



REPUBLIC OF KENYA



**Amboga v Ndeithi & 2 others (Environment and Land Appeal
E016 of 2023) [2024] KEELC 1335 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E016 OF 2023
CA OCHIENG, J
MARCH 14, 2024**

BETWEEN

CALEB AMBOGA APPLICANT

AND

MARGARET WANJIRU NDEITHI 1ST RESPONDENT

MWANZIA MUUTU MUTISYA 2ND RESPONDENT

THE REGISTRAR OF LANDS MACHAKOS COUNTY 3RD RESPONDENT

RULING

1. What is before this court for determination is a Notice of Motion Application dated the 12th September, 2023 where the Appellant/Applicant seeks for the following orders:-
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. This Honourable Court be pleased to order stay of execution of the decree pending hearing and determination of the Appeal filed herewith.
 6. That costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and supported by the Affidavit of one Caleb Amboga, the Appellant herein, where he explains that Kangundo CMC ELC No. 188 of 2018 was concluded and Judgment delivered. He contends that he was dissatisfied with the Judgment which was in favour of the 1st Respondent, directing that the 3rd Respondent to cause to be subdivided the



suit land into two pieces and $\frac{3}{4}$ of an acre of land be transferred to the 1st Respondent within thirty (30) days from the date of the Judgment. Further, the court ordered for cancellation of Certificate of Title for Donyo Sabuk/Komarock/Block 1/18279. He confirms that he filed a Memorandum of Appeal. Further, that the Appeal has high chances of success and will be rendered nugatory should the 3rd Respondent subdivide and transfer part of the suit land. He reiterates that the 1st Respondent will not suffer any loss or damage as she has never been in possession of the said suit land.

3. The 1st Respondent opposed the instant application by filing A Replying Affidavit where she deposes that the Appellant had forcibly and unlawfully evicted her from her portion of land measuring three-quarter of an acre around August 2018 and fraudulently amalgamated it with his one acre through a corrupt scheme. She highlights the chronology of events leading to the filing of the case and states that the court had issued an order dated the 30th January, 2019 restraining the Appellant from interfering with the suit land until the matter was heard and determined. She avers that the Appeal had no chances of success and that no security for due performance of the decree has been given.
4. The Application was canvassed by way of written submissions but it is only the 1st Respondent who filed hers.

Analysis and Determination

5. I have considered the instant Notice of Motion Application, the respective Affidavits and submissions and the only issue for determination is whether there should be a stay of execution of the Judgment delivered on 14th August, 2023 in Kangundo CM ELC No. 188 of 2018.
6. The 1st Respondent in her submissions contended that the Appellant was seeking stay of execution of the Judgment of the lower court yet he had disobeyed the orders of the court by not honouring the restraining orders issued on 31st January, 2019. She argued that the Appellant had also failed to obey the orders of the lower court to reinstate the suit plot measuring $\frac{3}{4}$ of an acre to her in good faith despite having earlier admitted and agreed to reinstate the same. She reiterated that the Appellant had not met the threshold for granting of stay of execution since he delayed for two months in filing the instant Application. Further, that from the issues raised in the Memorandum of Appeal, no sufficient cause had been demonstrated by the Appellant to warrant the granting of stay pending Appeal given his express admission in his evidence. To buttress her averments, she relied on Order 42 Rule 6(2) of the *Civil Procedure Rules* as well as the following decision: *Ena Investment Limited vs Bernard Onchau Mose & Jane Bosibori Onchau & 2 Others* (2022) eKLR.
7. The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides that:-

" 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."
8. In this instance, the trial court entered Judgment in favour of the 1st Respondent on 14th August, 2023 wherein it directed that the suit land be subdivided, Appellant's title be cancelled and for a portion of $\frac{3}{4}$ acres of the said suit land to be transferred to the 1st Respondent. The Appellant being aggrieved with the impugned Judgment filed a Memorandum of Appeal and the instant Application seeking stay of execution pending Appeal. He claims he stands to suffer irreparably as the appeal will



be rendered nugatory. The 1st Respondent vehemently opposed the instant Application and argued that the Appellant had disobeyed court orders issued on the 30th January, 2019 by the lower court.

9. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an Application for stay of execution pending Appeal held that a stay must be granted so that an Appeal may not be rendered nugatory.

10. While in *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2012) eKLR the Court of Appeal held that:-

" An Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party."

11. From a perusal of the proceedings in the lower court culminating in the impugned Judgment, I note the Appellant is still the registered proprietor of the suit land and the trial court had directed that an inhibition order do issue to protect the substratum of the suit. Further, the suit land is vacant. Based on the facts before me while associating myself with the decisions I have cited, I find that the Appellant has not demonstrated what substantial loss he stands to suffer if the order of stay pending Appeal is declined, since he is still the registered proprietor of the suit land, which is even vacant. It is my considered view that since the Appellant has not even offered security for the due performance of the decree, instead of granting a stay of execution, this Appeal should be expedited.

12. It is against the foregoing that I find the Appellant's Notice of Motion Application dated the 12th September, 2023 unmerited and will disallow it. Costs will be in the cause.

13. I direct that the Appellant do file and serve a Record of Appeal in thirty (30) days from the date hereof.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF MARCH, 2024

CHRISTINE OCHIENG

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JUDGE

In the presence of;

Nduati for 1st Respondent

Odhiambo for Appellant

Court Assistant – Simon/Ashley

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

