



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO. E002 OF 2021

JAMES MACHARIA NJUGUNA (suing s the legal representative of the estate of

WILLIAM NJUGUNA MARIGA (DECEASED).....APPELLANT

VERSUS

RUTH KANINI NDUNGU.....RESPONDENT

RULING

1. By a notice of motion dated 23rd March, 2021 based upon **Section 3 (1) of the Environment and Land Act, Sections 3A, 6, 7 & 63 (e) of the Civil Procedure Act (Cap. 21), Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules, 2010 (the Rules) and all other enabling provisions of the law**, the Appellant sought stay of proceedings and stay of the injunction order granted by the trial court on 17th February, 2021 in Nyahururu CMCC No. 64 of 2020 pending the hearing and determination of the pending appeal.
2. The application was based upon the grounds set out on the face of the application and the contents of the supporting affidavit sworn by the Appellant on 23rd March, 2021 and the exhibits thereto. The Appellant contended that the injunction order of 17th February, 2021 had the effect of evicting him and his family members from the suit property and that unless a stay was granted the pending appeal shall be rendered nugatory, if successful.
3. The Appellant contended that the said injunction which restrained him from, *inter alia*, entering, remaining upon, developing, ploughing or interfering with the suit property of which he was already in occupation was in effect a mandatory injunction requiring him to vacate the suit property before the hearing and determination of the suit before the trial court.
4. The Respondent filed a replying affidavit sworn on 10th May, 2021 in opposition to the said application. It was contended that the Appellant's late father had lost his claim for adverse possession of the suit property in Nyahururu ELC No. 52 of 2013 hence the Appellant had no legitimate claim to any portion of the suit property. It was further contended that the Appellant was not residing on the suit property and that his father was the owner of an adjacent parcel of land described as **No. 432**.
5. It was the Respondent's contention that the Appellant, who was a police officer, had issued death threats to her over the suit property and that the Appellant had failed to satisfy the requirements for granting a stay pending appeal. Consequently, she asked the court to dismiss the application with costs.
6. The Appellant filed a supplementary affidavit sworn on 9th June, 2021 in which he disputed the contents of the replying affidavit. He denied issuing any death threats to the Respondent and maintained that he was in actual occupation of the disputed portion of the suit property which he and his family have been cultivating for many years.
7. When the application was listed for *inter partes* hearing, it was directed that it shall be canvassed through written submissions. The record shows that the Appellant filed his submissions on 11th June, 2021 whereas the Respondent filed hers on 1st November, 2021.
8. The court is of the opinion that the main question for determination is whether or not the Appellant has made out a case for an order for stay of proceedings and stay of the interim injunction made on 17th February, 2021 by the trial court.
9. The Appellant submitted that he had satisfied the requirements for stay under **Order 42 Rule 6(2) of the Rules**. It was submitted that the interim injunction was in effect a mandatory injunction which required the Appellant to vacate the suit property since he was restrained from entering, remaining upon, or utilizing the same. The Appellant submitted that he shall suffer substantial loss if he were to be removed from the suit property of which he was in possession before the hearing and determination of the pending appeal. The Appellant relied upon the case of **Mukunya Mugo A & Another v Elizabeth Mugure Mukunya [2019] eKLR** in support of the application.

10. On the other hand, the Respondent submitted that the Appellant had failed to satisfy the requirements for the grant of stay of the interim injunction. It was submitted that the Appellant had failed to lodge and prosecute his appeal against the judgment in the claim for adverse possession. The Respondent further contended that the Appellant had failed to satisfy the grounds for stay of proceedings and that the application was merely intended to delay the hearing and conclusion of the suit before the trial court. The Respondent cited the case of **Kenya Wildlife Service v James Mutembei [2010] eKLR** in opposition to the application and urged the court to dismiss it with costs.

11. The court has considered the notice of motion dated 23rd March, 2021, the replying affidavit in opposition thereto, the Appellant's supplementary affidavit as well as the submissions on record. It is evident from the material on record that the Appellant and his family have been in possession of part of the suit property. It is also evident that they have been cultivating the property for several years.

12. By its judgment dated 6th August, 2020 in Nyahururu ELC No. 120 of 2017, the court found that the Appellant's father had demonstrated occupation for 9 years as opposed to 12 years required for claiming adverse possession. The court is thus satisfied that the Appellant and his family shall suffer substantial loss within the meaning of **Order 42 Rule 6 (2) of the Rules** if they were to be evicted during the pendency of the appeal. The court is further satisfied that the pending appeal may be rendered nugatory in the absence of a stay of both the interim injunction and of further proceedings.

13. The court is of the opinion that no provision of security is necessary since the Appellant can still be removed from the suit property or the injunction enforced should ultimately fail in the appeal. The court is also satisfied that the instant application was filed without unreasonable delay. The material on record shows that the impugned order was made on 17th February, 2021 whereas the instant application was filed on 24th March, 2021. The delay of about one month and one week does not appear unreasonable. The court is consequently inclined to allow the application.

14. The upshot of the foregoing is that the court finds merit in the Appellant's said application. Accordingly, the said application is hereby allowed in the following terms:

- (a) There shall be a stay of the injunction order made on 17th February, 2021 in Nyahururu CMCC No. 64 of 2020 pending the hearing and determination of the appeal.**
- (b) There shall be a stay of further proceedings in Nyahururu CMCC No. 64 of 2021 pending the hearing and determination of the appeal.**
- (c) The Appellant shall file and serve the record of appeal within 60 days in default of which orders (a) and (b) above shall stand vacated.**
- (d) The appeal shall be mentioned on 1st February 2022 for directions on the hearing thereof.**
- (e) Costs of the application shall be costs in the appeal.**

Orders accordingly.

Ruling Dated and Signed in Chambers at Nyahururu this 18th day of November, 2021 and delivered via Microsoft Teams platform.

In the presence of:

Ms. Ndegwa holding brief for Mr. Gakuhi Chege for the Appellant

No appearance for the Respondent

CA - Carol

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Y. M. ANGIMA

JUDGE