



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. E106 OF 2021

STEPHEN KIENJE NJUGUNA.....APPLICANT

=VERSUS=

GEORGE ODHIAMBO JOSIAH.....1ST RESPONDENT

LAND REGISTRAR, RUIRU.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This appeal arose from the Judgment rendered on 22/11/2021 by Hon JA Agonda, PM, in **Ruiru E & L Case No 44 of 2020**. The dispute in the trial court revolved around ownership of Land Parcel Number **Ruiru/Ruiru East Block 3/982**. Both the plaintiff and the 1st defendant were waving parallel titles.

2. Upon trial, the trial court came to the finding that the 1st respondent was the legitimate proprietor of the suit property. Consequently, the trial court issued the following disposal orders in the Judgment dated 22/11/2021:

i. The plaintiff's suit is dismissed with costs to the defendant.

ii. A declaration be and is hereby issued that the defendant is the legitimate owner of land title LR No. Ruiru/Ruiru East Block 3/982.

iii. A permanent injunction restraining the plaintiff, his agents, servants and any person claiming from interfering and or transferring to third parties all that parcel of land LR No. Ruiru/Ruiru East Block 3/982. (sic)

iv. The all transactions (sic) registered on LR No. Ruiru/Ruiru East Block 3/982 be cancelled and the Land Registrar, Ruiru be and is hereby directed to rectify the Land Register of suit property to reflect the name of the defendant George Odhiambo Josiah as its proprietor.

v. The plaintiff be and is hereby ordered to grant vacant possession of land he occupy in LR No. Ruiru/Ruiru East Block 3/982 within 60 days from the date hereof.

vi. The costs of this suit and counterclaim is awarded to the defendant and the plaintiff is condemned to pay the costs herein.

3. Aggrieved by the judgment of the trial court, the appellant brought this appeal advancing the following grounds:

a) That the learned magistrate erred in law and fact in disregarding the evidence produced.

b) The learned magistrate erred in law and in fact in inferring without evidence. (sic)

c) The learned magistrate erred in law and in fact in dismissing the claim of a bonafide purchaser of title.

d) That the learned magistrate erred in law and in fact in concluding fraud whereas it was not pleaded or proved to the required standard as against the appellant herein.

e) That learned magistrate erred in law and fact in not allowing the makers of the documents to appear in court and produce their documents and dismissing the request.

f) The learned magistrate erred in law and in fact in dismissing the appellant's prayers.

g) That the learned magistrate erred in law in directing the Land Registrar to cancel the registration of the appellant's certificate of title of the suit property and register the 1st respondent as the owner thereof.

4. Further, the appellant brought a notice of motion dated 30/11/2021 in which he urged the court to grant orders of stay of execution and *status quo*. The application was supported by the appellant's affidavit sworn on 30/11/2021, in which he deposed that he was apprehensive that his title would be cancelled and he would be evicted from the suit property. The said application is the subject of this ruling.

5. Canvassing the application through written submissions dated 16/2/2022, Mr Waweru Nyambura, counsel for the appellant submitted that the following three issues fell for determination in the application: (i) Whether substantial loss will result to the applicant if stay is not granted; (ii) Whether the applicant has given security; (iii) Whether the application was brought without unreasonable delay. On whether the applicant had demonstrated the likelihood of substantial loss, counsel submitted that the applicant was an indefeasible owner of the suit property, having been issued with a title in 2015. Counsel argued that because the applicant had been living on the suit property, there was the likelihood of his title being cancelled and him being evicted from the suit property. Counsel added that the application had been brought promptly. Lastly, counsel submitted that the appellant was willing and ready to be bound by the directions of the court in relation to security. Counsel urged the court to grant the orders of stay.

6. The 1st respondent opposed the application through a replying affidavit sworn on 19/1/2022. He deposed that the appellant did not have an arguable appeal because the judgment of the trial court was based on evidence which had demonstrated that the appellant's title was fraudulently acquired. He added that the suit property was bare/undeveloped hence there was no substantial loss or prejudice to be suffered. The 1st respondent added that should the court be inclined to grant the appellant an order of stay of execution, he should be ordered to deposit a sum of Kshs 7,500,000 [the equivalent of the value of the suit property] in an interest earning account.

7. Through written submissions dated 23/2/2022, counsel for the respondent submitted that the appellant had not demonstrated any kind of likely loss.

8. I have considered the application, the response to the application and the parties' respective submissions. The criteria upon which this court exercises jurisdictions to grant an order of stay of execution is set out in **Order 42 rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

"(2) No order for stay of execution shall be made under subrule (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. The subject matter of this appeal is a parcel of land measuring 0.809 hectares, situated in Ruiru. The 1st respondent deposed that the land is bare/undeveloped. The appellant did not lead any evidence to demonstrate that the land is developed. Secondly, the trial court found that the appellant's title was a product of fraud and upheld the title held by the 1st respondent. Thirdly, the appellant has offered to comply with conditions that may be set by the court in terms of security. Lastly, the record of appeal has been filed and all that is awaited are disposal directions relating to the appeal.

10. Given the above circumstances, I will allow execution of the judgment but at the same time preserve the suit property such that should the appeal in this court succeed, the orders of the court shall not be rendered nugatory. A stay order will be granted on the above terms for a limited period of 9 months.

11. In the end, the notice of motion dated 30/11/2021 is disposed in the following terms:

a) The 1st respondent will be at liberty to execute the judgment in the trial court save that the subsequent title to be issued in the name of the 1st respondent in respect of Ruiru/Ruiru East Block 3/ 982 shall be preserved in the sense that it shall not be disposed or charged for the next nine (9) months.

b) The appellant shall serve the record of appeal within three days and file and serve written submissions on the main appeal within 21 days from today.

c) A hearing date for the main appeal will be set at the time of rendering this ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF MARCH 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Waweru Nyambura for the Appellant/Applicant

Mr Okech for the 1st Respondent

Court Assistant: Lucy Muthoni