



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 4 OF 2020

(FORMERLY EMBU CC NO. 157 OF 2008)

JACKSON NDUNGU KAGUAE & ANOTHER.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT

D.C. KIRINYAGA DISTRICT.....2ND DEFENDANT

KIRINYAGA COUNTY COUNCIL.....3RD DEFENDANT

RULING

By a Notice of Motion dated 20th September 2019, the 3rd Defendant/Applicant is seeking the following orders:-

(1) Spent.

(2) That this Honourable Court be pleased to grant stay of execution pending hearing and determination of an Appeal against the Decree given by the Honourable Court on 26th September 2002.

(3) That leave be hereby granted to the 3rd Respondent to file Notice of Appeal and the Appeal out of time as per the Draft Memorandum of Appeal.

(4) That costs be in the cause.

The said application is premised on the following grounds:-

(a) That this Honourable Court issued a decree on 26th September 2002 in this suit (formerly NAIROBI HCCC No. 1162 of 1996), declaring that the 3rd Defendant held an still holds land parcels Number MUTIRA/KIRIMUNGE/219 measuring approximately 63.53 in trust for the plaintiffs herein.

(b) That the Honourable Court further directed the 1st and 2nd Defendants and or their agents together with the Police station to provide security and allow the plaintiffs' appointed surveyor to survey, sub-divide and prepare deed plans in favour of the plaintiff.

(c) That the Honourable Court further directed the 3rd Defendant to execute the transfer to the Plaintiffs titles on the sub-divisions of the said parcel of land No. MUTIRA/KIRIMUNGE/219.

(d) That the 3rd Defendant was not aware of the pending suit and was therefore not represented in the entire suit.

(e) That the 3rd Defendant was therefore not given an opportunity to be heard.

(f) That had the 3rd Defendant been given the said opportunity, they would have pointed out to the Court that the entire suit property is public land designated as a swamp and registered and Gazetted as such and therefore is not and has never been available for allocation either to the Plaintiffs or to any other persons or individuals.

(g) That the minutes of the 3rd Defendant's being MIN NO. WTPM & H.58/93 purporting to authorize the said allocations

acknowledged that the suit land was a swamp and therefore the said proposed allocations were null and void *ab initio*.

(h) That further minutes of the 3rd Defendant's Council members being MIN NO. 148/2003 deferred the said allocation and sub-division of the suit land pending further consultations and investigations.

(i) That it is only recently when the plaintiffs filed an application dated 4th June 2014 seeking committal of the D.C. Kirinyaga to civil jail that the 3rd Defendant became aware of existence of the suit.

(j) That it is trite law that the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *Audi alteram Partem* rule) is a fundamental principle of justice, one the 3rd Defendant has not been accorded.

(k) That the 3rd Defendant's Appeal is arguable and has overwhelming chances of success and stands to suffer substantial loss if execution occurs while the Appeal is pending.

(l) That the delay in bringing this application is inadvertent and excusable.

(m) That the 3rd Defendant is apprehensive that if the orders sought are not granted, the plaintiffs will obtain titles to public land and affect the eco-system to the detriment of the county and the country at large.

(n) That the 3rd Defendant verily believes that had the Honourable Court been seized of the actual nature of the suit property, it would have appreciated that it had no jurisdiction to convert land designated as public into private property or hand the same into private individuals' hands.

(o) That it is imperative that the conservation of the suit property be done in the interest of the wider public, which overrides private claims and that such land be not appropriated for private use.

(p) That there exists no Gazette notice alienating or converting the suit property into private land and as such, the same cannot be transferred or used in any other way than for public purpose.

(q) That an acquisition of the suit property by the plaintiffs would be in violation of *Article 40 (6) of the Constitution* since the right to property does not extend to property acquired unlawfully and acquisition of public land for private use is unlawful.

(r) That the 3rd Defendant maintains that such public purpose, is an overriding interest and not an equitable interest under *Section 28 of the Land Registration Act 2012*.

(s) That it is the constitutionally mandated role of the 3rd Defendant to preserve the suit land in trust for the public in its interest and in accordance with the law.

(t) That no prejudice will be occasioned to the plaintiffs if the orders sought are granted and the 3rd Defendant is willing to furnish security for due performance of the orders.

(u) That grant of the orders sought this would be in the interest of the general public; will be in line with fair administration of justice administrative action as enshrined by *Article 47 of the Constitution* and will ensure proper preservation of the eco system for the benefit of current and future generations.

(v) That this application has been brought without unreasonable delay.

(w) That it is therefore only mete and just that the orders sought are granted.

