



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO.18 OF 2021

LEAH NJERI.....1ST APPELLANT

VICTOR MIGIRO DANIEL.....2ND APPELLANT

MARK MATI T/A AHADI CENTRE OF CHRIST.....3RD APPELLANT

VERSUS

ADAN KANCHORO MULATA.....1ST RESPONDENT

HAWA MALYUM MOHAMMED.....2ND RESPONDENT

RULING

What is before court for determination is the Appellants' Notice of Motion application dated 15th June, 2021 where they seek the following orders:

- a) Spent
- b) That this Honourable Court be pleased to issue a Temporary stay of execution of enforcing of the whole ruling delivered on 2nd June, 2021 in Mavoko MCELC E 005 of 2021 pending the hearing and determination of the Application herein.
- c) That this Honourable Court be pleased to issue a Temporary stay of execution of enforcing of the whole ruling delivered on 2nd June, 2021 in Mavoko MCELC E 005 of 2021 pending the hearing and determination of the Environment and Land Court Appeal No. E 18 of 2021.
- d) That this Honourable Court be pleased to issue a Temporary stay of proceedings in Mavoko MCELC E 005 of 2021 pending the hearing and determination of the Environment and Land Court Appeal No. E. 18 of 2021.
- e) That this Court do award any other orders it may deem just, fit and expedient to award in the interests of justice.

The application is premised on the grounds on the face of it and the supporting affidavit of the 2nd Appellant VICTOR MIGIRO DANIEL where he claims the Appellants are the owners of land parcel number LR No. 23313 (IR No. 80206 delineated Survey Plan/ Deed Plan Number 220327 situated in Mavoko) hereinafter referred to as the 'suit land'. Further, that they have been in actual possession and/or occupation thereon. He explains that the Respondents filed a Notice of Motion application dated the 30th November, 2020 in Mavoko MC ELC Cause No. E005 of 2020 from which this application and instant Appeal emanate from. Further, in the said Notice of Motion application, the Respondents sought injunctive orders against the Appellants in respect to land parcel LR No. 23313 (IR No. 80206 delineated on land survey plan/ Deed Plan number 220327 situated in Mavoko, while possession vested in the Appellants. He contends that they have been in possession of the suit land for more than 14 years without interruption and the Respondents in an attempt to grab the said land doctored documents at the Machakos Lands Registry which they are relying on. He confirms that the Magistrate's Court vide its Ruling dated the 2nd June, 2021 did not address itself on the validity of the Respondents' title to the suit land and the people who have been in actual possession thereon. Further, that the trial Magistrate issued orders of temporary injunction restraining any party from interfering with the Respondents' possession and occupation of suit land while in essence the said possession vested in the Appellants. He contends that being dissatisfied with the said Ruling, they filed a Memorandum of Appeal which raises triable issues and has high chances of success. He reiterates that the instant application seeks to preserve the subject matter as in absence of orders sought herein, the Respondents will evict the Appellants hence rendering the Appeal an academic exercise. Further, that it was pertinent for the Court to make determination on whether the Respondents has regularly acquired their title.

The Respondents opposed the application by filing a replying affidavit sworn by ADAN KANCHORO MULATA where he deposes that the

said application is devoid of merit, replete with falsehoods, distortion and suppression of material facts, frivolous including an abuse of the court process as it fails to explain how the appeal will be rendered nugatory. He contends that the impugned Order is a negative one incapable of being stayed. He insists the Respondents never sought for a positive order in the lower court. He disputes that the Appellants are the owners of the suit land and avers that they never provided any documents of title to support this claim. Further, that in contrast, they produced documents of title to prove ownership of suit land. He states that in the lower court the Appellants never challenged the validity of their title. He denies that the Appellants have been on the suit land for more than 14 years as claimed and explains that since 19th August, 2013, the said suit land had been vacant as he visited it each year. Further, it is only in December, 2017 when he found a person had attempted to put temporary structures thereon and he brought them down. He avers that in 2018, 2019 and 2020 he used to visit suit land, find temporary structures thereon and bring them down. Further, in September, 2020 he found when someone had commenced putting up a permanent house thereon and he attempted to evict them but in vain. He reiterates that the trespassers later constructed a temporary iron sheer structure as a church and toilets on suit land. He further denies that there is an arguable appeal as there is no eviction order issued. Further, that the Respondents will suffer irreparable loss if the orders sought are granted.

The application was canvassed by way of written submissions

Analysis and Determination:

Upon consideration of the Notice of Motion application dated the 15th June, 2021 including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the Court should grant a temporary stay of execution of the ruling delivered on 2nd June, 2021 in Mavoko MCELC E 005 of 2021 pending the hearing and determination of the Environment and Land Court Appeal No. E 18 of 2021.

