Kamoing v Koitaba & another (Land Case 452 of 2016)
[2022] KEELC 2774 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2774 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 452 OF 2016

FM NJOROGE, J

JULY 6, 2022

BETWEEN

AARON KIPLAGAT KAMOING ..... PLAINTIFF

AND

MAJOR WILSON KOITABA ..... 1ST DEFENDANT

JOEL KIBET KOECH ..... 2ND DEFENDANT

RULING

1. Two post-judgment applications for stay of execution pending appeal dated January 23, 2022 and February 17, 2022, lodged by the 1st defendant and the 2nd defendant respectively are before me for determination and I have consolidated them for the sake of this single ruling.

2. The grounds upon which the applications are brought are that the defendants stand to suffer substantial and irreparable loss, that the suit property does not exist and the decree arising out of the judgment can not be enforced, that the appeal would be otherwise rendered nugatory, and that the intended appeals have a high chance of success.

3. Stay of execution proceedings are governed by order 42 rule 2 of the *Civil Procedure Rules*. According to that rule, the conditions to be satisfied for an order of stay to be granted are that there must be an appeal in place, that the application for stay has been lodged without unreasonable delay, that there is risk of substantial loss if the orders sought are not granted and readiness to provide security for the performance of the decree.

4. The 2nd defendant avers that he has subdivided the suit property and sold it to third parties and, perchance the intended appeal succeeds, there would be considerable wastage of time and resources spent in re-transferring the resultant sub plots back to their owners.

5. The 2nd defendant has also expressed an apprehension that the plaintiff might put the suit land out of reach if the same is transferred to him as ordered, thus rendering the appeal nugatory if successful. Further it is stated that the property was not registered in the name of the 1st defendant and that stay of execution is necessary pending a determination as to whether the 1st defendant should be the one to transfer the suit land to the plaintiff.

6. The respondent, naturally, opposed both applications in his two replying affidavits both dated 1/3/22. He stated that the applications are mischievous and calculated at denying him the fruits of his judgment; that no substantial loss would occur to both applicants; that only the issue of refund of the purchase price by the 1st defendant to the 2nd defendant would arise upon execution; that the records as at 25/5/2001 show that the suit land had been by then registered in the 1st defendant's name and his denial of the fact is untruthful; that the 1st defendant's lack of candour and his fraudulent collusion with the 2nd defendant to deprive the plaintiff of the suit land disentitles the two defendants from the orders sought and that the 2nd defendant was joined in the suit on 19/11/2009 and he ought to have joined third parties in the suit if he had indeed disposed of the suit land as claimed; he never did so. Finally, it is stated that the plaintiff, now 75, has been kept out of the use and enjoyment of the suit land for lengthy period of 40 years and he would in the circumstances be the one to suffer prejudice perchance the orders sought were granted.

7. The 1st and 2nd defendants filed their submissions on 18/3/22 and 20/4/22 respectively urging the grounds set out in their supporting affidavits.

8. I have considered the two applications and the response. The notices of appeal filed by the applicants are in the court record and therefore for the purposes of the applications for stay I consider that appeals have been filed by the two applicants and the first condition is therefore satisfied.

9. Regarding whether the applications have been lodged expeditiously I find that the 1st defendant lodged his application on 24/2/2022 while the 2nd defendant lodged his on 28/2/2022. The judgment having been delivered on 27/1/2022 there is no doubt that the applications were filed timelily.

10. The third condition as to whether there is proof of risk of irreparable loss and damage depends much on the evidence availed by the applicants. The 2nd applicant states that he has subdivided the land and he has been in occupation of one of the resultant plots since 2005, and that he is wholly reliant on it for the sustenance of his family. Nothing in support of these statements in his supporting affidavit has been annexed to that affidavit. As regards his averments that he had informed the court that the land had been subdivided and transferred to third parties, I have perused through the record of his oral evidence-in-chief and cross-examination and found that he was very economical with information at the hearing. He simply stated, without any elaboration upon cross-examination by Mr Wena that he had subdivided the land and sold it. Why he felt not compelled to bring substantive evidence to the hearing to demonstrate the veracity of these allegations is a wonder. In the affidavit dated 22/5/2017 which he adopted as his evidence-in-chief, there was no disclosure as at its swearing that the land had been subdivided and disposed of. Finally, no evidence of subdivision and disposal of the land is contained in the affidavit dated 17/2/2022 in support of his present application. The only logical conclusion in the midst of the defendants' collective taciturnity is that if the 2nd defendant disposed of the suit land at all, which is not proved, he did so pendent lite and all parties or transferees should in any event, know the court does not respect such transfers.

11. Regarding the 1st defendant's position, I find that there would only be the resultant issue, in view of the execution of court's judgment, of whether he should refund the 2nd defendant his money and no more. I find that he would suffer no irreparable loss from the implementation of the judgment.

12. The conditions for the grant of orders of stay of execution ought to be construed conjunctively and not otherwise. Failure to establish one condition therefore is fatal to an application for stay. In this case the two applicants have failed to establish that they stand to suffer irreparable harm should the judgment of the court be executed and the applications therefore must fail. Consequently, I dismiss the two applications dated January 23, 2022 and February 17, 2022, lodged by the 1st defendant and the 2nd defendant respectively, with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU