



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 42 OF 2019**

**M'MUGWIKA M'RUGONGO.....APPELLANT**

**VERSUS**

**THE SETTLEMENT FUND TRUSTEES.....1<sup>ST</sup> RESPONDENT**

**PETER N. KIRIGUA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This matter appears to have a chequered history in its short stint before this court whereby numerous applications and affidavits have been filed by the parties. The appellant here in was the plaintiff while respondents were the defendants in the case Meru CM ELC 11 of 2009 where Judgment was entered in favour of the 2<sup>nd</sup> respondent on 23.1.2019.
2. On 14.6.2019, appellant filed an **application dated 11.6.2019** seeking inter-alia orders of stay of execution of the judgment, and this is one of the two applications that form the subject matter of this ruling.
3. Thereafter, appellant filed another application dated 19.8.2019, filed on 22.8.2019 seeking orders inter-alia to file the appeal out of time of which a ruling allowing the application was delivered on 27.11.2019. The appellant then lodged a certificate of urgency dated and filed on 24.1.2020 seeking orders to have the application of 11.6.2019 heard expeditiously. The appellant has also filed a replying affidavit (a response to the application dated 11.5.2020 filed by the respondents).
4. The respondents have not been left behind as they filed their application dated 1.7.2019 and filed on 4.7.2019 seeking leave to be allowed to defend the suit which application was allowed on 8.7.2019. The respondents also filed an **application dated 11.5.2020** seeking orders inter-alia to be allowed to adduce further evidence which application also forms the subject matter of this ruling. Further, the 2<sup>nd</sup> respondent has filed a supplementary affidavit dated 30.6.2020 filed on 1.7.2020.
5. The gist of the dispute is that whereas the appellant seek orders of stay of execution of the magistrate's court judgment, the 2<sup>nd</sup> respondent contends that he has since implemented the judgment and he has sold the land to a third party.

**Application dated 11.6.2019**

6. This is the initial application filed by the appellants and is brought pursuant to the provisions of **Order 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A and 63 (E) of the Civil Procedure Act** and all other enabling provisions of the law. The appellant seeks amongst other orders, a stay of execution of the decree/judgment in Meru CMC Case No. 11 of 2009; an order of preservation/inhibition of L. R. No. NGUSISHI/384 and *status quo* of the decree pending the hearing of the appeal.
7. The application is premised on the grounds set out in its body and in the supporting affidavits of M'Mugwika M'Rugongo sworn on 11/06/2019 and on 12.6.2020. It is contended that the appeal which is arguable and has high chances of success will be rendered nugatory if the Suit Land is not preserved considering that the respondent may alienate the land.
8. The appellant further avers that the 2<sup>nd</sup> respondent was aware that the suit land was under litigation even as the said 2<sup>nd</sup> respondent was embarking on selling the land.

**The application dated 11.5.2020**

9. This second application was filed by the respondent and is brought pursuant to provisions of **Section 3A of the Civil Procedure Act, CAP**

**21 of the Laws of Kenya, Section 27 and 28 of the Registered Land Act** together with all other enabling provisions of the law. The 2<sup>nd</sup> respondent seeks amongst other orders leave to adduce additional evidence and the dismissal of the appeal with costs as it has been overtaken by events.

10. The grounds in support of this application are set out in its body and in the supporting and supplementary affidavits of Peter N. Kirigua sworn on 11/05/2020 and 30/06/2020.

11. It is contended that the 2<sup>nd</sup> respondent executed the lower court judgment and got the Suit Land transferred back to his name. On 8/02/2019 he sold it to a third party, Priscilla Muthoni Mwangi who is a *bonafide* purchaser for value. The property has since been transferred to the third party who is not a party to these proceedings neither has there been a notice to her.

### **Submissions**

12. Both applications were canvassed by way of oral submissions on 1.7.2020. Ms. Aketch counsel for the 2<sup>nd</sup> respondent submitted that she was served with the memorandum of appeal in April when the Suit Land had already been sold to a third party. Nevertheless, the appeal was filed out of time. That he who comes to equity must come with clean hands. There was no mistake in the purchase of the Suit Land by the third party who is a *bonafide* owner as per **Section 25 of the Land Registration Act**. It is only the court which may rectify a register under **Section 80 of the Land Registration Act**. She prayed that their application be allowed to enable them to produce the title of the third party and the green card.

13. Mr. Mutunga, counsel for the appellant, submitted that the lower court gave the appellant the right to appeal. That the decree was issued on 04/06/2019, and there is no other order emanating from the lower court after the judgment. To this end, the counsel for the appellant urged the court to look at the green card of the Suit Land in particular entry NO. 9 which shows that the respondent got the Suit Land vide a court order of 23/01/2019, which then is a wrong entry. Besides, an order of inhibition had been issued by the magistrate's court.

