



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. E104 OF 2021**

**JUSTUS MANYARA M'IGWETA.....1<sup>ST</sup> APPELLANT**

**JULIUS KATHURIMA M'IGWETA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHARLES GIKUNDI ..... RESPONDENT**

***(Being an appeal from the Judgment of Hon. T.M. Mwangi (S.P.M.)***

***delivered on 9<sup>th</sup> September, 2021, in Meru CM ELC No. 204 of 2018)***

**RULING**

**A. APPLICATION**

1. By an application dated 8.11.2021 the appellants seek for stay of execution of the judgment delivered on 9.9.2021. The application is supported by an affidavit sworn by Justus Manyara M'Igweta on the even date.
2. The grounds of the application are that the 2<sup>nd</sup> appellant is in occupation of 0.37 acres of **Land No. Nyaki/Mulathankari/635** where he has constructed his permanent house, there is threat to excise a portion of the appellants' prime property hence there is likelihood of irreparable loss and damage and the appeal being rendered nugatory.
3. The application is opposed through the respondent's replying affidavit sworn on 22.11.2021.
4. Firstly, it is averred the applicant has a distinct title from the respondent's title hence the stay would be an affront to his legal rights.
5. Secondly, it is stated the applicant is not being candid since he had another suit namely ***ELC No. 59 of 2019 Julius Kathurimia M'Igweta -vs- Charles Gikunda*** which was determined on 28.5.2018 hence he is on a forum shopping mission and has come to court with unclean hands.
6. Thirdly, it is averred the lower court judgment cannot be stayed since if gave some conditions to the parties prior to its implementation hence the application is an abuse of the court process.
7. Fourthly, the appellants should compensate him for the illegal encroachment and in any event the harm is on him whose land has been unjustly and illegally occupied.
8. Fifthly, the respondent states his land has a charge registered over it for Kshs. 20 million with Standard Chartered Bank which as ordered by the court takes precedence to their claim.
9. Further it is the respondent's view the applicants have offered no security and if the court was to grant the orders sought the appellants ought to deposit an undertaking for damages and costs.
10. Lastly, the respondent avers, the alleged time of 12 years was interrupted as held by the lower court hence the appeal stands not chance of success.

**B. THE LAW**

11. Under **Order 42 Rule 6**, a party must: demonstrate substantial loss that the application has been filed on time; offer security for the due performance of the decree and lastly that it is in the interest of justice to grant the orders sought.

### **C. ORAL SUBMISSIONS**

12. Miss Kaunyangi for the appellants submitted the excision of a portion of the 1<sup>st</sup> appellant in favour of the respondent would be detrimental to him. She relied on **Yishram Ravji Halai –vs- Thornton & Turpin 1990 KLR 365** and urged the court to balance the interests of the parties and preserve the substratum of the appeal.

13. On the issue of paragraph 7, 8, 13 14 and 19 of the replying affidavit, counsel submitted the appellants only sought stay in the lower court and that the other alleged suits do not appear in the application.

14. Regarding the issue that the property is charged with a bank, counsel submitted that it was a mere allegation and even if that was the case, there was need for an order staying the implementations of the decree.

15. Mr. Mutunga Advocate for the respondent on the other hand submitted the applicants had failed to meet the threshold under **Order 42 Rule 6** because there was a similar case where the 1<sup>st</sup> appellant lost based on the same issues being appealed against.

16. Secondly, counsel submitted there was also another pending suit **No. O.S 59 of 2019** brought under certificate of urgency hence the applicants were abusing the court process.

17. Thirdly, counsel submitted the applicants had annexed no decree and that the lower court has attached timelines for the implementation of the decree hence the applicants were on forum shopping mission which is a clear demonstration of an abuse of the court process.

18. Counsel further submitted property rights have to be protected and that the supporting affidavit was sworn by a person who is not on the land, and who has not demonstrated the alleged developments on the suit land. The application therefore is not supported by any evidence of substantial loss.

19. Counsel submitted that the lower court judgment was clear on the issue of stay hence the application is not merited and that the appellants should just file a record of appeal to have the appeal heard and determined.

20. In a rejoinder, Miss Kaunyangi submitted the 1<sup>st</sup> appellant was the proprietor of **L.R Nyaki/Mulathankari/612** out of which a portion of 0.37 acres is to be excised hence will directly be affected and shall suffer irreparable loss and damage even if he does not live there.

21. Counsel further submitted the alleged charge with the bank shows the respondent is being economical with truth and secondly he was exaggerating the amount in issue.