APPLICANTS CASE

The Applicant through the County Attorney one Caroline Kinyua deposed as follows:-

(1) That this Honourable Court issued a decree on 26th September 2002 in this (formerly NAIROBI HCCC No. 1162 of 1996), declaring that the 3rd Defendant held and still holds land parcel Number MUTIRA/KIRIMUNGE/219 measuring approximately 63.53 in trust for the Plaintiffs herein.

(2) That the Honourable Court further directed the 1st and 2nd Defendants and or their agents together with the Police Station to provide security and allow the Plaintiffs appointed surveyor to survey, subdivide and prepare deed plans in favour of the Plaintiffs.

(3) That the Honourable Court further directed the 3rd Defendant to execute and transfer to the Plaintiffs titles on the sub-divisions of the said parcel of land No. MUTIRA/KIRIMUNGE/219.

(4) That the 3rd Defendant was not aware of the pending suit and was therefore not represented in the entire suit.

- (5) That the 3rd Defendant was therefore not given an opportunity to be heard.
- (6) That had the 3rd Defendant testified, they would have pointed out to the Court that the entire suit property is owned by the 3rd Defendant absolutely and not in trust for any persons annexed hereto and marked "CK-1" is a true copy of the certificate of official search and the green card.
- (7) That the 3rd Defendant would have informed the Honourable Court that the suit land is public land designated as a swamp and registered and Gazetted as such and therefore is not and has never been available for allocation either to the plaintiffs or to any other persons or individuals.
- (8) That the minutes of the 3rd Defendant being MIN. NO. W.T.P.M & H. 58/93 purporting to authorize the said allocation acknowledged that the suit land was a swamp and therefore the said proposed allocations were null and void *ab initio*. Annexed hereto and marked "CK-2" is a true copy of the said minutes.
- (9) That further minutes of the 3rd Defendant's Council members being MIN NO. 148/2003 confirmed that the suit land is a swamp and deferred the said allocation and sub-division of the suit land pending further consultations and investigations. Annexed hereto and marked "CK-3" is a true copy of the said minutes.
- (10) That I verily believe that the foregoing information was never availed to this Honourable Court by the Plaintiffs to enable it make a proper and informed decision.
- (11) That it is only recently after the Plaintiffs filed an application dated 4th June 2014 seeking committal of the D.C. Kirinyaga to civil jail and served us with a hearing notice that the 3rd Defendant became aware of existence of the suit.
- (12) That I verily believe it is trite law that the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and fair opportunity to be heard (the *Audi Alteram Partem* rule) is a fundamental principle of justice, one the 3rd Defendant has not been accorded.
- (13) That the 3rd Defendant has an arguable appeal with overwhelming chances of success and stands to suffer substantial and irreparable loss if execution occurs while the appeal is pending.
- (14) That the delay in bringing this application is inadvertent and excusable.
- (15) That the 3rd Defendant is apprehensive that if the orders sought are not granted, the plaintiffs will obtain titles to public land and affect the eco-system to the detriment of the county and the country at large.
- (16) That I verily believe that had the Honourable Court been seized of the actual nature of the suit property, it would have appreciated that it had no jurisdiction to convert land designated as public into private property or hand the same into private individuals hands.
- (17) That it is imperative this Honourable Court intervenes and ensure that the conservation of the suit land be done in the interest of the wider public, which overrides private claims and that such land be not appropriated for private use.
- (18) That as a matter of fact there exists no Gazette notice alienating or converting the suit land into private land and as such the same cannot be transferred or used in any other way than for public purpose.
- (19) That I verily believe that an acquisition of the suit property by the plaintiffs would be in violation of *Article 40 (6) of the Constitution*, since the right to property does not extend to property acquired unlawfully and acquisition of public land for private use is unlawful.
- (20) That I further believe that such public purpose is, under Section 28 of the *Land Registration Act 2012* an overriding interest and not an equitable interest.
- (21) That it is the constitutionally mandated role of the 3rd Defendant to preserve the suit land in trust for the public in its interest and in accordance with the law.
- (22) That I believe that no prejudice will be occasioned to the Plaintiffs if the orders sought are granted and the 3rd Defendant is willing to furnish security for the performance of the Decree.
- (23) That grant of the prayers sought, this would be in the interest of the general public; will be in line with fair administration of justice administrative action enshrined by *Article 47 of the Constitution* and will ensure proper preservation of the eco-system for the benefit of current and future generations.
- (24) That it is therefore only met and just that the orders sought are granted.

