



Ngung'u & another v Munoru & another (Environmental and Land Originating Summons 21 of 2023) [2024] KEELC 6128 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6128 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 21 OF 2023
YM ANGIMA, J
SEPTEMBER 19, 2024**

BETWEEN

JANE WACUKA NGUNG'U 1ST PLAINTIFF

WAKABA NDERI MUCHIRI 2ND PLAINTIFF

AND

ELIZABETH NDUITA MUNORU 1ST DEFENDANT

HANNAH NYOKABI NGOYO 2ND DEFENDANT

RULING

A. Introduction

1. By a judgment dated 15.02.2024 the court entered judgment in favour of the 1st Plaintiff granting her a portion of 19 acres out of Title No. Nyandarua/South Kinangop/781 on account of the doctrine of adverse possession. The court also directed the Land Registrar-Nyandarua to cause the 1st Plaintiff to be registered as proprietor of the said portion of land in her capacity as the administrator of the estate of her late husband, John Ndungu Gichuki.
2. Being aggrieved by the said judgment the 2nd Defendant lodged an appeal to the Court of Appeal against the same. During the pendency thereof, she filed an application for stay of execution and stay of proceedings until the hearing and determination of the appeal.

B. 2nd Defendant's Application

3. *Vide* a notice of motion dated 19.04.2024 expressed to be grounded upon Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* (Cap.21), Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules* (the Rules), the 2nd Defendant sought a stay of execution of the decree as well as a stay of proceedings pending the hearing and determination of her appeal before the Court of Appeal.



4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2nd Defendant on 19.04.2024 and the annexures thereto. She pleaded that she had an arguable appeal which was pending hearing and that unless the stay sought was granted she stood to suffer irreparable harm. She further stated that the appeal also stood the risk of being rendered nugatory in the absence of a stay since the 1st Plaintiff had threatened to execute the decree in her favour.

C. 1st Plaintiff's Response

5. The 1st Plaintiff filed a replying affidavit sworn on 15.04.2024 in opposition to the application. She stated that she had been in occupation of the suit land since the 1970s and that the 2nd Defendant had never been in possession thereof hence there was no risk of her eviction. She further stated that there was no evidence of substantial loss demonstrated by the 2nd Defendant hence there was no justification for granting the stay sought.
6. It was also the 1st Plaintiff's response that there was no demonstration that the pending appeal might be rendered nugatory in the absence of a stay since the 2nd Defendant may still recover the suit property or its value in the event of the appeal being successful. The 1st Plaintiff further pleaded that the 2nd Defendant had not offered any security for due performance of the decree should her appeal ultimately fail. As a result, the court was urged to dismiss the application with costs.

D. 2nd Defendant's Rejoinder

7. The 2nd Defendant filed a further affidavit sworn on 26.06.2024 in response to the replying affidavit. She stated that the suit property was a source of livelihood to her and her family and that because it was part of her inheritance from her late mother it would not be possible to quantify its value for purposes of compensation.

E. Directions on Submissions

8. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 2nd Defendant filed submissions dated 19.06.2024 whereas the 1st Plaintiff's submissions were dated 11.07.2024.

F. Issues for Determination

9. The court has considered the 2nd Defendant's notice of motion dated 19.04.2024, the replying affidavit in opposition thereto, the further affidavit as well as the material on record. The court is of the view that the following are the key issues which arise for determination herein:
 - a. Whether the 2nd Defendant has made out a case for the grant of a stay of execution or stay of proceedings.
 - b. Who shall bear costs of the application.



G. Analysis and Determination

a. Whether the 2nd Defendant has made out a case for the grant of a stay of execution or stay of proceedings

10. The provisions on stay of proceedings and stay of execution are to be found in Order 42 rule 6 of the Rules. Order 42 rule 6(2) thereof stipulates as follows:

“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.”

11. The court has considered the material and submissions on record on this issue. Whereas the 2nd Defendant contended that she had satisfied all the requirements for the grant of a stay under the Rules, the 1st Plaintiff contended otherwise. It is evident from the material on record that the suit herein is already concluded hence the issue of stay of proceedings does not arise. The court has already determined the suit with finality vide its judgment dated 15.02.2024 hence there is nothing else pending adjudication. The only recourse the 2nd Defendant has is to pursue her appeal before the Court of Appeal.

12. The court has considered the fact that the 1st Plaintiff is the one currently in occupation of the suit property and as found in the judgment her family has been in possession thereof for several decades. The 2nd Defendant does not occupy or utilize any portion of the suit property and she does not seem to have any crops, houses or structures thereon. The court finds no evidence of the risk of substantial loss in the absence of a stay order. The mere fact that the 2nd Defendant has an expectation of an inheritance out of the suit property would not necessarily constitute substantial loss.

13. The court has considered the 2nd Defendant’s contention that her intended appeal shall be rendered nugatory if ultimately successful in the absence of a stay. By its judgment, the court simply declared that the 1st Plaintiff had acquired a portion of 19 acres out of the suit property on account of the doctrine of adverse possession and that she should be registered as proprietor thereof in her representative capacity. There is no allegation or demonstration that the 1st Plaintiff intends to sell or dispose of the property during the pendency of the appeal. There is no allegation that it shall be impossible or impracticable to recover the property in the event of the appeal being successful.

14. There is no demonstration by the 2nd Defendant that it shall not be possible to quantify the monetary value of the land or that monetary compensation, of whatever amount, shall not be adequate compensation. There is no evidence to show that the suit land is so unique or so special that it is incapable of replacement with land of a similar size elsewhere. There is evidence on record to demonstrate that the original owner had sold a substantial portion of her land to various purchasers and handed possession to them during her lifetime. Moreover, the court takes the view that transfer of land is a reversible process hence any transfer in favour of the 1st Plaintiff can always be reversed or cancelled at the opportune moment. As a result, the court is not satisfied that the 2nd Defendant’s appeal shall be rendered nugatory in the absence of a stay.



b. Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 1st Plaintiff shall be awarded costs of the application.

H. Conclusion and Disposal Order

16. The upshot of the foregoing is that the court finds no merit in the 2nd Defendant’s application for stay of proceedings and stay of execution of the decree. As a result, the notice of motion dated 19.04.2024 is hereby dismissed with costs to the 1st Plaintiff.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA THIS 19TH DAY OF SEPTEMBER, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Karuga for the Plaintiffs

Ms. Nekoye holding brief for Mr. Mwariri for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

