applicants had a right to appeal and that there was a need for the preservation of the status quo pending the hearing and determination of the appeal. The Learned Counsel contended that without the stay orders, the Appellants/Applicants stood to suffer substantial loss, which must be prevented by preserving the status quo. To buttress on his point of



law, the Learned Counsel relied on decision of:- *Rhoda Mukama v John Abuoga* (1988) eKLR, where the court held:-

“The cornerstone of exercise of both jurisdictions under Order 42 *Civil Procedure Rules* and Rule 5 (2)(b) is the issue of substantial loss. Substantial loss is what must be prevented by preserving the status quo ante because such loss would render the appeal nugatory.”

11. It was the contention of the Learned Counsel, if the 1st Respondent had gusts to move his merchandise to the suit premises during the existence of the stay orders, only go to show the substantial loss that may be suffered by the Appellants/Applicants if stay orders were not issued. The Learned Counsel averred that if the 1st Respondent was allowed to be in possession of the suit premises he would retain a position of advantage. Further, the submission by the was that the stay orders would not prejudice either 1st Respondent as he was not in occupation of the suit premises since the suit was commenced. In the long run, the Learned Counsel urged court to allow the application as prayed with costs in the appeal.

B. The Written Submissions by the 1st Respondent

12. On 21st December 2022, Learned Counsel for the 1st Respondent through the Law firm of Messrs. Isika & Associates Advocates filed their submissions dated 16th December 2022. M/s. Isika Advocate submitted that the 30 - day stay orders that were issued on 5th September 2022 in Voi CM ELC No. 18 of 2018 were not extended by the trial court on 3rd October 2022.
13. On that 3rd October 2022 the matter came up for hearing of an application dated 22nd September 2022 brought by the Appellant/Applicant herein sought for stay of execution. According to her, the application never met the threshold for an injunction pending appeal as set out in the case of:-“*Patricia Njeri and 3 others v National Museum of Kenya* (2004), where the Court held that:-

“An order of injunction pending appeal is discretionary which will be exercised against an Applicant whose appeal is frivolous, the discretion should be refused where it would inflict greater hardship that it would avoid, the Applicant must show that to refuse the injunction would rather the appeal nugatory and the court will also be guided by the principles in *Giella v Cassman Brown* (1973) EA 358.”
14. It was her argument that the application herein was frivolous, since it sought an injunction barring the 1st Respondent from evicting the Appellants/Applicants from the suit premises. Yet, in the appeal the Appellants/Applicants claim they were liable to a refund of the purchase price received from them for failure of consideration and they were not interested in the suit premises.
15. The Counsel submitted that the prayers sought by the Appellants/Applicants were a contradictions with the orders sought in the main appeal, and that the same could not exist side by side yet they were contradicting each other. The Counsel argued that these contradictions made the application frivolous and vexatious and an abuse of the court process.
16. The Learned Counsel submitted that the application would cause great hardship to the 1st Respondent, since he was the only party interested in the suit property. The Appellants/Applicants only had monetary interest in the value they paid towards the suit property and an injunction would cause unnecessary hardship to the 1st Respondent who had demonstrated his interest to the suit property to the satisfaction of the trial court. The application was said to be meant to cause hardship to the 1st Respondent by denying him occupation and use of the suit premises until the appeal was determined.



17. The Counsel further stated that if the application was denied the appeal would still be moot as the appeal was independent of the suit premises, since the Appellants/Applicants had admitted the suit premises belonged to Kishamba (B) group ranch. Further to that, the Counsel submitted that the Appellant/Applicants had not demonstrated to be bearing any “a prima facie” with a probability of success since they had admitted the suit premises belonged to Kishamba B group ranch. Further, the Appellants/Applicants admitted they purchased the said plot for a sum of Kenya Shillings Ninety Thousand (Kshs 90,000/=) from the 2nd Respondent, whom he established that he had been conned.
18. In conclusion, the Learned Counsel urged Court to find that the application failed the standard for grant of an injunction pending appeal and prayed for the same to be dismissed with costs.

IV. Analysis and determination

19. The Honourable Court has carefully considered the application dated 4th October, 2022 by the Appellants/Applicants, the replies by the 1st Respondent, the written submissions and the authorities cited thereof by the parties, the relevant provision of the Constitution of Kenya, 2010 and the statutes.
20. To reach an informed, reasonable, fair and just decision on the subject matter, the Honourable Court has crystalized the following three (3) issues for its determination. These are:-
 - a. Whether the Notice of Motion Application by the Appellants/Applicants dated 4th October, 2022 has any merit and the Appellants/Applicants have made out a case for the granting of orders of stay of execution pending appeal.
 - b. Whether the parties are entitled to the orders sought.
 - c. Who will bear the costs of the application

Issue No. a). Whether the Notice of Motion Application by the Appellants/Applicants dated 4th October, 2022 has any merit and the Appellants/Applicants have made out a case for the granting of orders of stay of execution pending appeal.

21. Under this sub heading the main Court wishes to state that the main substratum of this application on granting stay of execution of the Judgement by the Sub – ordinate Court pending the hearing of the filed appeal. The concept of Stay of Execution pending determination of appeal is founder under Order 42 Rule 6 (6) of the *Civil Procedure Rules*, of 2010. Legally speaking, this Honourable Court has jurisdiction to grant a temporary injunction pending hearing and determination of an appeal as provided by the above stated provision of law. Order 42 Rule 6 (6) provides as follows:-

“Notwithstanding anything contained in sub - rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

22. There are a myriad of authorities decided around this issue. Thus, the Court will not re – invent the wheel but to directly cite some of them which are all on fours to this case herein. The case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, settled the principles that have guided courts in determining whether or not an applicant has met the threshold to warrant the grant of an injunction pending appeal. It was held that:-

“In the *Venture Capital case* the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and



not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a. The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* (1985) KLR 840 (cited in *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries v KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*).
- b. The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
- c. The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* (1982) KLR 417 (cited also in *Venture Capital*).
- d. The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in *Venture Capital*).

23. Now the application of these legal principles to the instant application. From the filed records, it indicates that the Appellants/Applicants herein were the Defendants in the Civil Case of Voi CM ELC 18 of 2018 *Boniface Nuki Mutia v Cosmas Kodi Akhula and 2 others*, and on 5th September 2022, Honourable D. Wagechi entered Judgement against them and in favor of the 1st Respondent, who was a plaintiff therein. The Learned magistrate found that the 2nd Respondent (3rd Defendant therein) was not a member of Kishamba B Group Ranch, a community ranch which was the registered proprietor of LR No. Taita Taveta/Sagalla Kishamba ‘B’/1 measuring approximately 10.864ha, within which the parcel of land which the parties laid claim to was situated in. The Learned Magistrate found that the 2nd Respondent had no authority to deal with the community land held by the group ranch and did not pass a good title to the Appellants (1st and 2nd Defendants therein) let alone the 1st Respondent (plaintiff therein). The trial court found that the 1st Appellant (1st Defendant therein) had proved he was a bonafide purchaser and entitled to a refund of a sum of Kenya Shillings Ninety Thousand (Kshs 90,000/=) from the 2nd Respondent. The court made the following orders:

- a. That an order of permanent injunction is hereby issued against the 1st and 2nd Defendants barring them jointly and severally from building, constructing or in any other manner interfering with the Plaintiff’s quiet enjoyment, possession and occupation of the piece of land measuring 50ft by 100 ft situated adjacent to the main road Birikani-Voi Road.
- b. That the 3rd Defendant shall bear the costs of the main suit and the Counter - Claim.

24. Being dissatisfied by the said decision of the Learned Magistrate, the Appellants/Applicants lodged an appeal on appeal on 28th September 2022 before this court, seeking ‘*inter alia*’ the setting aside of the said Judgement. During the pendency of the hearing of the appeal, the Appellants filed this application seeking a stay of a temporary injunction restraining the 1st Respondent from evicting them from a piece of land measuring 50ft by 100ft situated along the Birikani-Voi Road pending the hearing and determination of the appeal. This parcel of land is within the larger parcel of land known as LR No. Taita Taveta/Sagalla Kishamba ‘B’/1 measuring approximately 10.864ha and registered in the name of Kishamba B Group Ranch.

