



Hamadi & 149 others v Safaricom Investments Co-operative Society Ltd & another (Environment & Land Case E005 of 2022) [2023] KEELC 21260 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E005 OF 2022
EK MAKORI, J
NOVEMBER 2, 2023**

BETWEEN

KIBWANA HAMADI & 149 OTHERS PLAINTIFF

AND

**SAFARICOM INVESTMENTS CO-OPERATIVE SOCIETY LTD 1ST
DEFENDANT**

JOHN KIMOGUT KIPTOO 2ND DEFENDANT

RULING

1. This court issued a Judgment dated 26th April 2023 dismissing the Plaintiff's case and allowing the counterclaim. The court ruled as follows:
 - a. A declaration does and is hereby issued that the 1st Defendant is the lawful owner of all that parcel of land known as No CR 35955/3 LR No 4379/111/MN by way of transfer out of purchase and is entitled to vacant possession.
 - b. A permanent injunction be and is hereby issued restraining the plaintiffs, their servants, or those claiming under them from trespassing, entering, or remaining on land parcel No CR 35955/3 LR No 4379/111/MN.
 - c. Notice of eviction issued by the 1st defendant be and is hereby declared legal, valid, and proper and the 1st defendant is at liberty to enforce the same in accordance with the law.
 - d. A declaration be and is hereby issued that the 2nd defendant's father William Kiptoo Barkoria acquired 68.62 hectares. of LR no 284/III/MN for valuable consideration and the 2nd defendant was properly registered as the owner of LR



563/III/MN and the consequent subdivisions thereof and transfer of portions thereof passed the property and are protected by law.

- e. A permanent injunction be and is hereby issued restraining the plaintiffs by themselves, their agents assigns or anybody else from encroaching, entering into any portion of land being a resultant subdivision of LR 563/III/MN.
 - f. An order of eviction against the plaintiffs do issue to evict in accordance with the law, any of the plaintiffs' defendants to the counterclaim and their assignee and beneficiaries of any portion of land being a resultant sub-division of LR 563/III/MN.
 - g. Costs of the suit and the counterclaim be and is hereby awarded to the 1st and 2nd defendants/counter-claimants.
2. An application was immediately filed dated 12th of May 2023 to have a stay of proceedings herein pending appeal to the Court of Appeal. The court invited the parties to make written submissions on the application. They did comply.
 3. The sole issue for the determination in the current application is whether a stay will be appropriate to grant.
 4. The applicants submitted that they would lose their homes if a stay was not granted. Photographs were exhibited during the pendency and hearing before this court and annexed to the submissions to show that they occupy the land in question. Any impending eviction will be detrimental to the applicant's case and if a stay is not granted, the substratum of the appeal will be lost and the appeal rendered otiose. The applicants cited the case of [RWW v EKW](#) [2019] eKLR on the conditions to satisfy before a stay of execution is granted pending appeal. The applicant concluded that the appeal has a higher chance of success.
 5. The 1st respondents averred that the applicants got to the suit property immediately after they got an injunction order in Malindi ELC OS No 44 of 2020 which means adverse possession had not accrued. The respondents averred that the court made a finding that applicants gained entry onto the suit property when the court gave injunctive orders in the aforementioned case.
 6. For a stay to be granted pending appeal, a party has to satisfy Order 42 rule 6 of the Civil Procedure Rules. The respondents are of the view that those conditions have not been met for instance, no security has been provided
 7. As correctly stated by the applicants quoting the case in [RWW v EKW](#) [2019] eKLR, the following conditions have to be met before a stay pending appeal is granted:

“Stay of Execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub-rule (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.

8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

8. In the judgment by this Court, a find was made that the applicants encroached on the suit property herein well after the issuance of an injunctive order in Malindi ELC OS No 44 of 2020 (and not earlier):

“The plaintiffs claim 99.94 acres in what I can say was in the abstract. No evidence was adduced to show the occupation of the said land. No attempt was made to exactly point out what portion the 149 plaintiffs including PWI occupied. Much of what was prosecuted in this case revolved around the subdivision of the parent title, acreage, and on cancellation of titles emanating from the subdivisions on allegations of fraud - which was never proved than possession. This is the scenario captured in the case of *Solomon Muatbe Mitau v Nguni Group Ranch* [2017] eKLR:

“It is clear from the record that 781 out of 788 individuals listed as claimants in the Originating Summons did not testify on the crucial aspect of possession of the disputed land or any part of it. They could easily have presented themselves for such evidence or instructed one or more of the other claimants to tender their evidence before the court in accordance with the rules of procedure. Rules of procedure are not mere platitudes or technicalities. They make the process of judicial adjudication and determination fair, just, certain, and even-handed as the Supreme Court affirmed in the case of *Zacharia Okoth Obado vs Edward Akongo Oyugi & 2 others* [2014] eKLR. There was no effort made in this case to have the evidence of the 781 claimants presented and considered in any lawful manner. Whatever the reason the appellants may have had for such omission, it lends credence to the assertions by the respondent that such persons were improperly



enjoined in the suit and were properly removed as parties by the trial court, or they were minors who had no capacity to sue, or many were dead, or others hailed from far-flung areas and had no interest in the suit. It is our finding, in those circumstances, that there was sufficient basis for the finding made by the trial court that the fact of possession, adverse or not, by those persons was not proved and their case was for dismissal.”

9. Evidence tendered by PW1 and PW2 was not enough to establish possession whether interrupted or uninterrupted PW2 admitted he was just a neighbour supporting the plaintiffs’ case. PW1 dwelt on the manner in which the 2nd defendant acquired the title in question and the acreage than possession. He did not refer to the other 148 plaintiffs’ occupation of the land with exactitude. As further stated in the Chevron Kenya Ltd Case (*supra*) the plaintiffs have failed to demonstrate and fall within the armpit and parameter as laid by the court to achieve adverse possession:

“We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the respondent manifested animus possidendi, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant’s rights. The appellant was, as such dispossessed of the suit premises by those acts. The respondent’s acts were nec vi, nec clam, nec precario (that is, neither by force nor secretly and without permission).”

The defendants allege invasion and incursion on the suit properties. The plaintiff by way of evidence did not torpedo the allegations by the defendants.’

10. Ordinarily in land matters in applications for stay pending appeal, the court is more inclined not to interfere with the substratum of the suit property so that an appeal is not rendered nugatory. As already stated my finding in the main suit is that the entry of the applicants into the suit property was forcible. There will be nothing to preserve pending the appeal.
11. Application dated 12th of May 2023 is hereby dismissed with costs. However, this court will be inclined to grant a further 30 days stay from today for the applicants to approach the Court of Appeal for either a stay pending appeal or any other further orders.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 2ND DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

Mr. Mwangunya for the Applicants

Mr. Muturi for the 1st Respondents

Mr. Nyabena for the 2nd respondents

Court Clerk: Happy

