



REPUBLIC OF KENYA



KENYA LAW
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Ibiiri & 3 others v Sikunyi & 2 others (Environment and Land Appeal E017 of 2023) [2024] KEELC 3506 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 3506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E017 OF 2023**

AK BOR, J

JANUARY 25, 2024

BETWEEN

**GLADYS MUTHONI IBIIRI 1ST APPELLANT
GEORGE KATHURIMA SIKUNYI 2ND APPELLANT
ABIGAELE MWENDWA MWELA 3RD APPELLANT
ELIZABETH MAKANDI MWELA 4TH APPELLANT**

AND

**HENRY MWELA SIKUNYI 1ST RESPONDENT
JIMMY KARIUKI BUSIENEI 2ND RESPONDENT
HON. ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. Vide the application dated 20/11/2023 brought under Section 1A & 1B of the [Civil Procedure Act](#) and Order 42 Rule 6 of the [Civil Procedure Rules](#), the Appellants seek stay of execution of the judgment delivered on 7/11/2023 by the Honourable Mr. B. Mararo (SPM) in Nanyuki CMCCC No. 120 of 2017 pending the hearing and determination of the appeal.
2. The grounds under which the application is made are set out on the face of the application and in the supporting and supplementary affidavits sworn by the 1st Appellant.
3. The 1st Appellant deponed that she was the wife of the 1st Respondent (now deceased) and that together, they purchased the land known as Laikipia/Kalalu/52 (“the suit property”) from Francis Kiogora with the intention of settling their family, who are the 2nd, 3rd and 4th Appellants, on the land. Further, she averred that she had been in exclusive occupation of the land since 2006 and had made extensive developments on it.



4. The 1st Appellant averred that the Appellants would be rendered destitute if they are evicted from the suit property before the appeal is determined because it is the only land they can occupy and from which they derive a livelihood and that they had no alternative land to settle. They added that their lifetime investments are on the suit land and that if the 2nd Respondent is not prevented from executing the judgment they would suffer irreparably and the appeal will be rendered nugatory. Further, that the appeal is arguable with high chances of success and raises germane points of law and that the application was brought without delay.
5. In her supplementary affidavit sworn on 15/12/2023, the 1st Appellant deponed that she had been farming on the suit property since 2000 and that she moved onto the land in 2006 after building a three-bedroom house on the suit property. She added that she had installed electricity, community piped water and dug a water pan for irrigation. She stated that she carried out subsistence farming and reared animals on the land. She urged the court to maintain the prevailing status quo as she prosecutes her appeal. She deponed that requiring her to deposit security would hamper her ability to access justice since she is a woman of straw.
6. The 2nd Respondent opposed the application through the replying affidavit he swore on 13/12/2023. He averred that the application seeks to deny him his rights under Article 40 of *the Constitution*. He deponed that the Appellants are misleading the court by stating that they had occupied and extensively developed the suit property since 2006 yet the 1st Appellant's supporting affidavit indicated that she entered the land in 2009, while the 2nd Appellant told the trial court it was in 2000. The 2nd Respondent emphasised that the Appellants had only occupied the suit property from November 2012 when they invaded the suit property and demolished the perimeter wall. He added that they constructed temporary developments while the suit was ongoing to prove possession.
7. He argued that the judgment is definitive and that no germane points of fact and law are raised in the appeal and that the appeal had no chances of success. He deponed that he was a bona fide purchaser without notice and would be prejudiced if the orders sought are granted. Further, that the Appellants had not demonstrated good faith by depositing security in the form of the general damages he was awarded by the court.
8. The 2nd Respondent prayed that if the court were to allow the application, a decretal sum should be deposited by the Appellants in an escrow account within 7 days and that the suit property be left vacant pending determination of the appeal without further developments on the suit property. The other conditions he advocated for was for the appeal to be heard and determined within 60 days. The 2nd Respondent urged the court to dismiss the application with costs.
9. This application and the intended appeal stem from the sale and transfer of the suit property by the 1st Respondent to the 2nd Respondent. The Appellants approached the trial court seeking various declarations including: that the 1st Appellant had directly or indirectly contributed to the acquisition of the suit property for the use and benefit of her family; that that transfer was unlawful, illegal and irregular; an order for cancellation of the title deed in respect of the 2nd Respondent and for the suit property to be registered in the 1st Appellant's name to hold in trust for the 2nd, 3rd and 4th Appellants.
10. The 2nd Respondent filed a defence and counterclaim against the Appellants seeking a declaration that he was the rightful owner of the suit property; a permanent injunction against the Appellants and their representatives; cancellation and removal of the caution on the suit land; an eviction order against the Appellants and mesne profits to be calculated from 29/11/2012 until the day the Appellants moved out of the land as well as general damages for trespass.



11. The 2nd Respondent relied on *Charles Wabome Getbi v Angela Wairimu Getbi* [2008] eKLR where the Court of Appeal dismissed an application for stay with costs because the Appellant failed to establish that unless stay were granted he would suffer substantial loss and the appeal if successful would be rendered nugatory. The court notes that that decision is premised on the *Court of Appeal Rules* while it is Order 42 of the *Civil Procedure Rules* that would be applicable to the present application.
12. The trial court found that the 1st Appellant did not prove her marriage to the 1st Respondent and that there was no proof of a fraudulent sale. The Learned Magistrate dismissed the Appellants' suit with costs and declared the 2nd Respondent the rightful owner of the suit property. Further, he ordered cancellation of the caution placed against the suit property and issued a permanent injunction restraining the Appellants from interfering with the 2nd Respondent's quiet enjoyment. Additionally, the trial court issued an eviction order against the Appellants and awarded general damages of Kshs. 200,000/= for trespass together with interest.
13. The court has considered the application, the affidavits in support and the annexures exhibited as well as the replying affidavit and the case law cited by the 2nd Respondent. The issue for determination is whether the court should stay execution of the decree emanating from the judgment delivered by Hon. B. Mararo on 7/11/2023.
14. To demonstrate the current status of the suit property and prove occupation of the land, the Appellants tendered photographs of a semi-permanent house, electricity connected to the house, a mabati gate and live perimeter fence, cultivated food crops, some sheep and semi-permanent structures used as animal pens.
15. The Appellant also annexed a memorandum of appeal, with one of the grounds of appeal being that the dealing in the suit property by the 1st and 2nd Respondents was unprocedural because the consent of the Land Control Board was procured more than one and a half months after the transfer had been effected. Further, the Appellants faulted the trial court for failing to appreciate the fact that the 1st Appellant and the 1st Respondent acquired the suit property for the settlement, use and occupation by their family and it thus constituted family land.
16. The trial court stated in the judgment that the 2nd Respondent testified that the suit property was transferred to the 1st Respondent on 6/5/2010 and 4 years later it was transferred to him on 5/5/2010 (sic) and the title deed issued in his name. The court noted that the charge dated 14/10/2006 was discharged on 6/5/2012. Further, that the transfer was dated 7/5/2010, which was after title had been issued but the 2nd Respondent stated that he did not handle the transaction. It was his evidence that the 1st Respondent attended the Land Control Board on 28/6/2010.
17. Taking into account the application, response and supplementary affidavit, and the timelines under which the transfer appears to have been done, and the ground that this is family land which is developed which the Appellants claim to have been occupying, the court finds that the appeal is arguable and that the 2nd Respondent will not be prejudiced if the application is allowed. On the other hand, execution of the judgment would cause the Appellants to suffer substantial loss if their appeal is successful.
18. In *RWW v EKW* [2019] eKLR, the court stated that the purpose of an application for stay of execution pending an appeal was to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right of appeal against the success of a litigant who should not be deprived of the fruits of his/her judgment. Indeed, whether



to grant or refuse an application for stay of execution pending appeal is discretionary. When granting stay, there must be a balance between the interests of the appellant and those of the respondent.

19. Order 42 rule 6(2) of the *Civil Procedure Rules* provides that no order for stay of execution shall be made under sub-rule (1) unless the court is satisfied that substantial loss may result to the Appellant if the order is not made and that the application has been made without unreasonable delay. Further, that 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 appellant.
20. The court is satisfied that the Appellants will suffer substantial loss rendering the appeal nugatory if an order for stay of execution is not granted.
21. An order for stay of execution of the judgment delivered on 7/11/2023 by the Hon. Mr. B. Mararo is hereby granted pending the hearing and determination of the appeal on condition that the 1st Appellant shall deposit the sum of Kshs. 200,000/= as security, which will be held in an interest earning account in the joint names of the Advocates for the Appellants and the 2nd Respondent within 21 days of the date of this ruling.
22. The Appellants are to maintain the status quo prevailing on the suit property as at 25/1/2023.
23. The Appellants are directed to file the record of appeal within 45 days of this ruling and to take steps to have the appeal disposed of expeditiously.

The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NANYUKI THIS 25TH DAY OF JANUARY 2024.

K. BOR

JUDGE

In the presence of:

Mr. Kaumbi Kioga for the Appellants

Mr. Ramadhan Abubakar for the 2nd Respondent

Ms. Stella Gakii- Court Assistant

No appearance for the 1st and 3rd Respondents

