



Kenya Forest Service v Kiniaru (Environment and Land Miscellaneous Application 1 of 2024) [2024] KEELC 7229 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2024**

AK BOR, J

OCTOBER 17, 2024

BETWEEN

KENYA FOREST SERVICE PLAINTIFF

AND

SAMUEL MWANGI KINIARU DEFENDANT

RULING

1. The Applicant brought the application dated 29/2/2024 seeking stay of execution of the judgment delivered by Hon. Mercy Muhoro on 11/12/2023 in Nyahururu CM ELC No. 30 of 2020 and leave to appeal out of time against that decision. The application is premised on the ground that the dispute revolved around a parcel of land known as Laikipia/Nyahururu/6777, a gazetted forest area which formed part of Marmanet Forest (the suit property). Further, that when the Learned Magistrate delivered the judgment on 11/12/2023, the advocate who attended the virtual session on behalf of the Applicant attempted to seek stay of execution but was prevented from doing so owing to a network hitch on her device. It was claimed that the information was relayed to the State Counsel who brought the application after a copy of the decree was served on its client.
2. In addition, that being dissatisfied with the judgment of the Learned Magistrate, the Honourable Attorney General wished to challenge the judgment on appeal. The delay in seeking stay of execution and filing the appeal was attributed to the omission on the part of the State Counsel, who beseeched the court not to allow that error to prejudice the Applicant's right of appeal. She added that the delay was not inordinate. She asserted that the intended appeal raised substantial issues requiring hearing and determination. The application was supported by the affidavit of Ngira Lynn who deponed to these grounds, which are set out on the face of the application.
3. The application was opposed by the Respondent through his replying affidavit sworn on 8/4/2024. He averred that the application lacked substance and did not meet the statutory provisions for invoking



- the court's jurisdiction. He maintained that there had been undue delay in filing the application and that the intended appeal was an afterthought. He urged the court to dismiss the application.
4. The court directed parties to file submissions, which it read and considered. The Applicant submitted that vide the plaint dated 30/6/2016, the Respondent sought to be declared the owner of Laikipia/Nyahururu/6777, a gazetted area which he claimed to have purchased in May 2018. The Applicant filed a defence in which it asserted that the suit property was illegally obtained through illegal excision since it formed part of the forest and had never been degazetted hence it was not available for alienation.
 5. The Applicant submitted that an order of stay pending appeal is granted where an Applicant has an arguable appeal with high chances of success. The Applicant cited various decisions supporting the position that one needed to demonstrate that they had an arguable appeal which would be rendered nugatory if the orders of stay were not granted. The other requirement is that the application should have been filed expeditiously and on this point, the Applicant submitted that the delay on its part was not inordinate. On the issue of substantial loss, the Applicant submitted that execution of the judgment delivered on 11/12/2023 would cause substantial loss because the Applicant would never recover the gazetted forest land.
 6. The Respondent submitted that the present application was filed with the intention of obstructing the course of justice and that it was evident that the Applicant failed to take any action after the judgment was delivered in December 2023. The Respondent cited decisions in which the court discussed the principles for grant of stay. He added that the Applicant had merely stated that it would suffer substantial loss but had not offered any security. He was of the view that the Applicant was intended to delay and bar him from enjoying the fruits of the judgment delivered in his favour. He maintained that the appeal did not have any chances of success because the trial court considered all the facts and evidence produced in the court before arriving at its decision. He went further to outline the matters the court takes into account in deciding whether to grant extension of time for lodging an appeal. These are the length of delay, the reasons for the delay, the chances of the appeal succeeding and the degree of prejudice the Respondent would suffer if the application were granted. He urged the court to exercise its discretion and dismiss the application.
 7. The issue for determination is whether the court should grant stay of execution of the judgment delivered on 11/12/2023 and grant the Applicant leave to appeal out of time. The Applicant attributed the delay in filing the appeal to a technical hitch when the judgment was delivered. The delay in the court's view was not inordinate.
 8. The Applicant contended that the suit property formed part of Marmanet Forest and that substantial loss would result if the Respondent were allowed to proceed with execution as it may never recover the gazetted forest land.
 9. Based on this contention, the court is persuaded that substantial loss would result if the Applicant were to proceed with execution of the decree emanating from the Magistrate's Court the suit property and the Applicant eventually succeeded on its appeal.
 10. The Applicant is granted leave to file and serve its appeal within 30 days of the date of this ruling against the judgment delivered of Hon. Mercy Muhoro delivered on 11/12/2023.
 11. Execution of the judgment delivered by Hon. Mercy Muhoro on 11/12/2023 is stayed pending hearing and determination of the Applicant's intended appeal.

The Respondent is awarded the costs of the application.

DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.



K. BOR

JUDGE

In the presence of:

Mr. Nderitu Komu for the Respondent

No appearance for the Appellant

