



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 87 OF 2021

KAROGO M'NKOROIAPPELLANT

VERSUS

NKIROTE M'ARAI1ST RESPONDENT

KAROGO NKOROI....2ND RESPONDENT

(Being an appeal from the Judgment of Hon. S. Abuya (C.M.) delivered on 28th July, 2021, in Meru CMCC No. 76 of 2016)

RULING

1. Through a notice of motion dated 9.9.2021, the appellant seeks a stay of execution of the judgment delivered on 28.7.2021 pending the hearing and determination of the appeal. The application is based on the grounds on its face and a supporting affidavit sworn by Karogo M'Nkoroi on 9.9.2021.
2. The grounds are that the appellant has been in occupation of the sublet land since 1970, it is his only source of livelihood and subsistence for his homestead and three sons; if evicted, he and his sons shall lose out their lifetime investments, become landless and destitute and that their homestead shall be demolished and that the respondent has never occupied the suit land.
3. The respondents oppose the application through a replying affidavit sworn on 26.10.2021.
4. The 1st ground is the suit has been in court for 35 years since 1986 during which the appellant has been enjoying the suit land to the detriment of the respondents hence the court should not allow any more delay of the respondents' enjoyment of the fruits of their judgment.
5. The second reason is that the trial court gave the appellant 90 days to vacate the land which he has not done despite the expiry of the period.
6. Thirdly, the respondents aver the appellant forcefully entered the suit land in 2007 and not 1970 as alleged and since the court has established he is there illegally, the court would be sanctioning a perpetuation of trespass and or an illegality if it were to grant the orders sought.
7. Fourthly, the respondents aver no substantial loss has been demonstrated and an offer for security made as condition for grant of stay orders.
8. With leave of court, parties filed written submissions dated 11.11.2021 and 29.11.2021 respectively.
9. The appellant submits he has demonstrated substantial loss since he has a homestead on the subject land; it is his only source of income and sustenance; he has immense investments thereon; he is elderly and the appeal would be rendered nugatory if eviction occurs.
10. Secondly, it is submitted the application was filed soon after the judgment was delivered and thirdly, he is willing and amenable to pay any such security as may be directed by the court.
11. Lastly, the appellant urges the court to balance the interest of both parties and allow the application.
12. On the other hand, the respondents submit the appellant has demonstrated no substantial loss to be suffered; a delay of one month was inordinate and that no security has been offered. Reliance is placed on:-

a. ANM –vs- VN [2019] on the proposition that there must be special circumstances to sway the discretion of the court in exercising its discretion in favour of the applicant considering that a successful party has a right to enjoy fruits of his judgment.

b. Century Oil Trading Co. Ltd. –vs- Kenya Shell Ltd Nairobi (Milimani) on the proposition that substantial loss means something in addition to an ordinary loss.

13. Order 42 Rule 6 provides that a party seeking a stay of execution must satisfy the three key principles namely: substantial loss, inordinate delay and security for due satisfaction of the decree if the appeal were to be unsuccessful.

14. On the issue of substantial loss, there is no dispute the appellant's suit was dismissed by the trial court for lack of evidence and the 3rd defendant's counterclaim was allowed for the plaintiff to vacate the suit land and a permanent injunction restraining the appellant from interfering with the suit land plus costs.

15. In **Mukuma –vs- Abuoga [1988] KLR 645**, the court described substantial loss as what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

16. In **Charles Wahome Gethi –vs- Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held it was not enough for the applicant to say they live or reside on the suit land and that they will suffer substantial loss and that a party must go further and show the substantial loss that he stood to suffer if the respondent executed the decree in the suit against him.

17. The appellant herein states he derives income and subsistence from the suit land and that his sons' households are likely to be evicted and or destroyed.

18. The appellant other than mere assertions, has not produced any cogent and tangible evidence of the alleged investments, and or developments on the suit land. He has not attached any photographic evidence or valuation report estimating or demonstrating the alleged substantial loss. There are no affidavits signed by the alleged sons to show that they are occupying the suit land together with their families thereon.

19. Paragraph 3 of the supporting affidavit does not state if the appellant has any homestead on the suit land. The nature of the investment is also not defined and or demonstrated.

20. At paragraph 14 of the supporting affidavit, the appellant does not elaborate on the irreparable loss and damage to be suffered if the stay is not granted.

21. In **Butt –vs- Rent Restriction Tribunal [1982] eKLR**, the court held a court should not refuse a stay if there are good grounds for granting it and that the court should also consider the special circumstances of the case and or unique requirements.

22. The appellant has not demonstrated any good grounds and or special circumstances why he deserves a stay bearing in mind the interests of the 1st respondent who has a title deed which conclusive evidence of ownership which has not been impeached on account of illegality, fraud and or misrepresentation as per **Section 26 of Land Registration Act**.

23. The court has a responsibility and a duty to enforce the rights of registered owners under **Article 40 of the Constitution** as read together with **Section 25 of Land Registration Act**.

24. The appellant avers he has been on the suit land since 1970 but the respondent denies that and alleges he only forcefully entered her land in 2007. The court is aware the appellant in the lower court did not base his claim on adverse possession.

25. So the appellant must demonstrate why this court should deny the successful party the right to enjoy the fruits of her judgment.

26. Again as a way of demonstrating substantial loss, the appellant has not stated what is likely to happen if the respondents take vacant possession as ordered by the trial court. There is no evidence that the substratum of the suit premises shall change. The appellant has not expressed any fears that the respondent is about to transfer and or dispose of the suit land.

27. In any event, there is no evidence the appellant has ever lodged a caution and or sought for an inhibition order against the title held by the 1st respondent.

28. Similarly, as regards security, the duty is on the appellant to make an offer for security for the due performance of the decree should the appeal be unsuccessful. The appellant has not mentioned or offered any proposal of security in the application as well as the supporting affidavit.

29. As a show of good faith, it is expected the appellant would have demonstrated as a good gesture his willingness to offer such a security both for the lower court costs as well as to the subject land.

30. In **Thomas Limo Mutkaa –vs- Albina Kaitany [2021] eKLR**, the court held whereas an unsuccessful litigant has a right to prefer an appeal, a successful litigant has a right to enjoy the fruits of his judgment and that the two competing rights have to be balanced.

31. In the instant case, the appellant's suit was dismissed and the respondent's counterclaim allowed. The appellant has failed to demonstrate any substantial loss and or an offer of security for the due performance of the decree. Likewise, in the wider interest of justice as provided

under **Sections 1A, 1B and of the Civil Procedure Act and Article 159 of the Constitution**, I find the applicant undeserving of the orders sought.

32. I dismiss the application herein with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

In presence of:

Kaunyangi holding brief for Kaumbi for applicant

Nyamu Nyaga for respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE