



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E101 OF 2021

CHARLES MUTETHIA.....APPELLANT

VERSUS

JOSEPH NTONGAI M'ALABWA.....RESPONDENT

RULING

1. The applicant seeks stay of execution and a temporary injunction pending hearing and determination of the appeal on the reasons that the lower court ordered cancellation of his title **No. LR No. Kangeta/Kangeta/5036** and transfer to the respondent. He states if stay is not granted, his appeal shall be rendered nugatory.

2. The application is supported by an affidavit sworn on 15.9.2021. The applicant alleges the respondent is busy scouting for potential buyers to dispose of the subject matter with an intention of defeating the appeal. Secondly he avers the respondent has taken vacant possession and blocked him from any access and or use of the decreed land.

3. The application is opposed by way of grounds of opposition and a replying affidavit sworn on 7.10.2021. It is averred the respondent took possession upon delivery of the judgment and started developments thereon hence granting the order shall be tantamount to evicting him.

4. Secondly the respondent says the applicant has failed to disclose that he was only an interested party in the lower court and not the defendant.

5. Thirdly, it is stated the appellant has deliberately left out the original defendant who had direct interests in the matter.

6. Fourthly, the respondent says the applicant has failed to disclose he had Miscellaneous Civil Application No. 22 of 2019 against a ruling in the lower court which was raising similar issues as in the instant application but was dismissed. Consequently, it is submitted the current application is res judicata, an abuse of the court process and lacks merits.

7. Lastly, the respondent takes the view the appeal has no chances of success.

8. Order 42 rule 6 requires a party to prove substantial loss, there is no inordinate delay, and readiness to offer security for due performance of the decree.

9. Coming to the issue of substantial loss the appellant has not offered tangible and concrete evidence demonstrating the manner he is likely to suffer should the orders not be issued.

10. The respondent has also confirmed he took vacant possession soon after judgment was entered in his favour.

11. Judgement was entered on 26.7.2021 where this application was made on 17.9.2021 by which time the respondent had already taken vacant possession. Clearly no explanation has been offered why the appellant took too long to apply for the stay.

12. The appellant is no longer on the suit land. The nearest the appellant has tried to allege loss is by alleging the respondent is scouting for potential buyers. It is not enough to say so without any proof.

13. Thirdly, the appellant has not offered any security for the due performance of the decree should he lose the appeal.

14. The respondent has stated that the appellant had no substantial claim against him since he was a mere interested party and that there was a

defendant in the matter who had made a similar application which was dismissed. No rebuttal has been made to these allegations by the applicant herein.

15. From the record it appears is humble evidence that by the time the appellant allegedly bought the land, there existed a court order which he ignored and allegedly bought the suit land. He cannot therefore turn around and claim substantial loss when he is the author of his own misfortune.

16. In the circumstances, I am of the considered view the application lacks merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Miss Kiema holding brief for Kaberia for appellant

Nyamokeri for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE