



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 44 OF 2019**

**MUSILILI KILONZO.....1<sup>ST</sup> APPELLANT**

**NGONDU KYALO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEPHINE SELLE JUMA (*Suing on behalf of***

**MBITHE MUTYAMBAI (*deceased*).....RESPONDENT**

***(Being an Appeal from the Judgment and Decree of Principal Magistrate's Court at Mutomo in Civil Case No. 7 of 2018 delivered on 18<sup>th</sup> September, 2019 by Hon. Z.J. Nyakundi, Snr. Principal Magistrate)***

**RULING**

1. In the Notice of Motion dated 2<sup>nd</sup> December, 2019, the Appellants have prayed for the following orders:

***a) That pending the hearing and determination of the Appeal, there be a stay of execution of the ex-parte eviction order issued on 12<sup>th</sup> November 2019 made by Honourable Mr. Z.J. Nyakundi (Senior Principal Magistrate).***

***b) That the Honourable Court be pleased to set aside the ex parte proceedings and order dated 12<sup>th</sup> November 2019.***

***c) That costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Appellant who has deponed that they have filed an Appeal against the decision of the lower court; that on 29<sup>th</sup> November, 2019, the Appellants were served with an eviction order dated 12<sup>th</sup> November, 2019 and that the Appellants and their families are at the brink of being evicted from the suit property.

3. The 1<sup>st</sup> Appellant deponed that the learned Magistrate erred by holding that the suit property belongs to Mutyambai; that the learned Magistrate erred in holding that the sale of the suit property to him was null and void and that unless an order of stay of execution of the Judgment is granted, the Appeal will be rendered nugatory.

4. In her reply, the Respondent deponed that the trial court did not err in its Judgment; that the Appellants' Appeal has no chances of success; that the Appellants admitted in evidence that they bought the suit property from Kisyio Mutyambai who did not have Letters of Administration and that the Appellants have not demonstrated the substantial loss that they will suffer if the Application is disallowed.

5. The Respondent finally deponed that should the Application be allowed, then she should be furnished with security for costs and that the Appeal should be prosecuted within 120 days.

6. The Application proceeded by way of written submissions which I have considered.

7. The record shows that on 18<sup>th</sup> September 2019, Hon. Z.J. Nyakundi (*Senior Principal Magistrate*) delivered a Judgment in Civil Suit No. 7 of 2018 where she allowed the Plaintiff's Pleint.

8. According to the Decree of the lower court, a permanent injunction was issued restraining, stopping and barring the Appellants either by themselves, their agents, servants, employees or relatives from entering into the Respondent's unregistered land known as Plot No's 519 & 532 Kaatene Adjudication Section Mutha, Mutomo Sub-County.

9. In addition to the order of permanent injunction, the court directed for the deletion from the land register of Kaatene adjudication area, the names of the Appellants in respect to the unregistered land parcel of land currently known as parcel No. 519 & 532 Kaatene adjudication section Mutha, Mutomo Sub-County and the same be registered in the name of the Respondent.

10. The Appellants have lodged in this court an Appeal in respect of the Judgment of the lower court. In the meantime, the Appellants are seeking for a stay of execution pending the hearing of the case.

11. The law governing Applications for stay of execution is Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

*“(2) No order for stay of execution shall be made under sub rule (1) unless-*

*(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”*

12. In considering if the Appellant will suffer substantial loss unless an order of stay of execution is granted, I am guided by the decision of the Court of Appeal in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* in which the court stated as follows:

*“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”*

13. The Appellants have deponed that they are in occupation of the suit property, a deposition that has not been controverted by the Respondent. Indeed, the Judgment of the lower court acknowledged as much, and restrained the Appellants and their relatives from accessing the suit property. The lower court also directed for the Appellants names to be deleted from the register in respect of the suit land and have the Respondent registered as the owner of the suit land.

14. The eviction of the Appellants and their relatives, and the deregistering of the Appellants as the proprietors of the suit land will occasion the Appellants substantial loss. I say so because once the Appellants are evicted from the suit property, they will have to look for another parcel of land and put up new structures, thus incurring substantial loss before the Appeal is heard and determined.

15. Considering the suit land will be there even after the Appeal has been heard and determined, an order for security for the due performance of the Decree is not necessary.

16. The Appellants having shown that they will suffer substantial loss unless the Application is allowed, and the Application having been filed without unreasonable delay, I allow the Application dated 2<sup>nd</sup> December, 2019 as follows:

***a) That pending the hearing and determination of the Appeal, there be a stay of execution of the Judgment and Decree dated 18<sup>th</sup> September, 2019 and issued on 1<sup>st</sup> December, 2019 in Mutomo SPMCC No. 7 of 2018.***

***b) Each party to bear his/her own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**O.A. ANGOTE**

**JUDGE**