



**Roysa Community Development Society Ltd v Director Land Administration,
Ministry of Lands and Physical Planning & 2 others (Civil Appeal (Application)
E181 of 2022) [2022] KECA 1133 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1133 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E181 OF 2022
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA
OCTOBER 21, 2022**

BETWEEN

ROYSA COMMUNITY DEVELOPMENT SOCIETY LTD APPLICANT

AND

**DIRECTOR LAND ADMINISTRATION, MINISTRY OF LANDS AND
PHYSICAL PLANNING 1ST RESPONDENT**

**CHIEF LANDS REGISTRAR, MINISTRY OF LANDS AND PHYSICAL
PLANNING 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

(An application for stay of execution of the judgment of the Land and Environment Court of Kenya at Nairobi, (Wabwoto J.) dated 14th December, 2021 in Nairobi ELC JR No. E008 of 2020)

RULING

1. The applicant herein has moved this Court under Rules 5(2)(b) and 42 of this Court's Rules, by way of a notice of motion dated 7th July, 2020, seeking orders that: -
 1. Spent.
 2. Spent.
 2. That this Honorable Court be pleased to order stay in the nature of status quo in that there should not be any transfer, charge or alienation of the suit land pending the appeal herein."
2. Before we embark on considering the application, we find it prudent to lay out the background of the dispute. The applicant in the trial court sought Judicial Review orders of mandamus directed at the 1st and 2nd respondents to process and issue certificates of leases and titles to individual members of the



applicant as per the approved subdivision scheme in terms of NLC/Chaiman/VOL. XIX/143 and as per the allotment letters issued by the Nairobi City County. There was equally an antecedent prayer against the 1st and 2nd respondents to process and issue certificates of leases and titles for public utilities being Roysambu Buspark and Market, Roysambu Recreation Centre, Roysambu Technical Training Institute and Secondary School as per the approved subdivision scheme relating to L.R No. 5875/2 (“the suit property”).

3. The respondent opposed the suit on grounds that it was res judicata by dint of HCCC No. 153 of 2017 (formerly No. 495 of 2011) Kasarani Mall Otieno Miganga, Roysa Community Self-Help Group and Others and Nairobi ELC No. 1522 of 2013 Daniel Otieno Miganga and Roysa Community Self-Help Group & Another vs. Kasarani Mall Ltd and Uchumi Supermarkets Plc and that the suit property had an existing title in the name of Kasarani Mall Ltd.

After considering the matter, the court concluded that there was nexus in all the cases cited by the respondents to the suit property, thus the suit was moot by dint of being res judicata. Dissatisfied with the judgment and decree, the applicant filed the notice of appeal and has followed it up with the instant application.

4. The application is based on the grounds on the face of the motion to wit; that on 14th December, 2021 the Environment and Land Court of Kenya “ELC” rendered its decision in the above case in which it dismissed the applicant’s notice of motion. Being dissatisfied, the applicant subsequently, filed a notice of appeal against the said judgment and decree. That there are third parties who have moved into the suit property with heavy machinery and equipment ready to develop it and unless the orders sought are granted, they will proceed with the development yet the ownership of the suit property is still in dispute by virtue of the appeal proffered in this Court. Further, that the appeal has high chances of success for the reason that the trial court wrongly invoked the doctrine of res judicata as the suits relied on to make that finding were filed before different courts in which the parties were different and the circumstances and facts were also different.
5. The application is further supported by the affidavit of one Peter Kihuyu Muthee, a trustee with the applicant who reiterates the grounds above and further depones that the actions of the said third parties are likely to breed violence and may even lead to loss of lives. The respondents did not file responses to the application.

The matter proceeded by way of written submissions with limited oral highlights. It is the applicant’s case that it has demonstrated that the intended appeal is arguable as the trial court erred in law and fact by erroneously finding issues raised in the suit as moot by dint of being res judicata.

6. On the nugatory aspect, the applicant submitted that if the judgment and decree of the trial court is allowed to stand, then the appeal will be rendered nugatory as the applicant has already been issued with an allotment letter pursuant to the approved sub-division scheme relating to the suit property. However, after the delivery of the judgment, third parties had moved into the suit property and caused violence and mayhem to the members of the applicant. That this is despite the applicant having incurred heavy financial outlay on the suit property. That the applicant in the premises is poised to suffer irreparable loss and damage. Lastly, that the applicant is willing to maintain and not interfere with the title to the suit property.
7. The respondents’ submissions were filed by the 3rd respondent. It is their case that the applicant filed judicial review proceedings against them before the High Court, which was dismissed after hearing both parties. The dismissal meant that the orders issued were negative in nature and therefore incapable of being stayed or even enforced save for costs perhaps. They relied on the case of George Ole Sangui & 11 Others vs. Kedong Ranch Limited [2015] eKLR for that proposition. Further, that the applicant



had failed to demonstrate and or satisfy any of the settled principles for the grant of the orders sought. That the applicant used the wrong forum in approaching the court for determination of land ownership disputes. That the applicant had instituted several suits which had all been dismissed by the court and had not preferred any appeal against them. Lastly, it was the respondents' submissions that the applicant had tactfully avoided to sue the registered proprietor of the suit property when, well aware that the suit property had title in the name of a third party. They therefore, prayed for the application to be dismissed with costs.

8. We wish to point out from the onset that it is now settled law that a negative order is incapable of being stayed. In the case of *George Ole Sangui vs. Kedong Ranch Limited*, Civil Application No. Nai 55 of 2015, this Court whilst citing the famous case of *Western College of Arts and Applied Sciences vs. Oranga & Others* [1976] KLR 63, pronounced itself as follows: -

In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

9. Equally, in the case of *Daniel Lomagul Kandeji & 2 Others vs. Kamanga Holdings Limited & 40 Others* (2017) eKLR, this Court expressed itself as follows:-

In the motion before us the applicants sought a stay of the striking out of the O.S. This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed.”

10. The motion before us, though is a straight forward application for stay of execution of the judgment and decree, the applicant has cleverly phrased the prayer so as to bring in the notion of maintenance of the status quo, which is a totally alien concept unknown to our rules. We are not about to fall for those kind of tricks. The trial court simply dismissed the applicant's claim with no order of costs. This was a negative order which, as this Court has observed in past decisions cited above, is incapable of being stayed.

Accordingly, the application is devoid of merit and is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

H. A. OMONDI



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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

