



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. E013 OF 2021

LUCAS SASATI NYARERU.....APPELLANT

VERSUS

OSINYO MOCHUMBE MEROKA.....1ST RESPONDENT

LAND REGISTRAR, KISII COUNTY.....2ND RESPONDENT

RULING

INTRODUCTION

1. This ruling pertains to the Appellant's Notice of Motion dated 17th August 2021 seeking the following orders:

- i. Spent
- ii. Spent
- iii. That pending the hearing of this application interpartes, this Honourable Court be pleased to order a stay of execution of the lower court's ruling dated and delivered on 28th July 2021.
- iv. That pending the hearing and final disposal of this appeal, this Honourable Court be pleased to order a stay of execution of the lower court's ruling dated and delivered on 28th July 2021.
- v. That the costs of this application be provided for.

2. The application is anchored on the grounds set forth on the face of the application, the main one being that the lower court has barred the Applicant from accessing his property thus adversely affecting his proprietary rights. He contends that his appeal has high chances of success and if this application is not granted, his appeal shall be rendered nugatory.

3. The application is also based on the Supporting Affidavit of Lucas Sasati Nyareru, the Appellant/Applicant herein. In the said affidavit he depones that he is the registered proprietor of land parcel number KISII MUNICIPALITY/ BLOCK 1/788 and he has been in actual occupation and possession of the same since the year 2000. He further depones that in 2015 he put up some structures of the said plot which he has rented out to tenants. He adds that in the same year he sold the plot to one Samwel Gekonge Mireri to enable him pay his father's medical bills. The Applicant contends that if the lower court's ruling is implemented, he is likely to suffer irreparably.

4. The application is opposed by the 1st Respondent through his Replying Affidavit sworn on the 31st August 2021. In the said affidavit he challenges the Applicant's title and claims that the same is fraudulent. He further takes issue with the Applicant's averment at paragraph 7 of his Supporting Affidavit where he depones that he sold the suit property to one Samwel Gekonge Mireri and wonders why the vendor is not party this suit. He adds that the Applicant will not suffer any prejudice as he is occupying the suit property illegally. He is of the view that the ruling of the lower court was intended to preserve the suit property since there are competing claims over the same. He accuses the Applicant of non-disclosure of material facts and states that for that reason the application ought to be dismissed.

5. Before delving into the merits of the application, it is necessary to give a brief background of the case. On 14th April 2021 the Respondent filed a suit against the Defendant in the Chief Magistrate's court challenging the Defendant's title in respect of LR No. KISII MUNICIPALITY/ BLOCK 1/788. He sought a number of reliefs among them being an order nullifying the registration of the the suit property in the name of the 1st Defendant and an eviction order against the 1st Defendant.

6. On 5th May 2022, the Respondent filed a Notice of Motion seeking various orders as follows:

i. Spent

ii. That the court do issue an order directing that a forensic test be done on the signatures of Moywayu Nyabaro as they appear on the Letter of Allotment, Transfer of Lease dated 9th February 2000 and on the last page of the transfer to confirm whether they were done by one person and/or forged and a copy of the late's National Identity Card (sic)

iii. That an injunction restraining the 1st Defendant either by himself, his agents, servants from selling, alienating, trespassing, transferring, leasing, erecting iron sheet shanties, letting illegal tenants, or in any other manner howsoever interfering with the Applicant's title No. Kisii Municipality/Block 1/788 located at Nyanchwa within Kisii County pending the hearing and determination of the application

iv. Demolition of illegal and irregularly erected iron sheet shanties and eviction of all illegal occupants/tenants pending the hearing and determination of the main suit.

v. That this Honourable Court do issue an order restraining the 1st Defendant either by himself, his agents or servants from selling, alienating, trespassing, transferring, leasing, erecting iron sheets shanties, letting illegal tenants, or in any other manner howsoever interfering with the Applicant's title No. Kisii Municipality/Block 1/788 located at Nyanchwa within Kisii County pending the hearing and determination of the main suit.

vi. That the Plaintiff be allowed to erect a gate at the entrance and block the suit premises i.e Kisii Municipality/ Block 1/788 located at Nyanchwa pending the hearing and determination of the main suit.

vii. That the Plaintiff be allowed to further amend the Amended Plaint before hearing and determination of the application.

viii. The O.C.S Kisii Central Police Station do issue security during eviction.

ix. That the costs of this application be provided for.

7. In his ruling dated 28th July 2021 which is the subject of this appeal the learned trial Magistrate granted 1, 2, 4 and 6 of the application. In effect the court granted three orders as the first one is spent. The first is an order that the forensic test be conducted to establish the authenticity of the signature of Moywayu Nyabaro deceased. Secondly, the court granted an order of injunction restraining the 1st Defendant either by himself, his agents or servants from selling, alienating, trespassing onto, transferring, leasing, erecting iron sheets shanties, letting illegal tenants, or in any other manner howsoever interfering with the Applicant's title No. Kisii Municipality/ Block 1/788 located at Nyanchwa within Kisii County pending the hearing and determination of the main suit. Thirdly, the Plaintiff was granted leave to further amend his Amended Plaint before the hearing and determination of the application.

8. The Applicant being aggrieved by the said orders has appealed to this court against the said ruling and by this application seeks that the implementation of the said orders be stayed pending appeal.

ISSUES FOR DETERMINATION

9. Having considered the Notice of Motion, rival affidavits and the submissions filed by both parties, the main issue for determination is whether the Applicant has met the conditions for the grant of an order of stay of execution pending appeal.

ANALYSIS AND DETERMINATION

10. The principles guiding the courts while considering such an application are now well settled. The substantive provision for grant of stay pending appeal is to be found under Order 42 Rule 6 of the Civil Procedure Rules.

Order 42 Rule 6 provides in part as follows: -

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

11. I will therefore proceed to analyze whether the Applicant has met the requirements for stay pending appeal set out in the above

provisions. The first requirement is the need to demonstrate substantial loss if the order for stay is not granted.

12. The court in the case of **Migotio Plantations Limited v Paul Wanyama Wafula [2015] eKLR** stated as follows in considering a similar issue:-

The powers of the court to grant stay of execution of the decree are discretionary. The ultimate goal of the court is to preserve the appeal and ensure that the rights of the Appellant are not defeated pending its determination. (Butt v Rent Restriction Tribunal [1962] KLR 417)

Therefore, whether the Appellant stands to suffer substantial loss is the cornerstone of the application of stay. However, the court must also consider special circumstances and unique requirements of the case. (See Butt V Rent Restriction Tribunal supra at pages 419-420).

13. Learned counsel for the Applicant has submitted that if the Respondent is allowed to execute the orders of the lower court, the Applicant who is the registered owner of the suit property will be dispossessed of his property at an interlocutory stage. He contends that the Applicant has annexed documents to his supporting affidavit as proof that he is the owner of the suit property. Counsel concedes that there may have been double registration but maintains that the Applicant's registration was the first in time.

14. He argues that the issue of establishing the legal owner of the suit property can only be determined at a full hearing. On the other hand, counsel for the Respondent has gone flat out to discredit the Applicant's title claiming that it is a forgery. I agree with counsel for the Applicant that the issue of the validity of the titles issued to both parties can only be determined at a full hearing and not on the basis of the parties affidavits and annexures at this interlocutory stage. It is counsel's further contention that the order barring the Applicant who is the registered owner from accessing the suit property is illegal and unlawful.

15. It is not in dispute that both parties have title documents to the suit property and that the Applicant is currently in occupation thereof as he has some structures which he has rented out to tenants. The effect of the order barring him or his agents from accessing the suit property would no doubt occasion him substantial loss as he will not be able to maintain the structures on the suit property or rent them out to tenants and the same will go to waste. It is therefore my finding that the Applicant has demonstrated that he will suffer substantial loss.

16. The second condition that the Applicant is required to satisfy is that he has made the application without delay. The impugned ruling was delivered on 28th July 2021 and the application for stay was filed on 18th August 2021 so there was no inordinate delay.

17. The last condition that the Applicant is required to satisfy is his willingness to furnish security for costs. Even though counsel for the Applicant has submitted that this condition is only applicable in monetary terms, this is not borne out by order 42 Rule 6. If that was the intention of Parliament, nothing would have been easier that the framers of the Civil Procedure Act to say so. The applicant must therefore be able to demonstrate that he is willing to furnish security for costs in the event that his appeal is unsuccessful.

18. In view of the foregoing, I am persuaded that the Applicant has largely demonstrated that he is entitled to an order of stay pending appeal although the same shall be issued on terms. I am of the view that at this juncture, it is important to preserve the suit property so that the appeal is not rendered nugatory. I therefore allow the application and make the following orders:

- a) A stay of execution of the ruling delivered on 28.7.2021 is hereby granted on condition that the Applicant does not sell, alienate, transfer or charge or erect new structures on all that property known as L. R No Kisii Municipality/ Block 1/788 pending the hearing and determination of the appeal.
- b) The Applicant shall furnish security for costs in the sum of Kshs. 75,000 within 30 days failing which the orders of stay shall automatically lapse.
- c) The costs of this application shall be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF NOVEMBER, 2021.

J.M ONYANGO

JUDGE