Ita & 2 others v Njeru (Environment and Land Appeal E026 of 2023) [2024] KEELC 4476 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 4476 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL E026 OF 2023

A KANIARU, J

APRIL 24, 2024

BETWEEN

AUGUSTINE KINYUA ITA ..... 1ST APPELLANT

SELINA MUTHONI ..... 2ND APPELLANT

ITA NGURU ..... 3RD APPELLANT

AND

ELIUD NJERU ..... RESPONDENT

RULING

1. The application before me for determination is a Notice of Motion dated 15.12.2023 and filed on 16.12.2023 under Certificate of Urgency. It is expressed to be brought under Article 48 of the *Constitution* of Kenya 2010, Sections 3(1) and 13(7)(a) of the *Environment and Land Court Act* 2011, Sections 1B and 63(e) of the *Civil Procedure Act*, and Order 42 rule 6 of the *Civil Procedure Rules 2010*. The applicants are the 1st, 2nd and 3rd appellants. They were the defendants in the lower court suit while the Respondent was the plaintiff in the lower court. The prayers sought are as follows:

    1. Spent

    2. Spent.

    3. Execution of the decree issued on 14.12.2023 be stayed pending hearing and determination of the appeal herein.

    4. Costs of this application be provided for.

2. The application is predicated on the grounds on the face of it and on the Supporting Affidavit and further affidavit sworn by the 1st Appellant - Augustine Kinyua Ita - on behalf of the other Appellants. She deposed that judgment in the lower court case was delivered ion 16.11.2023 in favour of the

respondent. That the decree was issued to her on 14.12.2023 and as per the decree, they were to vacate and deliver vacant possession of land parcel No Mbeere/Kirima/2999 to the respondent within 90 days of the delivery of judgement. That the 90 day period was to lapse on 16.02.2024 and she and the other appellants were apprehensive that after the lapse of the said period, the respondent would forcibly remove them or anyone claiming under them from the suit land.

3. That they were aggrieved by the lower court's decree and had filed an appeal and that the appeal was unlikely to be determined by 16.02.2024. That the appeal raises triable points of law and has a high probability of success. That if the execution of the decree is not stayed, they will suffer substantial and irreparable loss as they will be forcibly removed from the suit land which has been their home for decades. That the land was the only source of their livelihood and that execution will render them landless and destitute. That they will also suffer substantial and irreparable loss of the equal protection and benefit of the law as the decree effectively repealed the community land laws which entitle them to free access of the Mbeere community land and which prohibits subdivision of the Mbeere community land into private titles.

4. That they have filed this application without unreasonable delay as it is filed within the 30 days appeal period. That they will provide security in form of a bank guarantee or as directed by court. That the respondent has never occupied or utilized the suit land and will not suffer prejudice if their application is allowed.

5. The respondent responded to the application via a replying affidavit sworn on 17.01.2024. He deposed that the application lacks merit, is an abuse of the court process, and does not meet the threshold for staying of execution. That the applicants have not sufficiently demonstrated that they will suffer substantial or irreparable loss. That the applicants occupy only a section of the suit parcel of land and that they have not done substantial development and neither is the land their source of livelihood as they do not carry out any activities that generate income. That therefore they will not be prejudiced by moving out of his land. That the applicants are not destitute or landless as they have another parcel of land allocated to them by their Ngithi clan, the same being land parcel Mbeere/Kirima/3368.

6. That there does not exist Mbeere community land laws that prohibit sub division of Mbeere community land into private titles. That the appeal does not have high chances of success and the applicants are seeking to deny him the fruits of his judgement. That the applicants have not offered any security for the granting of the orders sought. He urges the application be dismissed with costs to him.

7. The application was disposed of by way of written submissions. The appellants filed their submissions on 26.01.2024. They submitted that they have demonstrated that they have been in possession and occupation of the suit land since 1987 to the total exclusion of the respondent, which averment is supported by the letter of the chief in the record of appeal. That tthey have established a home, constructed permanent buildings and other structures, and developed a farm on which they subsist. That this was supported by the respondent in his plaint where he pleaded "the defendant without justification have encroached on the said land built structures therein" and "the defendant have encroached on the said parcel of land purported to dwell therein without authority of the owner".

