Mathai v Chiuri s/o Mathai (Environment and Land Appeal E7 of 2021) [2023] KEELC 21439 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21439 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL E7 OF 2021

JO OLOLA, J

NOVEMBER 10, 2023

BETWEEN

FRANCIS MUNDIA MATHAI .... APPELLANT

AND

CHIURI S/O MATHAI .... RESPONDENT

RULING

1. By the Notice of Motion herein dated 3rd March 2023, Francis Mundia Mathai (the Appellant) prays for an order that there be a stay of execution of the Judgment and decree dated 19th November, 2020 as amended on 17th October, 2022 in Karatina ELC Case No. 32 of 2018 pending the hearing and determination of this Appeal.
2. The application which is supported by an Affidavit sworn by the Appellant is based on the grounds that:

    (i) The Appellant instituted this Appeal on 22nd February, 2022 against the Judgment;

    (ii) The Respondent is in the process of executing the Judgment and has started fencing off the land thereby restricting the Appellant's use and occupation of the suit land;

    (iii) Unless the orders sought are granted, this application and the Appeal itself will be rendered nugatory;

    (iv) This application has been brought without delay; and

    (v) The Appellant will suffer immense and irreparable loss if execution proceeds before the Appeal is heard and determined.

3. Chiuri s/o Mathai (the Respondent) is opposed to the application. In his Replying Affidavit sworn and filed herein on 21st March 2023, the Respondent avers that he had sub-divided L.R No. Kirimukuyu/Ngandu/85 before the suit in the Lower Court was filed.

4. The Respondent further avers that there is nothing he is doing to warrant this application as all the Parties are occupying their respective portions of land. He further asserts that the fence the Appellant is complaining about was equally erected before the suit was filed.

5. The Respondent avers that the Appeal filed herein is incompetent and unmerited as it was filed long after the statutory period had expired without any extension of time.

6. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the submissions and authorities to which I was referred by the Learned Advocates representing the Parties herein.

7. By his application herein, the Appellant has urged the Court to grant an order of stay of execution of the Judgment and decree issued by the Karatina Magistrates Court on 19th November, 2020 pending the hearing and determination of his Appeal as filed herein. It is the Appellant's case that unless the said orders are granted, he will suffer immense and irreparable loss and the Appeal may be rendered nugatory.

8. The conditions to be met before an order of stay of execution can be granted are stipulated under Rule 6(2) of Order 42 of the *Civil Procedure Rules* as follows:

> " 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."

9. Commenting on an application such as the one before me in *Kenya Shell Limited v Kibiru* (1986) KLR 410, Platt Ag. J. A (as he then was) expressed himself thus:

> " It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money."

10. As it were, it is proper that in a situation such as this, the Court must balance the undoubted right of appeal against the weighty right of the decree-holder to enjoy the fruits of his or her Judgment. As was stated in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* (1988) 2 KLR:

> " We are faced with a situation where a Judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage

to the Plaintiff … It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal …"

11. In the matter before me, the Appellant filed the suit in the Lower Court claiming that his brother - the Respondent herein was holding title to the suit properties in trust for himself and one Benson Mathai. It is his case that he had acquired by adverse possession the parcels of land known as Kirimukuyu/Ngandu/1158, 1159 and 1160 and he urged the Court to have title deeds in respect of the same issued in his name.

12. On his part, the Respondent conceded that part of the subject land used to belong to his father. It was however his case that during land consolidation, he had consolidated part of his land with a small portion of his own. It was also his case that one of his brothers by the name Muraguri Mathai had sold his portion of land to him while his brother Kanyi had gifted him his portion of the ancestral land.

13. Accordingly the Respondent asserted that his portion of land was bigger than the Appellants because it consisted of the two additional portions together with his own.

14. Having considered the issues, the Learned Trial Magistrate did find that the share of land allocated to the Appellant was equal to what all the 5 brothers were getting from their ancestral land. The Court therefore directed that since the Respondent had already sub-divided the land into three (3) portions, the Respondent should transfer the parcel known as Kirimukuyu/Ngandu/1160 measuring 0.1012 Ha. to the Appellant as the same was held in trust.

15. By the application before the Court however, the Appellant contends that the Respondent has now embarked on execution of the Judgment by fencing off parts of his parcel of land hence denying him access for cultivation. On his part, the Respondent denies that he has taken any such action and asserts that the fence said to be erected was in place long before the suit in the Lower Court was filed.

16. I have looked at the issues before me and I am not persuaded that the situation depicted by the Appellant can lead to any substantial loss as purported. The orders granted by the Trial Court do not appear to me to be able to be executed in a manner that may lead to any irreparable loss to either of the Parties.

17. I was equally not persuaded as at this stage that there was a competent Appeal before the Court upon which a stay of execution application could be anchored. From the material placed before me, Judgment was rendered in the Lower Court on 19th November, 2020. No Appeal was however lodged until some three (3) months later on 22nd February, 2021.

18. In the circumstances herein I did not find any merit in the Motion dated 3rd March, 2023. I dismiss the same with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 10TH DAY OF NOVEMBER, 2023.

In the presence of:

Ms Wangechi holding brief for W. Macharia for the Appellant

Mr. Kebuka Wachira for the Respondent

Court assistant - Kendi

J. O. Olola

JUDGE