



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kimani & 4 others v Gachai (Land Case Appeal E001 of 2024)
[2024] KEELC 5870 (KLR) (20 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
LAND CASE APPEAL E001 OF 2024
AK BOR, J
AUGUST 20, 2024**

BETWEEN

**JACINTA WAIRIMU KIMANI 1ST APPELLANT
HASMUKHLAL KHETSI SHAH 2ND APPELLANT
LATA HASMUKHLAL SHAH 3RD APPELLANT
NARESH HIRJU SHAH 4TH APPELLANT
DILSUDHA NARESH SHAH 5TH APPELLANT**

AND

LUCY WANJIRU GACHAI RESPONDENT

RULING

1. The Appellants brought the application dated 21/1/2004 seeking stay of the decree issued in Nanyuki CM ELC Case No. 171 of 2018 on 20/12/2023 pending hearing and determination of the appeal on the grounds that they were dissatisfied with the decision of the Learned Magistrate and had filed an appeal. They urged that they stood to suffer irreparable damage unless orders for stay of execution were issued and added that there had been no delay in bringing the application.
2. Jacinta Wairimu Kimani, the 1st Appellant, swore the affidavit in support of the application in which she deponed that the effect of the judgment delivered by the Chief Magistrate was that their title over Nanyuki Municipality Block 8/908 was to be cancelled and the land will vest in the Respondent. She urged that she acquired the land legally and followed the proper procedure yet the Respondent based her claim on a letter of allotment yet she did not accept the offer by paying the requisite fees. She had been informed that the Respondent had entered the suit land and deposited building materials and was in the process of erecting a perimeter fence. She was apprehensive that unless orders for stay of execution of the decree were granted, the suit land may be developed or sold to third parties to the



detriment of the Appellants. She contended that the land had been empty with no developments and that the Respondent would not be prejudiced if stay orders were granted. She annexed a copy of the judgment to her affidavit together with a copy of the authority to act in the appeal. She also exhibited a copy of the memorandum of appeal.

3. The Respondent swore the replying affidavit on 9/2/2024 opposing the application. She averred that the orders sought were equitable and available to a deserving party in exercise of the court's discretion. She added that the instant application was not made in good faith but was intended to deny her the right to enjoy the fruits of her legally earned judgment and keep her away from the suit land. Further, that the intended appeal did not have any chances of success and that the Appellants had failed to satisfactorily demonstrate how they stood to suffer loss if the application was not allowed. She stated that she had been in continuous occupation of the suit land from 1991 when she bought it. She conceded that the suit land had been re-fenced after delivery of the judgment. She maintained that the application had been overtaken by events since the decree had been implemented and urged the court to dismiss the application.
4. The Respondent filed a further replying affidavit in which she deponed that after the decree was issued by the trial court, she forwarded it for registration at the Laikipia Land Registry and the Registrar confirmed that the fake white card only bore the name of Michael Kariuki and that there were no other entries on the card. She annexed photographs showing the fencing of the land and the application for registration of the decree which was received in the lands office on 12/3/2024.
5. The court directed parties to file written submissions. The Appellants submitted that under Order 42 Rule 6 of the Civil Procedure Rules, they needed to demonstrate that they stood to suffer substantial loss unless orders for stay were made, that the application was filed without delay and that they had furnished such security as the court may order for the due performance of the decree that may ultimately be binding on them. They maintained that there had been no delay in bringing the application since the application and memorandum of appeal were filed on 20/12/2023. They expressed fears that if the orders for stay were not granted, the Respondent could deal with the suit land adversely through sale, transfer, lease or mortgage to third parties which would affect the substratum of the appeal and render it nugatory. They reiterated that the 1st Appellant had confirmed that the Respondent had entered the suit land, deposited building materials and was in the process of erecting a perimeter fence. They urged that if the orders sought were granted the Respondent would not suffer any prejudice. They argued that the general principle in granting or refusing stay was that if there was no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the appellate court reverse the trial court's decision. They added that the court had a discretion to allow stay of execution without requesting the deposit of security for the performance of the decree but if this court was minded to order that security is needed they were ready to abide by the court's decision.
6. The Respondent submitted that the Appellants had not met the threshold for the grant of orders of stay of execution pending appeal because they had not demonstrated the loss they stood to suffer if the application were not allowed. She maintained that she had been in occupation of the suit land all along and that she had occupied the land and had the documents showing ownership. She was emphatic that the Appellants had not demonstrated the loss they stood to suffer to justify the court denying her the fruits of her judgment. She reiterated that the mere fact that execution had commenced did not of itself impute substantial loss on the part of the Appellants because execution was a lawful process. The Respondent also argued that the time for filing the record of appeal had lapsed without the Appellants taking steps to file and serve their record of appeal, which in the Respondent's estimation showed that technically there was no appeal pending.



7. She maintained that the grounds set out in the memorandum of appeal did not stand a chance of success when one considers the historical background of how she acquired the suit land. She concluded that a stay order would not serve any useful purpose because the order of cancellation of title had already been registered and there was nothing to stay. Further, that the subject matter of the appeal had always been with the Respondent and that should this court grant any orders in favour of the Appellants it would be difficult to enforce such order.
8. The issue for determination is whether the court should stay of execution of the decree emanating from the Learned Magistrate. The Respondent's contention that the order for the cancellation of the Appellant's title over the suit land had already been registered was not controverted. The Appellants have not demonstrated what substantial loss they stand to suffer if stay is not granted. There is no evidence to show that the Respondent intends to dispose of the suit property.
9. In this court's view, the Appellants ought to fast track the hearing of the appeal so that a quick determination can be made by the court regarding the ownership of the suit property.
10. The court declines to grant the orders sought in the application dated 31/1/2024.
11. The costs of the application will abide the outcome of the appeal.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF AUGUST 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Sanjay Bhansali and Mr. Kebuka Wachira for the Appellants

Mr. David Kirimi for the Respondent

Court Assistant: Diana Kemboi

