



Ikiugu v Mpaka (Sued as the Legal Representative of the Estate of Gilbert Karagania Miringo-Deceased) (Environment and Land Appeal E042 of 2024) [2024] KEELC 5738 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E042 OF 2024**

**CK NZILI, J
JULY 31, 2024**

BETWEEN

NATHANIEL KITHINJI IKIUGU APPLICANT

AND

PAULINE MPAKA RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GILBERT
KARAGANIA MIRINGO-DECEASED**

RULING

1. By notice of motion dated 11.6.2024, the applicant seeks, among other things, an order for stay of execution of the judgment and decree of 24.5.2024 pending hearing of the appeal. The grounds in support of the application are on the face of the motion and in the affidavit sworn by the applicant on the even date. He avers that the intended appeal has a high chance of success; he stands to suffer substantial loss and irreparable damage; he shall deposit the title deed for L.R. No. Ntima/Igoki/3348 (suit land), as security, which is worth Kshs.6,000,000/=; the suit land is his family home, which he bought in 2014 by procuring a loan facility; customary trust was not proved and that the suit was res judicata. The applicant has annexed a copy of the title deed for the suit land, judgment, decree, memorandum of appeal, and the sale agreement as annexures marked NK1-4.
2. Opposing the motion, the respondent filed a replying affidavit sworn on 11.7.2024. She terms the application as lacking merits, anchored on deceit, material non-disclosure; the appeal is not arguable and will not be rendered nugatory. Further, the respondent avers that she owns the suit land; the decree has been implemented; the suit land is in the name of her brother in law one Marete M'Iringo; the loan was for the applicant's interests. Again the respondent avers that she stands to suffer no loss as the applicant is not in occupation and resides in Nkubu; events have overtaken the application; he should deposit Kshs.5,000,000/= as security; he has unclean hands; he should have conducted due



diligence before purchasing the suit land and ought to have filed a counterclaim. She annexed copies of the judgment, decree and official searches as annexures marked as PM1-4.

3. This court, on 14.6.2024, issued orders staying the execution of the decree pending the inter partes hearing on 2.7.2024.
4. Come 2.7.2024, counsel for the appellant stated that the title deed that ought to be surrendered was in the name of the appellant while the respondent was in occupation of the suit land. Consequently, the court issued an order for the maintenance of the status quo subsisting as of that day, with no changes to the title register.
5. This court, in the exercise of its appellate jurisdiction, has powers to grant temporary orders of injunction pending appeal on such circumstances as ends of justice demand and where the procedural law to institute an appeal has been followed. Such powers are derived from Order 42, Rule 6 of the Civil Procedure Rules, 2010, which provides as follows: -
 - “(1) ... 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 a 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.
6. The purpose of a stay of execution or injunctions is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in *RWW vs EKW* (2019) eKLR, held that an applicant must establish a sufficient cause, show substantial loss and furnish security.
7. On sufficient cause, the applicant avers that his appeal is arguable and raises triable issues for determination as set in the memorandum of appeal. He alleges that the lower court suit was res judicata, and therefore his appeal has arguable grounds likely to succeed once the appeal is heard on merits.
8. In *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. A court does not consider the assertion of substantial loss at face value but rather by proper evidence of the loss. See *Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.
9. The applicant has offered the original title as security for costs. On the other hand, the respondent avers that the applicant should deposit Kshs.5,000,000/= since the title deed is not under his name. The applicant insists that he is the registered proprietor of the suit land. He has annexed a copy of the title deed, which is prima face evidence of land ownership, acquired pursuant to a sale agreement, which he has also annexed. Further, he has alleged that he stands to suffer irreparable loss if the decree



is executed as the suit property is his family home. The respondent, on the other hand, despite alleging that execution has already occurred, relies on official searches showing that the suit land belongs to one Marete M'Iringo.

10. The application was filed on 11.6.2024, which was within reasonable time. On the other hand, one of the official searches is allegedly dated 31.6.2024. A closer look at the annexure shows the same is dated 31.6.2021 and not 31.6.2024. This court takes judicial notice of the calendar days of the month of June, and such a date would not appear in the ordinary course of time. The other official search is dated 1.7.2024.
11. The lower judgment is dated 24.5.2024, while stay orders were issued on 14.6.2024. Thus, no alterations should have occurred to the title register subsequent to this date. Further, the orders to maintain the status quo were issued on 2.7.2024, when the counsel for the applicant said that the title was in the name of the applicant. Why the respondent has shied away from producing a copy of the title deed allegedly in the name of Marete M'Iringo remains a mystery to this court. An official search is not a title document with enforceable proprietary rights. If the title register was altered after the orders of 14.6.2024, the same was in contempt of court and is null ab initio.
12. Having considered the circumstances of this application, the applicant has demonstrated that he stands to suffer loss if the suit land changes hands since it is his only home. A look at the memorandum of appeal shows that it raises triable issues and could be rendered nugatory if a stay is not granted. I therefore find the application merited. The original title is to be deposited in court within 7 days from the date hereof; otherwise, the stay orders shall lapse.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 31st DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Respondent in person

Kerubo for Muriuki for the applicant

HON. C K NZILI

JUDGE