The 1st Plaintiff/Respondent on behalf of all the Plaintiffs swore a replying affidavit in opposition to the application on 5th November 2019 and deponed as follows:-

- (1) That I have read and understood the 3rd Defendant/Applicant application dated 20th September 2019 and it is in reply thereto I swear this affidavit.
- (2) That the suit herein was filed way back on 14th May 1996 whereby the plaintiffs prayed for inter alia declaration inter alia that the 3rd Defendant held and still holds land parcel No. MUTIRA/KIRIMUNGE/219 in trust for the Plaintiffs herein. (Attached herewith and marked "JNK-1" is a copy of the plaint).
- (3) That this was pursuant to the 3rd Defendant Council meeting of 19th October 1993 (Minute No. 58 of 1993) whereby, the 3rd Defendant resolved to sub-divide the land parcel No. MUTIRA/KIRIMUNGE/219 amongst the Plaintiffs herein. (Attached herewith and marked "JNK-2" is a copy of the said minutes).
- (4) That the said minutes of the 3rd Defendant outlined the specific members of 11 sub clans which were to benefit from the land.
- (5) That these are the members on whose behalf of the Plaintiffs herein instituted the current suit in 1996.
- (6) That the 3rd Defendant in their defence admitted that they had resolved vide Minute NO. WTPM & 4/58/93 to release the suit land to the Plaintiffs (Attached herewith and marked "JNK-3" is a copy of the 3rd Defendant's defence to show this).
- (7) That the minutes of the 3rd Defendants also indicated the acreage which every member of the clans would get.
- (8) That the Courts judgment only confirmed the 3rd Defendant defence as per the Plaintiffs claim that indeed they had resolved vide Minute No. WTPM & H/58/1998 to release the suit land to the Plaintiffs.
- (9) That after the hearing, the Court allowed the Plaintiffs claim but indicated that the questions of the rightful beneficiary in each of the 11 clans had not been determined.
- (10) That in its judgment, the Court "*Observed in part that there are people who have been in occupation for a long time but they have not been given any share. Those people have not been enjoined in this suit and I did not rule whether or not they are not entitled to any share. That problem can only be reosoved by either the District Commissioner or by the Kirinyaga County Council. Because of the problem, I cannot order that the land be sub-divided in accordance with Schedule A, annexed to the plaint*" (Attached herewith and marked "JNK-4" is a copy of the Court's judgment and the decree therefrom).
- (11) That for this reason, the Court referred the matter to the 2nd Defendant (District Commissioner Kirinyaga District to determine the beneficiaries entitled to the suit property).
- (12) That the District Commissioner held a meeting on the ground and submitted a list of beneficiaries of the suit property (Attached herewith and marked "JNK-5" is a copy of the letter plus the annexed list of beneficiaries that he forwarded to Court).
- (13) That the said list was read in Court and adopted as the Court's award on 20th June 2007 bringing to an end the more than half a decade case (Attached herewith and marked JKN-6 is a copy of the award).
- (14) That the Interested parties thereafter filed an application praying for setting aside of the award which application was dismissed.
- (15) That after the award was read, the 2nd Defendant has held several meetings between the two (2) groups in an attempt of implementing the award.
- (16) That on 13th October 2011, a meeting was held and D.O. 1 offices of Kerugoya which resolved that the decree herein be taken to the Court for verification, if it is genuine. Representatives of opposing parties were sent to Embu Law Courts and the decree was confirmed as genuine.
- (17) That the Plaintiffs have waited since 2007 and indeed since 2002 when the first judgment was granted to enjoy the fruits of the judgment.
- (18) That it is not true that the 3rd Defendant was not represented or was not given an opportunity to be heard and/or was not aware of the suit. It has all through been represented by counsel before and after judgment.
- (19) That it is an outright lie for the 3rd Defendant to state that it only became aware of this suit on 4th June 2014 and if it is true one wonders why it did not seek time to appeal out of time then.
- (20) That in fact the Defendant has through its Chief officer Lands, Housing and Urban Development has already executed mutation forms in favour of the Plaintiffs. (Attached herewith and marked "JNK-8" is a copy of the mutation form).

(21) The land in question is not a swamp but a rice field. The ecosystem of the County will be affected, it has always been utilized as such. (Attached herewith and marked "JNK-9" are copies of photographs to show this).

(22) That the delay of over 17 years even in the light of the 3rd Defendant having been represented by counsel has not been explained.

(23) That litigation has to come to end. The Defendant cannot purport to raise new issues that it had raised when the matter came up for hearing and re-open a case that was finalized in 2002.

(24) That it is not true that the suit property is public land, designate as a swamp, registered and Gazetted as such and that have never been available for allocation and therefore the intended appeal is not meritorious but only meant to deny the Plaintiffs the fruits of their judgment, more than 17 years after the judgment was delivered.

(25) That I am advised by my Advocate on record which advice I verily believe to be true that the current advocates are improperly on record as there is already a counsel on record for the 3rd Defendant i.e. D.N. Gitonga & Co. Advocates.

(26) That for these reasons, I pray that the application be dismissed with costs.

