



**Juma & 2 others v Mukoko DA (Environment & Land Case
20 of 2022) [2022] KEELC 14495 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 20 OF 2022
EC CHERONO, J
NOVEMBER 1, 2022**

BETWEEN

FELISTUS JUMA 1ST APPELLANT

EVANS WAFULA 2ND APPELLANT

FRANCIS WAKHUNGU 3RD APPELLANT

AND

FRANCIS MUKOKO DA RESPONDENT

RULING

1. The appellants/applicants moved this Honourable court vide a Notice of Motion application seeking the following Orders;
 - a. (Spent)
 - b. That there be a stay of execution of the order issued on June 10, 2022 pending *inter-parte* hearing of this application
 - c. That there be a stay of execution of the order issued on June 10, 2022 pending hearing and determination of this appeal
 - d. Costs
2. The said application is based on grounds that the applicants were aggrieved by the order issued by Hon C A S Mutai, Senior Principal Magistrate Bungoma on August 26, 2022 in CMELC MISC. Civil Application Number 340 of 2020 and that they have exercised their undoubted right of appeal to this Honourable Court. The appellants also averred that the contestation in the former suit was in respect of a Boundary dispute in relation to land parcel Number West Bukusu/North Mateka/1219 in which the trial Magistrate issued Ex-parte orders directing Bungoma county Surveyor to visit and



restore boundaries of the suit land. The applicant had further averred that the land parcel NO. West Bukusu/north Mateka/1219, the subject matter of the dispute in the former suit is registered in the name of their father, one Egnatius Juma Sindani (now deceased) and that succession is yet to be taken out. He contends that the orders issued by the trial court allowing boundary determination were issued without Jurisdiction and that he will be seeking to reverse the same on appeal.

3. In the supporting affidavit sworn by Evans Wafula on August 29 2022, the applicants averred that the application has been brought without undue delay and that they are willing to offer any security as may be ordered by this Honourable court for the due performance of the decree as may ultimately be binding on them.

In conclusion, the applicants contend that unless the stay of execution order is granted, they stand to suffer irreparable loss.

4. The application is opposed with a replying affidavit sworn by the respondent on September 19, 2022. In the said affidavit, the respondent deposed that he is the registered proprietor of land parcel No W. Bukusu/n. Mateka/1220 which is adjacent to land parcel No. E. Bukusu/w. Mateka/1219 belonging to the appellant's family. He stated that after the death of his father, the appellants destroyed boundary features and encroached and occupied part of his land measuring two and a half acres or thereabouts which they have been utilizing for some time. The respondent further stated that the application has been brought with unclean hands since the actions by the appellants offends the provisions of Section 18 of the Land Registration Act, NO. 3 of 2012 which the application has been brought under.

Analysis And Decision

5. I have considered the Notice of Motion application dated August 29th August --2022, the supporting affidavit and the replying affidavit as well as the rival submissions. Order 42 Rule 6(2) of the Civil Procedure Rules which is the applicable law 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---

6. It is clear from the above provisions of the law that before an application for stay pending appeal is granted, an applicant must first demonstrate that the application has been brought without unreasonable delay. The second condition is that the applicant must demonstrate that he will suffer substantial loss unless the application is granted and finally, the applicant must be ready to provide security for the due performance of the decree/order as may ultimately be binding on him.

The applicants in the supporting affidavit stated that they had made a similar application for stay pending appeal before the trial court dated 4/4/2022 but the same was dismissed on 26/8/2022. If the present application was brought the same day the application that had been filed before the trial court was dismissed, it follows therefore that this application has been brought without undue delay.

7. On the second condition, the applicant has stated that the trial Magistrate was not seized with jurisdiction to grant the orders for determination of boundary features under Section 18 of the land Registration Act, NO.3 of 2012.



I have read the ruling issued by the trial court on 26th August, 2022. At page 2 paragraph 5 of the said Ruling, the learned trial magistrate observed as follows;

“The court only facilitated the providing of security and nothing else otherwise the land Registry/Surveyor is to make a finding as a tribunal under the Survey Act Cap 299. Any parties who is aggrieved by such finding can appeal against such decision.”

8. From that ruling, the trial magistrate admits that he issued orders for enforcement of the boundary features which the respondent contends that the learned trial magistrate lacked jurisdiction. That issue whether or not the trial magistrate was seized with jurisdiction to entertain a boundary dispute is the heart-beat of the intended appeal. I agree with the applicant that if the impugned order is not stayed and the applicant ultimately succeed in the appeal, his appeal would be rendered nugatory. That in my view is substantial loss which this Honourable court must prevent so that the applicant/appellant will not reap a barren judgment if the intended appeal succeed.

The upshot of my finding is that the application dated 29th August 2022 is merited and the same is hereby allowed in the following terms;

1. There shall be a stay of execution of the order issued by Hon C.A.S Mutai (SPM) on 10/6/2022 pending the hearing and determination of this Appeal.
2. The applicant to fast track compiling of the record of this appeal
3. Mention on November 14, 2022 for taking directions on the appeal.
4. Costs shall abide the event.

READ DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 1ST NOVEMBER, 2022

HON. E.C. CHERONO

ELC JUDGE

In the presence of;

M/S Wanyama H/B for Kassim

Mr. Waswa H/B for Bw'onchiri

M/S Joy C/A

