



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 67 OF 1998

ESTHER KATHAMBI DELFIN PLAINTIFF

VERSUS

M'IBEERE KARAINA DEFENDANT

RULING

1. By an application dated 22.11.2021 the court is asked to grant a stay of execution of decree the issued on 22.9.2021 pending appeal and secondly an inhibition order over title No. **Ex-Lewa Settlement Scheme/698**.
2. The application is premised on the grounds that the suit land is currently under the applicant's name, if deregistered in line with the decree, there is likelihood of alienation to third parties hence there will be substantial loss to the applicant.
3. In the supporting affidavit sworn on 22.11.2021, the applicant states he has held the title for 26 years and once the decree is executed, his proprietorship shall end yet his appeal has high chances of success hence the need to preserve the substratum of the appeal.
4. The respondent opposes the notice of motion through a replying affidavit sworn on 1.12.2021 stating he has been on the land for 38 years; the case has taken 23 years; the application is made 2 ½ months after the judgment was delivered; the application is made in the wrong court; the conditions under Order 42 rule 6 have not been met; the appeal has no chances of success; the title deed is now a nullity; applicant shall deny her enjoyment of fruits of her litigation and that the application lacks merits.
5. In his oral submissions, Mr. Karuti advocate for the applicant submitted that on substantial loss there was no need to bring any evidence due to the very fact that the subject land had intrinsic value while as regards security, the applicant was ready and willing to provide should the court order for it.
6. Counsel submitted the notice of appeal had been filed and the appellant was ready and willing to prosecute his appeal expeditiously otherwise if the suit property is alienated, the appeal shall be rendered nugatory.
7. As regards the replying affidavit, counsel submitted paragraph 10 thereof was a bit odd and stated there would be no prejudice if the application was allowed.
8. Mr Abwuor Advocate for the respondent opposed the application relying on the replying affidavit. Counsel submitted that under Order 42, the applicant had to show there has been no inordinate delay, there will be substantial loss and that an offer for security was available for the due performance of the decree.
9. In his view counsel submitted the applicant had waited for close to 2 ½ months before filing the application which was inordinate and had also offered no reasons for the delay.
10. Secondly, counsel submitted a draft memorandum of appeal had not been attached for the court to verify the grounds of the appeal and whether the same were arguable or not.
11. Thirdly, counsel submitted the applicant ought to have made a proposal for the security and an undertaking as to costs as a condition precedent for applying for the stay in absence of which he urged the court to reject the application.
12. Further counsel submitted the right forum for the applicant was the Court of Appeal under **Rule 5 (2) (b)** of the **Court of Appeal Rules**.
13. Again counsel submitted the alleged title deed stood nullified and that the contention that there would be substantial loss was spurious.
14. In a brief rejoinder, Mr. Karuti advocate submitted **Order 42 rule 6** does not require a draft memorandum of appeal to be attached to the

application and urged the court to glean that the applicant had an arguable ground one of which was the nullification of the title he held.

15. As regards **Rule 5 (2) (b)**, the Court of Appeal Rules counsel submitted it only applies when the application is before the Court of Appeal unlike in the present application brought under **Order 42 Rule 6** of the **Civil Procedure Rules**.

16. Regarding the undertaking as to costs, counsel submitted the applicant was ready and willing once ordered to effect it.

17. Having looked at the application and heard the submissions by parties, what stand as issue(s) for determination is whether the applicant has satisfied the conditions as to the grant of stay orders.

18. The first condition is demonstration of substantial loss. There is no dispute a decree of court was issued on 9.11.2021. The same has also been effected going by annexure marked E.K 1 to the supporting affidavit. So in essence the applicant moved to court long after the execution process had commenced. The applicant has not explained why she waited from 22.9.2021 to file her application on 25.11.2021.

19. The respondent has already moved to effect the requisite changes to the title deed by lodging the decree with the Land Registrar.

20. The applicant has not demonstrated any substantial loss to be occasioned given that already the land registrar has commenced the process.

21. Whereas the applicant submits there is likelihood of the property changing hands that by itself has not been backed by any cogent or tangible evidence.

22. Further, the applicant has not averred if she is in occupation of the suit land and if execution occurs she shall be evicted. In absence of that information, I find no substantial loss demonstrated or established.

23. On the issue of security and an undertaking as to costs, the applicant has not specified which manner she is willing to comply in the event the court were to grant some conditions. An applicant must make a reasonable proposal including the surrender of the original title deed to court as a show of good faith. She cannot just leave it to court to impose conditions.

24. On the issue of there being an arguable appeal, it is true a draft memorandum of appeal has not been attached to the application. Consequently the court may not be in a position to assess the nature of grounds of the appeal.

25. Be that as it may, over and above the three grounds under **Order 42 rule 6** this court is expected also look at the overriding objective under **Section 1A, 1B and 3A** of the **Civil Procedure Act** as read together with **Article 159 (2) (b)** of the **Constitution** of Kenya on the aspect of substantive justice to the parties.

26. Since the respondent has already commenced the execution and at the same time the applicant has exercised her right of appeal, it would be in the interest of justice to order for the preservation of the subject land. Therefore status quo obtaining at the moment that is to say the property shall remain under the name of the respondent with no more dealings for a period of six months. The applicant shall surrender the original title deed to the Deputy Registrar within 14 days from the date hereon failure of which the orders herein shall lapse.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20TH DAY OF DECEMBER, 2021

In presence of:

Karuti for applicant/plaintiff

Abwour for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE