



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 144 OF 2006**

**MARY WAMBUI MURIITHI.....PLAINTIFF**

**VERSUS**

**MARGARET WANJIKU KARIUKI .....DEFENDANT**

**R U L I N G**

1. By its order made on 17/7/2017 this court directed that the application by the defendant, which is dated 16/6/2017 and the application by the plaintiff which is dated 14/7/2017, be heard together.

2. The application dated 16/6/2017 seeks the following orders:-

(a) .....(spent);

(b) This Honourable Court do order the Land Registrar, Trans-Nzoia County to lift the Caution placed over the parcel of land known as Sinyerere/Sitatunga Block 1/Mukuyu/401;

(c) The County Surveyor, Trans-Nzoia County be and is hereby ordered to visit the parcel of land known as Sinyerere/Sitatunga Block 1/Mukuyu/401 upon grant of Order (b) above and put up beacons;

(d) The defendant/applicant herein be and is hereby granted eviction orders against the Plaintiff/Respondent herein, her agents, employees and /or servants from occupation of the land parcel known as Sinyerere/Sitatunga Block 1/ Mukuyu/401;

(e) This Honourable Court do order the Officer Commanding Station (OCS) Kitale Police Station to ensure compliance with the orders and provide security;

(f) Costs of this application be in cause.

3. The grounds on which the said application is made are as follows:-

(i) On 29<sup>th</sup> May, 2017, this Honourable Court delivered a judgement and thereof issued a decree on 8<sup>th</sup> June, 2017 in favour of the Defendant/Applicant herein in respect to the land parcel known as Sinyerere/Sitatunga Block 1/ Mukuyu/401 measuring 17.0 acres;

(ii) The Court via the decree issued permanent injunction orders against the Plaintiff/Respondent herein restraining her from interfering with the Defendant/Applicant's quiet possession of the abovementioned parcel of land;

**(iii) However, the above decree cannot be executed since the Plaintiff/Respondent, her agents, employees and/or servants are still illegally in occupation of the said parcel of land and thus obstructing access of the said land by the Defendant/Applicant herein;**

**(iv) The Respondent/Applicant herein cannot therefore enjoy quiet and peaceful possession of the said parcel of land;**

**(v) The Defendant/Applicant therefore seeks this Honourable Court to lift the caution over the land parcel No. Sinyerere/Situnga Block 1/ Mukuyu/401 and further to issue eviction orders against the Plaintiff/Respondent, her agents, servants and or/employees so that she may take and enjoy quiet possession of the said parcel of land;**

**(iv) The application herein has been made in good faith and in the interest of justice.**

4. The application is opposed. The plaintiff has filed her sworn affidavit dated 21/9/2017 in opposition. She states that she has preferred an appeal to the Court of Appeal against the judgement of this court in this matter and that the appeal was filed and served on 13/7/2017 and it is now pending for determination. The respondent states that she also filed an application for stay of execution after this application was filed, that is on 14/7/2017, and that the averments in the affidavit filed in support of that stay application can serve as a response to the instant application.

5. The plaintiff/respondent avers that allowing the application dated 16/6/2017 will place the suit property beyond the reach of the court since the defendant has title to the suit property and yet the plaintiff is the one who has had the possession of the suit property at all material times. For that reason she avers that the *status quo* that prevailed at the time the judgement was read should be preserved otherwise the appeal may be rendered nugatory.

6. I must refer to the supporting affidavit annexed to the application dated 14/7/2017 since the plaintiff has relied on it in her defence to the application dated 16/6/2017. In that affidavit the plaintiff states in a nutshell that she represents the Estate of the late Dominic Muriithi which Estate is in possession of the suit land; that the land got subdivided into parcel **No. 400** in the deceased's name and parcel **No. 401** in the name of the defendant; that this court had issued a restraining orders against the defendant pending the barring of the suit, barring her from taking possession or disposing of the same; that the plaintiff has preferred an appeal against this court's decision, which appeal has been served upon the defendant; that it would be best to hear the application in preference to the application dated 16/6/2016; that the appeal is likely to be determined expeditiously; and that the taking over of the suit property by the defendant, if allowed, may place the property beyond the court's reach and thus render the appeal nugatory and thus occasion the applicant substantial loss.

7. It behoves the court to also look at the response filed by the defendant to the application dated 14/7/2017. The defendant filed a further replying affidavit dated 22/9/2017 in response to the application dated 14/7/2017. In that affidavit the defendant avers that the application dated 14/7/2017 is totally misconceived, brought in bad faith and an abuse of the process of the court. She states that : on 29/5/2017 judgement was delivered in her favour in this suit in respect of the suit land measuring **17.0 acres** against the plaintiff; that a permanent injunction was issued against the plaintiff, restraining her from interfering with the defendant quiet possession of the suit land; that no application for stay was made at the time judgement was read, and she filed an application under certificate of urgency; that the application for stay dated 14/7/2017 was filed after unreasonable delay of one and a half months and is an afterthought meant to frustrate her, chance of enjoyment of the land; that the appeal lodged is lacking in merit, having been filed out of time and with no leave of court; that the plaintiff has not demonstrated any possible loss if stay is denied; that she will be deprived of her earnings of Kshs.3,000,000/= per annum being earning from the piece of land; that she has been denied user of the land for 30 years; that the plaintiff has not furnished any security, or shown any willingness to furnish the same; and that if the court is to allow the application, the plaintiff should pay costs as assessed by the Deputy Registrar pending the appeal as well as furnish security in the sum of Kshs.24,000,000/=.

8. The plaintiff and the defendant both cite the cases of *Eldoret ELC No. 200 of 2012 - Jaber Mohsen Ali & Another -vs- Priscilla Boit & Another*, *Eldoret ELC No. 495 of 2012 - Thomas Kiplel Sum -vs- Philip Kipkorir Samich and 3 Others*, *Eldoret ELC No. 411B of 2012 -Sammy Some Kosgei -vs- Grace Jejel Boit* and *NBI CA No. 35 of 2000 -Kalondu Mbusya -vs- Martin Kimwele Kiko & 10 Others 2004 eKLR*.

9. To do justice to both parties in the present case I must not only consider the applications together, for they are intertwined, but prioritize the plaintiff's application as any move gravitating towards the granting of the defendant's application dated 16/6/2016 before considering the plaintiff's application would do away with the need to consider the latter.

10. In doing so, I must consider the principles applicable in an application for stay of execution. In *NBI Civil Application No. 74 of 2015 Housing Finance Company of Kenya -vs- Sharok Kher Mohamed Ali Hirji and Another (2015) eKLR* the court stated as follows:-

**“The principles governing the exercise of the court’s jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. We need only restate these principles from *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)*, thus:**

**“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:**

**1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,**

**2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”**

11. Both limbs must be proved to co-exist at the same time if orders of stay are to be granted as prayed. This is supported by the Ruling in the same case where the Court of Appeal referred to the earlier *Republic -vs- Kenya Anti Corruption Commission and 2 Others [2009] KLR (31)*.

12. In the *Housing Finance Company of Kenya* the court also addressed an issue that underlies the two principles hereinabove, that is, whether an appeal has been filed, or is intended to be filed. It was stated that the jurisdiction of the court in an application for stay of execution arises only when a notice of appeal has been filed. I find that in the instant case an appeal has been filed.

13. In considering whether the appeal is arguable, and not frivolous, the Court of Appeal has in previous decision stated that the applicant need not show that such an appeal is likely to succeed. It is enough show that there is at least one issue upon which the court should pronounce its decision.

14. The court has considered the 2 motions before it and the grounds stated in the Memorandum of Appeal. The origin of these motions is the judgement of this court dated 29/5/2017.

15. The suit filed by the plaintiff had sought the following reliefs:-

**(a) A declaration that the judgment of 18/12/1997 in Kitale High Court Civil Appeal No. 51 of 1997 (Original Eldoret HCCA No. 26 of 1990) and against which no appeal was preferred, finally dispossessed the defendant of the seventeen (17) acres that had been awarded to her by the judgment of 26/6/1990.**

**(b) An order be issued to the District Land Registrar, Trans-Nzoia directing him to cancel the**

**registration of Title Nos. Sinyerere/Sitatunga Block 1/ Mukuyu/400 and 401 and in their place restore Title No. Sinyerere/Sitatunga Block 1/ Mukuyu/13 and which should remain registered in the name of the late Dominic Muriithi Mathenge.**

**(c) A temporary and permanent injunction.**

**(d) Any other order that this Honourable Court may deem fit to grant.**

**(e) Costs**

**(f) Interest.**

The defendant had filed a defence and raised a counterclaim.

**16.** After considering all the evidence exhaustively this court arrived at the findings that the verdict of the panel of elders who had found that the defendant herein was entitled to 17 acres was overturned only on technicalities on the basis that their report was not filed within 60 days as directed by the court and that Mukuyu Farmers Co. Ltd which had been sued as the 2<sup>nd</sup> defendant had already been wound up at the time the suit was filed.

**17.** This court found that the merits of the verdict of the panel of elders was not challenged. It also found that the decision of the High Court cannot be said to have dispossessed the defendant of the land.

**18.** In the judgement in this case the court also observed that the plaintiff's husband's evidence before the panel of elders was very weak, and that the plaintiff herself did not say "*say even a word on how the deceased acquired the property in contention*"; The court found that the plaintiff proceeded only on the basis that the decision which gave the 17 acres to the defendant had been set aside and that since there was no appeal preferred against that decision, the land should revert to its original title, that is **LR. No. Sinyerere/Sitatunga Block 1/ Mukuyu/13**. The court also found that the plaintiff's deceased husband had amalgamated his land with that of the defendant and obtained a single title and the deceased had failed to adduce any evidence before the panel of elders to show how he bought the land. The judge also noted that in the Civil Appeal that annulled the panel of elder's verdict the High Court was clear that part of the reason for that annulment was occasioned by mistakes committed by court officials.

**19.** This court also found that the decision of the High Court was not final as to the dispute between the plaintiff and the defendant herein. The judge observed that though the case was referred back to the lower court and it did not proceed there, the hearing of the dispute between the parties in the lower court, being the parties herein, has finally been achieved through the counterclaim in this case.

**20.** I find that the land in question had already been divided into two portions in execution of the decree of the lower court which had adopted the decision of the panel of elders. One of the portions is registered in the name of the defendant. The plaintiff's claim was found not to be sustainable by this court and it was dismissed. A permanent injunction was issued against the plaintiff.

**21.** In dealing with the plaintiff's application I must take caution so as not to prejudice the pending appeal. An in-depth discussion of the grounds of appeal is to be avoided.

**22.** However, after perusing the grounds of appeal and relating them to the above analysis of the evidence taken at the hearing of the suit and also the judgement of this court, I am unable to say that the plaintiff has even one arguable ground. I also do not find that there is any evidence adduced to the effect that the appeal would be rendered nugatory by the refusal to grant a stay of execution as prayed by the plaintiff. Indeed the defendant has been portrayed as one who has been merely intent on entering the land and reaping from its fruits. The land is in any case registered in the name of the defendant. While she is the registered proprietor of the suit land, the plaintiff has in her possession L.R. Number **Sinyerere/Sitatunga Block 1/ Mukuyu/400** which is not the subject of the controversy herein. I therefore find no good ground upon which to grant the prayers sought in the application dated 14/7/2017.

23. Finally, on the basis of the analysis conducted as hereinabove. I find that the application dated 16/6/2017 is merited.

The upshot of the foregoing is that application dated 14/7/2017 filed by the plaintiff is hereby dismissed with costs. Consequently, the application dated **16/6/2017** filed by the defendant is hereby allowed in terms of **prayers (b), (c), (d) and (e)**. The defendant shall also have the costs of the latter application.

Dated, signed and delivered at Kitale on this **21<sup>st</sup>** day of **November, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**21/11/2017**

Coram

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Oketch holding brief for Mr. Okango for defendant

N/A for the plaintiff

**COURT**

Ruling read in open court in the presence of counsel for the defendant.

**MWANGI NJOROGE**

**JUDGE**

**21/11/2017**