14. It was further submitted that the allegation that the respondent was not served is not true for he was represented by another counsel. As for the application made by the respondents, it ought to be dismissed. After all, there is no sale agreement which has been annexed to the respondents' application, thus it is a collusion to defeat justice.

### **Determination**

15. The issues for determination before this court are:

- a) *Whether to allow the 2<sup>nd</sup> respondent to produce additional evidence*
- b) *Whether to grant a stay of execution*
- c) *Whether to dismiss the appeal*

16. On the issue of additional evidence, it should be noted that this court is not the trial court but it is the appellate court of the first instance. That being the case, introduction of additional evidence in an appeal ought to be handled with caution.

17. The questions that a court needs to ask itself before admitting additional evidence were stated by the Court of Appeal in the case of **Attorney General v Torino Enterprises Limited [2019] eKLR** as follows:

***“In the instant motion, it is our duty to determine: (a) if there is additional new evidence; (b) if that evidence could have been obtained by the applicant after reasonable diligence before and during hearing; (c) if there is a probability the additional evidence would have an important influence on the result of the case and finally, (d) based on the foregoing, is there sufficient reason to admit the additional evidence?”***

18. Further, in the case of **Safe Cargo Limited v Embakasi Properties Limited & 2 others [2019] eKLR** the same court stated as follows:

***“Of significance is whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before this Court and if given, it would influence or impact upon the result of the verdict, and whether it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of trial by the applicant.”***

19. The 2<sup>nd</sup> respondent has alleged that when the trial court delivered its decision on 23/01/2019, he proceeded to sell the Suit Land to a third party on 08/02/2019. The 2<sup>nd</sup> respondent seeks to produce evidence which will show that he has sold the Suit Land to the 3<sup>rd</sup> party. This certainly is new evidence which could not be obtained before and during the hearing neither could it influence the result of the case. It occurred after the trial court had determined the case to its finality.

20. Would this new information significantly affect or is directly relevant to the appeal? Looking at the record of appeal the issue at hand is who really is the legal proprietor of the Suit Land, is it the appellant or the 2<sup>nd</sup> respondent as determined by the trial court. The issue lies between the two parties and not the 3<sup>rd</sup> party. However, the latter may be interested in the suit if indeed she bought the Suit Land from the 2<sup>nd</sup> respondent.

21. In his affidavit in support of his application of 11.5.2020 at paragraph 5, the 2<sup>nd</sup> respondent has made reference to annexure “PNK2” a copy of the title deed which document has actually not been availed, while in his affidavit of 1.7.2020, the 2<sup>nd</sup> respondent makes reference to a copy of the green card availed as annexure “PNK 1”. The green card is available. The question begging for an answer is **“Did the 2<sup>nd</sup> respondent have the new title deed (the one in the name of a third party) as at 11. 5. 2020? Which annexure was he referring to as ‘P.N.K.2’?”** Save for the copy of the green card which in any event does not bear the name of a 3<sup>rd</sup> party, the 2<sup>nd</sup> respondent has not availed the documents appertaining to the alleged sale of land, not even the sale agreement yet the sale occurred way back on 8.2.2019. I find that allowing the application will only convolute the dispute further. I decline to allow the application of 11.5.2020.

22. As regards the application of 11.6.2019, I find that no orders were ever given in the interim. Thus there has never been a stay of execution of the Judgment of the magistrate’s court. I have read the said Judgment and it is apparent that the same was issued in favour of the 2<sup>nd</sup> respondent. I have also discerned from the said judgment that the person who was in occupation of the suit land was the 2<sup>nd</sup> defendant, (see paragraph 11 of the judgment) even though his advocate submitted otherwise. However, the magistrate’s decision is based on the evidence of the parties unlike the submissions from the bar.

23. What then is the nature of stay that the appellant is seeking before this court? Since he was not in occupation of the suit land, then the only other issue for concern ought to be the preservation of the land.

24. Thus in view of the fact that there was no order of stay of the judgment, that the appellant was not in occupation of the suit land and that the land may have been alienated after judgment, I find that the appropriate order to give is prayer no. 5 in the application of 11.6.2019 (prayer for inhibition). The issue as to whether the said judgment was implemented unlawfully as alleged by the appellant is one which can be canvassed in the main appeal.

25. **Final orders:**

a) The application dated 11/05/2020 is hereby dismissed.

b) An order is hereby issued for the inhibition of the land parcel no. L.R.NGUSISHI/384 in terms of prayer number 5 in the application dated 11.6.2020 but all other prayers in the said application are hereby dismissed.

c) Since the record of appeal has been filed, then I direct that the appeal be heard speedily.

d) Each party to bear their own costs of the applications.

**DATED, SIGNED AND DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 1.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**