The Appellants in their submissions reiterated their averments in the supporting affidavit and contended that the orders issued in Mavoko MC ELC E 005 of 2021, would render them homeless as they would be evicted. Further, that they stand to suffer substantial loss if the orders sought are not granted. They reiterate that the Application was made without unreasonable delay and the appeal is arguable. To support their averments, they relied on the following decisions: **Elena Doudoladova Korir Vs Kenyatta University (2014) eKLR and Hassan Guyo Wakalo V Straman East Africa Ltd (2013) eKLR.**

The Respondents in their submissions insist the order of the lower court was a negative one and the Appellants have not met the threshold set for the granting of stay of execution. Further, that the Appellants have no arguable appeal. They contend that vide the temporary order of injunction, the Court only sought to maintain status quo ante in order that the issue of ownership of suit land would be settled. They insist the Appellants would not suffer any substantial loss as from 2017 they would enter suit land but get chased away, take time and return thereon. Further, that the Appeal will not be rendered nugatory. To buttress their averments, they relied on the following decisions: **Kamau Mucuha V Ripples Ltd (1993) eKLR; Ephraim Mwangi Gachigua V Teachers Service Commission & 12 Others (2021) eKLR; Kaushik Pancharatia & 3 Others V Prime Bank Limited & Another (2020) eKLR; Samuel Nyabeta Gesacho V Laban Munene (2021) eKLR; Philmark Systems Co. Ltd V Andermore Enterprises (2018) eKLR; Peter Mwaniki Njeru & Another V Vieta Wakere Kienge (2019) eKLR and Kivanga Estates Limited V National Bank of Kenya Limited (2017) eKLR.**

As to whether the Court should issue temporary stay of execution of the ruling delivered on 2nd June, 2021 in Mavoko MCELC E 005 of 2021.

On stay pending Appeal, Order 42 Rule 6(2) of the Civil Procedure Rules provides inter alia:

“ 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”

In the current scenario, a Ruling was delivered on 2nd June, 2021 wherein the Appellants were restrained from interfering with the suit land pending the outcome of the lower court suit. The Appellants being dissatisfied with the whole of the said Ruling filed a Memorandum of Appeal dated 8th June, 2021. The Appellants claim to be owners and in possession of the suit land. They insist the Respondents are not in possession of the suit land. The Respondents insist they own the suit land and from 2017 the Appellants would enter the suit land but get chased away, take time and return thereon. The Appellants explain that the Respondents filed a Notice of Motion application dated the 30th November, 2020 in Mavoko MC ELC Cause No. E005 of 2020 from which this application and instant Appeal emanate from. Further, in the said Notice of Motion they sought injunctive orders against the Appellants in respect to the suit land, yet they have been in occupation thereon and that the Respondents in an attempt to grab the said land doctored documents at the Machakos Lands Registry which they are relying on. The Appellants contend that the trial Magistrate vide her Ruling dated the 2nd June, 2021 did not address itself on the validity of the Respondents' title to the suit land and the people who have been in actual possession thereon. They insist they will suffer irreparable harm when the orders sought are not granted.

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while dealing with an issue of stay of execution pending appeal held that it is a discretionary power, a stay must be granted so that an appeal may not be rendered nugatory and judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

While in **James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR** the Court of Appeal held that:

“an Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party”.

From a perusal of the annexures in the respective affidavits which include the impugned application and Ruling as well as the Appellants' relying affidavit which was filed in the Lower Court, I note it is actually the Respondents who are the owners of the suit land. Further, the Appellants did not produce any documents in the lower court to prove ownership of the suit land nor challenged the validity of the Respondents title. I note they claim to have been in possession of the suit land and provided photographs but the Respondents insist as from 2017 the Appellants would enter suit land but get chased away, take time and return thereon. Further, that one of the Appellants commenced construction of a permanent house in 2020. The 2nd Appellant claims they have been on the suit land for over 14 years but in a statement which he filed in lower court, he admits he was born in 1991 and commenced constructing a small house in 2020 on the suit land. I opine that these averments seem contradictory. Except for the permanent structure, the rest of the photographs reveal temporary structures on the suit land. The Appellants have not controverted the Respondents averments, that they were severally chased away from the suit land from the year 2018 but they continued to re enter it. I have had a chance to peruse the impugned Ruling and Order and note there is no order of eviction granted therein. Further, in associating myself with the decision of *Kenya Commercial Bank Limited V Tamarind Meadows Limited & 7 Others (20160 eKLR)*, I find that there is no positive order capable of being stayed. Insofar as the application was filed without inordinate delay, it is my considered view that the Appellants have failed to demonstrate what substantial loss they stand to suffer since they have not denied they had forcefully continued to re enter the suit land despite being chased away by the Respondents and 2nd Appellant only commenced putting up his house thereon in 2020 when he knew a third party was claiming the land.

Based on the foregoing, while relying on the legal provisions cited above and associating myself with the decisions quoted, I find that the Appellants have not demonstrated if they have an arguable Appeal, and there is no order of eviction issued in the impugned Ruling as claimed. To my mind they have failed to meet the **threshold set for granting stay of execution pending appeal and will decline to grant the orders as sought.**

It is against the foregoing that I find the Appellants' Notice of Motion application dated the 15th June, 2021 unmerited and will dismiss it.

Costs will be in the cause

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2ND DAY OF MARCH, 2022.

CHRISTINE OCHIENG

JUDGE