LEGAL ANALYSIS AND DECISION

I have considered the Notice of Motion application dated 20/9/2019, the affidavit both in support and in reply thereto as well as the annexures thereto. I have also considered pleadings, proceedings and the applicable law.

The application under review is for stay pending Appeal under the provisions of **Order 42 Rule (6) (1) Civil Procedure Rules, 2010 and Section 1A, 1B and 3A CPA**.

Order 42 Rule 6(1) of the Civil Procedure Rules provides as follows:-

(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".

An Applicant seeking stay of execution pending Appeal is obligated to satisfy the conditions set out under **Order 42 Rule 6 (2)** aforementioned; to wit; (a) That substantial loss may result to the Applicant unless the order is made. (b) That the application has been made without unreasonable delay and (c) That such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given. In the exercise of the discretion, the Court is obligated to do so in a manner that would not prevent the Appeal from being rendered nugatory. That was the decision in the case of **Bhutt Vs Rent Restriction Tribunal (1982) K.L.R 417** where the Court held that the Courts discretion must be exercised in a manner that would not prevent the appeal from being heard and determined on merits. The main reason for stay of execution of a decree or order is to prevent the subject matter from being rendered nugatory or superfluous.

In this case, the Applicant has stated that they will not only suffer substantial loss as trustees of community land on behalf of people of Kirinyaga County but the people of Kenya will suffer immensely due to loss of Gazetted swamp/public land alienated illegally, unlawfully and without due process to private individuals. The Applicant further contends that the Respondents have commenced contempt proceedings with a view to enforce the impugned judgment/decreed and that unless the application is granted, the suit property will be subdivided and title deeds issued to private individuals thereby rendering the intended appeal an exercise in futility.

The Court in the case of **R.W.W. Vs E.K.W. (2019) e K.L.R** addressed its mind to the purpose of stay of execution pending appeal and stated as follows:-

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Applicant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent”.

In exercising its discretion, this Honourable Court has to balance between the rights of the Appellant and that of a successful litigant who is the Respondent herein. In my view, the Applicant is likely to suffer substantial loss unless the application is allowed.

Turning to the second requirement, the impugned judgment and/or decree which is the subject of this application was issued on 26th September 2002. From then until now is almost 19 years. A period of 19 years delay is by no means unreasonable delay. However, the Applicant has explained on oath through her County Attorney one Caroline Kinyua that they were not aware of the pending suit and were not represented in the entire proceedings. She further stated that they only became aware of this suit recently after the Respondent commenced contempt proceedings against the District Commissioner Kirinyaga (2nd Defendant/Appellant) who notified them of the same. Though the Respondents opposed this application strenuously, they have not attached a copy of a Notice of Appointment of advocates by the then Kirinyaga County Council (defunct) or any letter of appointment by the then Kirinyaga County Council. These are issues that are likely to be argued in the intended Appeal and I dare not make a finding on the same.

In the circumstances, I find that the Appellant/Applicant has satisfied this Honourable Court that it stands to suffer substantial loss and that the delay in bringing this application timeously has been explained to the satisfaction of the Court.

As to whether or not the Applicant has given security for the due performance of the decree that will ultimately be binding on him, the Applicants have indicated their willingness to furnish security for the due performance of the decree and/or orders. The Respondent on the other hand has not stated what prejudice they are likely to suffer if the application is granted other than the obvious delay in bringing the present application without delay which delay has been explained to the satisfaction of the Court.

The proposal to offer security is a sign of good faith by the Applicant as was stated in the case of **Focin Motorcycle Co. Limited Vs Ann Wambui Wangui & Another (2018) e K.L.R** where the Court held:-

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay”.

Unlike liquidated/money judgment/decree, the subject of this application is un-liquidated judgment/decree involving land in which the Appellant is mandated under the law to hold the same including any instruments of title on behalf of the people of Kirinyaga County.

In the circumstances therefore, I find that the offer by the Applicant to furnish security has satisfied the third ground for stay pending Appeal. The upshot of my findings is that the Notice of Motion dated 20th September 2019 is meritorious and I hereby allow the same in the following terms:-

- (1) There be a stay of execution of the judgment/decree of this Honourable Court issued on 26th September 2002.**
- (2) Leave be and is hereby granted to the 3rd Defendant/Applicant to file Notice of Appeal and the Appeal out of time within 30 days from the date of this Ruling.**
- (3) The Defendant/Applicant to pay the Plaintiffs/Respondents thrown away costs assessed at Ksh. 20,000/- within 30 days from today.**

RULING DELIVERED VIRTUALLY AT GARISSA THIS 26TH DAY OF OCTOBER, 2021.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

IN THE PRESENCE OF;

1. M/S WANGECHI MUNENE

2. APPLICANT/ADVOCATE: ABSENT

3. M/S IJABO; COURT ASSISTANT