8. That the eviction of the applicants will entail total destruction of their home, their buildings, and other developments thereon hence causing irreparable loss which will also render the appeal nugatory. That the application was filed within the statutory appeals window of 30 days, hence has been brought without unreasonable delay. That the applicants have undertaken to deposit a bank guarantee as security which is a sign of good faith as was held in the case of *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & another* [2018] eKLR. That order 42 rule 7 of the *Civil Procedure Rules* gives the court discretion to determine what constitutes sufficient security for the performance of a decree.

9. The cases of *Antoine Ndiaye v African Virtual University* [2008] eKLR, *Patrick Kithaka Borici & another v Shadrack Nyaga Njeru* [2019] eKLR, *Absalom Dova v Tarbo Transporters* [2013] eKLR among many others, were cited in support of the submissions.

10. The respondent on the other hand filed his submissions on 01.02.2024 and submitted that he is the one suffering substantial loss since as the registered proprietor of the suit land. That he has not been able to use the same since the year 2010. That the applicants have not produced any evidence to prove that they have done extensive developments on the suit land to prove what loss they will suffer. He cited the cases of *Machira t/a Machira & Co. Advocates v East African Standard* [2002] eKLR, *Kenya Shell Ltd v Benjamin Karuga Kibiru & another* [1986] eKLR among others to support his submissions.

11. I have considered the application, the response made to it, and the rival submissions. The issue for determination is whether the appellants are entitled to an order of stay of execution pending appeal.

12. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules, 2010* which provides as follows: -

    (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

    (2) No order for stay of execution shall be made under subrule (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.

    (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

13. The power to grant stay of execution is a discretionary one. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 as cited in *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKLR gave guidance on how a court should exercise the said discretion and held that:

> " 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is No other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the Judge's discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

14. Further guidance is discernible from the pronouncement of the court in *Elena Doudaladova Korir v Kenyatta University* [2014] eKLR which cited with approval the case of *Halai and another v Thorton and Turpin [1963] Ltd* [1990] KLR 365 where Gicheru JA, chesoni and Cockar Ag JJA's (as they then were) stated thus:

> " The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the appellant must furnish security. The application must of course be made without unreasonable delay"

15. I approach the issue of making the decision herein mindful of the instructive observation made by the court in *Absalom Dova v Tarbo Transporters* [2013] eKLR, which was as follows:

> " The discretionary relief of stay of execution pending appeal is designed on the basis that No one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."

16. From the foregoing, it is clear that in order for an applicant to succeed in an application for stay of execution, they must satisfy the court that substantial loss may result to them unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

17. On the issue of substantial loss, the appellants claim that they have resided on the suit parcel of land since 1987 and have made extensive developments therein. They say that the land has been the only home they know and if they are evicted from it, they will rendered landless and destitute. Though No evidence of these averments was tendered, the appellants rightly pointed out that the respondent in his plaint did imply that the appellants had encroached on his land and built structures thereon and purported to dwell therein without authority. Again, this suit was solely over ownership of the suit land which the trial court found to belong to the respondent and ordered for the eviction of the appellants. If the appellants are to be evicted from the land and the respondent enforces his rights as

proprietor before the appeal is heard, the appeal will be rendered nugatory and the ensuing loss can be said to be substantial.

18. On the issue of delay, the trial courts judgement was delivered on 16.11.2023. The applicants filed this application on 18.12.2023, which is about a month from the date of judgment. This to me does not amount to unreasonable delay.

19. The applicants have expressed that they are willing provide security for the performance of the decree in the form of a bank guarantee or as directed by the court. However, it has been held that the court in fashioning the security is not necessarily bound by what is offered by the applicants. This court therefore directs that the applicants do deposit the sum of Kshs 20,000 in court as security for the performance of the decree within the next 21 days of this judgement.

20. The upshot of the above is that the notice of motion application dated 15.12.2023 is allowed in terms of prayer No (3).

21. Costs to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF APRIL, 2024.

In the presence of Gachumba for the Appellant/ Applicant and Rose Njeru for Okwaro for respondent.

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

24.4.2024