



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E052 OF 2021

FESTUS RIUNGU M'ARITHI APPELLANT

VERSUS

JULIUS MWIRIGI M'ARITHI RESPONDENT

RULING

1. The appellant has sought prayers for his new lawyers to come on record; stay of execution of the judgment delivered on 18.3.2021 and temporary injunction against the respondents from destroying or interfering with **LR No. Igoji/Kinoru/3974** pending hearing of the appeal.
2. In support of the application, the appellant has sworn affidavit on 15.4.2021 whose gist is that following the judgment, the respondent is likely to evict him, has commenced cutting down trees and tea bushes which he had planted.
3. The application is opposed through a replying affidavit sworn on 2.6.2021. First the respondent states the court cannot stay non-existent orders since he is the registered owner; he should not be evicted from his own land; there is no loss or damage since the appellant is not in occupation; the appeal raises no arguable points; the appellant had a grace period of 3 years to comply which expired on 4.12.2016 resulting to the suit and that the appellant had his own land which is distinct where he occupies and has made extensive developments.
4. Lastly the respondent takes the view the applicant has been peddling falsehoods and making him incur expenses and loss hence urges the application be dismissed.
5. In *Halai & Another –vs- Thornton & Turpin [1963] Ltd. [1990] KLR 365* the Court of Appeal held that four conditions must be met simultaneously, for a grant of stay namely, sufficient cause, risk of substantial loss, furnishing of security and if the application is made timeously.
6. The appellant has admitted the suit land is registered in the name of the respondent. In the trial court, the appellant stated he was willing to vacate the suit land but only after six years which the court found unreasonable and unsupported by any law.
7. The appellant pleads what is on the suit land to be his mature trees and tea plants and that there was a family meeting and minutes for him to vacate within 3 years which he did not do leading to the case herein.
8. There is a title deed in favour of the respondent, **Sections 25 & 26** of the **Land Registration Act** provides the same to be taken as prima facie evidence of ownership except on account of fraud, illegality or acquisition through corrupt means which is not the case in this case. The said title deed has protectable bundle of rights under **Order 40 Rules 1, 2 & 3** of the **Civil Procedure Rules** as read together with Article 40 of the Constitution.
9. The appellant cannot therefore purport to injunct and stop an absolute owner from enjoying his land given the circumstances in this case where the appellant to say the least was a licensee to the land whose term has expired and a lower court has issued orders of permanent injunction against him.
10. The appellant has not demonstrated any substantial loss to be suffered if execution ensues particularly given his admission that there was a family meeting in which he was given sufficient time to harvest and collect his belongings and vacate the suit land. He knew he was not the owner permanently and hence find his loss if any is the proceeds of the trees and tea plants he had planted. He cannot therefore turn around and claim substantial loss when the day of reckoning has come, yet he had consented to it.
11. A party seeking stay of execution he must show how the substratum of the appeal will be affected should the appeal succeed.

12. The appellant has raised no claim over the ownership of the suit land but only the proceeds from the trees and tea bushes. The allegation is that the respondent has commenced cutting the trees and embarked on evicting him.

13. As stated above, the appellant consented to vacate the land and hand over vacant possession and was given a humble time of 3 years. He knew the land and whatever he had planted there would eventually belong to the respondent. He was not compelled to make these developments in the first place and further he was unable to prove why he should be extended time to vacate.

14. If indeed the respondent has already taken vacant possession, such is a normal process after a party has won a case and seeks to enjoy fruits of his litigation. A stay of execution has been termed in **Butt –vs- Rent Restriction Tribunal [1979] eKLR** as discretionary measure aimed at balancing the interests of a successful party with those of the unsuccessful one wishing to go on appeal. These are two compelling interests in the administration of justice.

15. The appellant has not said the respondent intends to dispose of the subject land and or change the substratum. Similarly, the appellant does not lay any legitimate ownership claims on the suit land.

16. Even though the applicant filed the application for stay within a reasonable time, no offer for security for the due satisfaction of the decree has been made in the event his appeal does not succeed.

17. Given the foregoing circumstances, I am of the considered view that the appellant has not met the threshold for the grant of stay and or temporary injunctive orders. The application is dismissed.

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

In presence of:

No appearance for the parties

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE