



**REPUBLIC OF KENYA**

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

**ELCA NO 2 OF 2019**

**ROSE NJERI NDEGWA.....APPELLANT**

**VERSUS**

**SAMUEL SOBI J. MISINGU.....RESPONDENT**

**RULING**

1. What is before me for determination is the Applicant's Application dated 9<sup>th</sup> October 2019 brought pursuant to Section 3(1), 13(4) & 7(a) of the Environment and Land Court Act 2011 & Order 42 Rule 3 (2) & Order 51 Rule 1 & 3 of the Civil Procedure Rules and all other Enabling Provisions of the Law where the Applicant seeks for preservatory orders restraining the Respondent or any other person claiming through or under him from transferring, charging, leasing, taking possession or in any other manner dealing with title number Laikipia/Supuko/ block 2/1982 Wiumiririe.
2. That leave be granted to the Appellant to amend her Memorandum of Appeal in terms as of the draft Memorandum of Appeal she had annexed on her Application.
3. Costs of the Application to be provided for.
4. The said Application was supported by the grounds on the face of it as well as the sworn Affidavit of Charles Gakuhi Chege, Counsel for the Appellant, dated the 9<sup>th</sup> October 2019.
5. Vide their Application, Appellant's Counsel, while relying on their sworn affidavit of the 9<sup>th</sup> October 2019, sought for preservatory orders as well as leave to amend their Memorandum of Appeal
6. She submitted that the issuance of preservatory orders is provided for under Section 13 (7) of the ELC Act. That in their annexed affidavit, the deponent has stated that there had been some people who have gone to the suit land with the intention of purchasing the same. That in the event the transaction

was to be sanctioned by the land registry, the suit land would be alienated with the result that it would fall in the hands of 3<sup>rd</sup> parties, wherein a greater injustice would be occasioned to the Appellant should the Appeal succeed. That the purpose of preservatory orders was to maintain the status quo to preserve the suit land.

7. That in regard to the 2<sup>nd</sup> prayer wherein they had sought for the leave to amend the Memorandum of Appeal, that the deponent had annexed a certified copy of the green card marked 'SGC 5' to support the said Application.
8. That the suit property was registered in the name of the Respondent which had necessitated their Application to amend their Memorandum of Appeal in line with the draft amended Memorandum of Appeal which action was sanctioned Order 42 (3) of the Civil Procedure Rules.
9. They prayed for their Application to be allowed.
10. The Application was opposed by the Respondent's Counsel who relied on their replying affidavit sworn on the 1<sup>st</sup> November 2019. Counsel stated that he would be adopting the said affidavit and submitted that the decree of the trial court had already been executed and a title issued in the name of the Respondent who had already taken possession of the land.
11. That the Respondent, who had been a successful litigant in the trial court should be allowed to enjoy the fruits of his judgment. That the current Application was a mischievous way of achieving a stay of execution. That the Applicant did apply for stay before the trial court which Application was dismissed through a substantive ruling. That the Applicant had then moved before this court on Appeal wherein the Resident Judge- Nyeri had declined to give a temporary stay paving way for execution to proceed. The Application for stay was argued inter-parties and the same was pending the ruling.
12. That the Applicant had not opted to withdraw the Application. That the present Application was an abuse of the court process. The Appellant was a resident of the United States of America and granting a stay would be in favour of a stranger. The Respondent had deponed that he had no intention of alienating the land which he had already cultivated. There was no danger of the land being alienated to 3<sup>rd</sup> parties and that in case the Appeal succeeded, the title would be cancelled and the land reverted to the Appellant. The Respondents sought that the Application be dismissed including the Application to amend.
13. In rejoinder, counsel for the Respondent submitted that the Application sought for preservatory orders to preserve the suit land which Application was not one for a stay of execution, for reasons that there was a genuine apprehension that the subject matter would be alienated to 3<sup>rd</sup> parties.

14. That it was true that the Court had been moved for stay orders where the matter was heard before Hon J. Waithaka, wherein the ruling had been pending since the 30<sup>th</sup> May 2019 and had been overtaken by events. That they had been unable to make an Application for withdrawal of the Application as the original file was locked up in the Judge's Chambers necessitating them to use a skeleton file. She reiterated her earlier submissions and prayed that their Application be allowed.

**Determination.**

15. Preservatory orders are in essence similar to injunctive orders where an Applicant has to make out a prima case and show that s(he) will suffer irreparable loss if the order sought is not granted.

16. It is not disputed that the Applicant herein did apply for stay before the trial court which Application was dismissed through a substantive ruling after which she moved before this court on Appeal wherein the resident Judge Nyeri had declined to give a temporary stay paving way for execution to proceed.

17. That as at now, the suit land herein is registered to the Respondent. Section 26 of the land Registration Act obliges me to take the certificate of lease as conclusive evidence of proprietorship. It provides as follows :-

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.....*

18. Now that the Respondent is registered as the proprietor of the suit land, and there is and an Appeal pending, the Appellant is apprehensive that the Respondent might dispose the suit land to 3<sup>rd</sup> parties thus defeating the purpose of Appeal.

19. I find that the Appellant has satisfied the court that the suit land needs to be preserved. The outcome is that in order to preserve the same there shall be orders of status quo issued to the effect that the said suit land shall be preserved as is at the moment until the Appeal is heard and finalized or until such other orders as may be necessary are issued.

20. On the second issue as to whether the Application for the amendment of the Memorandum of Appeal is merited, the provisions of Order 42(3)of the Civil Procedure Rules provides as follows;

*1) The Appellant may amend his Memorandum of Appeal without leave at any time before the court gives directions under rule 13.*

*(2) After the time limited by sub rule (1) the court may, on Application permit the*

*Appellant to amend his memorandum of appeal.*

21. The Applicant seeks leave to amend her Memorandum of Appeal on the ground that the suit property had now been registered in the name of the Respondent and therefore this did not reflect properly the case the Applicant sought to urge before the court. In my view the intended amendment is necessary for the purpose of understanding the real issue in controversy and for effective and fair adjudication of those issues. I find the Application to be merited and allow the same as prayed.
22. I direct that the Applicant prepares, files and serves the amended Memorandum of Appeal, as per the draft amended Memorandum of Appeal annexed to the Application herein, together with a supplementary record of appeal within 21 days from the date hereof.
23. Costs of the Application to abide the outcome of the Appeal.

**Dated and delivered at Nyahururu this 17<sup>th</sup> day of December 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**