25. I have perused the Judgement of the lower court and the Memorandum of Appeal, and I do note that the appellants are raising bonafide issues that ought to be determined in the main appeal. The



Appellants/Applicants have argued that the Learned Magistrate erred in law by restraining them from the suit premises, yet she found that the 2nd Respondent did not pass a good title to either them or the 1st Respondent. I find that this argument to be reasonable. I hold that it is a suitable ground for maintaining a status quo, as the Appellants/Applicants are simply telling court that the Learned Magistrate contradicted herself. On one hand she said neither party has title while on the other hand she restrained one party and issued possession to the other. For these reason, therefore, I discern that the application has merit and should be allowed accordingly.

Issue No. b). Whether the parties are entitled to the orders sought.

26. Under this sub heading, having affirmed that the application has merit, the task ahead is on the entitlement of the parties to the reliefs sought. Critically, I am of the opinion that the intended appeal will be rendered futile if the 1st Respondent is not restrained from evicting the Appellants/Applicants from the suit premises. I have also considered the arguments advanced by the 1st Respondent, that the Appellants/Appellants have admitted to having no interest in the suit premises other than a refund from the 2nd Respondent. These are also weighty issues that can only be canvassed at the hearing of this appeal alongside any other argument that he may have that is centered around protecting his interest in the suit premises. May that be the case, but if the orders issued on 5th September 2022 are executed it would mean that the Appellants/Applicants will be evicted and possible demolition of any of their developments made on the suit premises which would result in irreversible loss and damage that cannot be compensated by an award of damages.
27. It has not been clearly demonstrated to court, which of the two parties is in possession of the suit premises. On one hand the Appellants/Applicants claim the 1st Respondent moved his merchandise to the frontage of the suit property in readiness to take over the suit property, while the Respondent admitted to be in possession of the suit premises. It is therefore paramount for court to preserve the same by issuing maintaining an order of status quo especially since the suit premises seems to be of commercial use and of monetary value to both parties herein. The maintenance of status quo, will safeguard the rights of the Appellants/Applicants to appeal. The Appellants/Applicants have developments on the suit premises and the orders of the lower court barred them from accessing the suit premises, and a further eviction from the same which is detrimental to their interests.

Issue No. c). Who is to bear the costs of the application

28. It is now well established Costs is at the discretion of Court. Costs mean the award that is granted to a party at the conclusion of any legal action or proceedings in a litigation process. The Proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 hold that costs will follow the events. By the events it means the result or outcome of such legal action or procedure.
29. In the instant case, the Appellants/Applicants herein have been successful in prosecuting the application dated 4th October, 2022. It follows, therefore they are entitled to cost of the said application to be in the cause.

VI. Conclusion & findings

30. In the light of the foregoing, I allow the Application in the following terms:
 - a. That the Notice of Motion application dated 4th October, 2022 by the Appellants/Applicants be and found to be meritorious and hence allowed.
 - b. That pending the hearing and determination of the Appellants' appeal herein, the 1st Respondent, his agents and/or servants be and are hereby restrained from building,



constructing or in any other manner interfering with the appellants quiet enjoyment of the suit premises measuring 50ft by 100ft situated along the Birikani-Voi Road within the larger parcel of land known as LR No. Taita Taveta/Sagalla Kishamba 'B'/1 measuring approximately 10.864ha and registered in the name of Kishamba B Group Ranch pending the hearing and determination of this appeal.

- c. That for expediency sake the following steps to be undertaken:
- i). the Lower Court file to be brought to this Court immediately to enable parties prepare the Record of Appeal.
 - ii). the appeal to be disposed off within the next One Hundred and Eighty (180) days from this date.
 - iii). there shall be a mention on 27th October, 2023 at the ELC Voi to ascertain compliance of these orders and if possible taking direction on the disposal of the Appeal under Order 42 Rules 11, 16 & 18 of the Civil Procedure Rules, 2010.
- d. That costs of this application shall abide the appeal.

It is so ordered accordingly

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED DATED
AT MOMBASA THIS 9TH OF OCTOBER 2023**

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**HON. JUSTICE LL. NAIKUNI (JUDGE),
ENVIRONMENT & LAND COURT, AT
MOMBASA**

Ruling delivered in the presence of:

- a) M/s. Yumnah Hassan, the Court Assistant.
- b) Mr. S.M Kimani Advocate for the Appellants/Applicants.
- c) No appearance for the Respondent.