22. While expounding on the parameters of **Order 42 Rule 6**, in **Cooperative Bank of Kenya Ltd –vs- Banking Insurance & Finance Union (Kenya) [2015] eKLR** the court held a stay ordinarily is an interim order seeking to delay the performance of a positive obligations that are set out in the decree as a result of a judgment presupposing the existence of a situation to stay a positive order.

23. In **George Boniface Mbugua –vs- Mohammed Jawayd Iqbal [2021] eKLR** expounding of an appeal being nugatory the court stated the issue is on whether what is sought to be stayed if allowed to happen is reversible or if it is not reversible whether damages will reasonably compensate the aggrieved party.

24. Turning to the issue of substantial loss, In **Daudi Kiptugen –vs- Commissioner of Lands & 6 others [2021] eKLR** the court held a party must demonstrate in absence of stay, the substratum shall be interfered with, will be beyond the appellants' reach and hence make the appeal if successful an academic exercise.

25. In **Monica Opete –vs- Michael Owino Awinde [2021] eKLR** the court held a party must disclose the status of the suit property and a mere statement of substantial loss is not sufficient without particulars of loss and damages.

26. Coming to the grant of security in **Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR**, the court held that an offer of security is a mandatory tenet to be met before an order of stay is granted which may take the form of either a deposit of title documents in court or a monetary security.

27. The question is therefore whether the applicants have met the threshold above.

28. The lower court judgment was delivered on 9.9.2021 whereas this application was filed on 10.11.2021. In my view therefore I find the same was filed without any unreasonable delay.

29. Substantial loss, the judgment ordered 0.37 acres be excised from **L.N Nyaki/Mulathankari/612** belonging to the 1<sup>st</sup> appellant in favour of the respondent so as to avoid demolition of a house on equivalent portion of the respondent's **L.R No. Nyaki/Mulathankari/635** encroached and occupied by the 2<sup>nd</sup> appellant.

30. The appellants argue if the excision occurs, they stand to suffer irreparable loss, damage, loss of user and the appeal shall be rendered nugatory.

31. At paragraph 12 of the supporting affidavit, the 1<sup>st</sup> appellant states his family will suffer irreparable loss and damage and the appeal shall be rendered nugatory.

32. The respondent has opposed the application on the basis that the 1<sup>st</sup> applicant does not stay on the land in issue hence he cannot purport to swear the affidavit on behalf of the 2<sup>nd</sup> appellant who is actually the one occupying the disputed land.

33. Now from the judgment it appears what the court ordered to be done is to excise a portion the 1<sup>st</sup> appellant's land in favour of the respondent.

34. No evidence has been availed to show the respondent has extracted the decree and set in motion the process of excising the 1<sup>st</sup> appellant's land.

35. A threat to execute must be real but not imagined. The applicants have not attached anything to show the land surveyor has been approached by the respondent to excise the portion in the process of implementing the decree if at all any has been extracted. It is not enough for a party to allege there is an impending execution without any factual basis.

36. Additionally, the respondent alleges the lower court gave a conditional decree that until there is discharge of charge over **L.N Nyaki/Mulathankari/635**, there is an automatic stay. The respondent has insisted he took a loan of Kshs. 20 million against his land and which is yet to be cleared. In other words, the respondent is saying until he discharges his obligations with the bank the appellants are secured and have nothing to worry about.

37. The applicants have therefore brought nothing to show the respondent has no pending loan obligations either by production of a search that **L.N No. Nyaki/Mulathankari/635** is now unencumbered or a bank clearance to that effect.

38. The respondent has also attached a judgment in **Meru ELC (O.S) 152/2009** where the 2<sup>nd</sup> appellant's claim on adverse possession was dismissed by this court on 23.5.2018. Strangely, this was close to 3 years before the decision made on 9.9.2021.

39. Additionally, the respondent states there is another pending matter **No. 59 of 2019**. Incidentally, the appellants are appealing against the dismissal of a counterclaim seeking for adverse possession before the court which on 23.5.2018 determined a suit between the same parties based on the same land and the same cause of action.

40. It will therefore not be in the best interest of justice, to grant any stay orders in favour of the appellants otherwise it could amount to an abuse of court. This court has dismissed a suit over the issue. It cannot order a stay pending an appeal on issues already determined to finality.

41. As regards the issue of security, the appellants have offered no security for the due satisfaction of the decree should the appeal fail.

42. The above conditions are expressed in mandatory terms and have not been met. In the premises, the application dated 8.11.2021 is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

No appearance for parties

Court Assistant – Kananu

**HON. C.K. NZILI**

**ELC JUDGE**