Kamau & others v Lendira & 36 others (Environment & Land Case 4 of 2022) [2025] KEELC 499 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEELC 499 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT & LAND CASE 4 OF 2022

LN MBUGUA, J

FEBRUARY 12, 2025

BETWEEN

RICHARD MWANGI KAMAU & OTHERS ..... PLAINTIFF

AND

LELEREKO LENDIRA & 36 OTHERS ..... DEFENDANT

RULING

1. Before me is the defendants' notice of motion application dated 31/10/2024 seeking orders of stay of execution of the judgment delivered on 28/6/2024 pending hearing and determination of the intended appeal. The application is premised on grounds on the face of the application and supporting affidavit of Oletipipi Ntarkus Sina, the 44th Defendant applicant.

2. He contends that he is duly authorized to swear the affidavit on behalf of the other co-defendants. He avers that pursuant to the judgment and decree delivered hereby, the plaintiffs are intent on excising the specific portions of the suit property where the defendants homesteads, schools, churches and shopping centre are currently situated with a view to issuing titles for those specific portions to the defendants.

3. He avers that the issuance of titles poses a risk of the transfer of the said titles to third parties during the pendency of the intended appeal which maybe rendered nugatory.

4. He contends that the execution of the judgment will restrain about 5,047 aggrieved persons and their livestocks from accessing water tanks, boreholes, dams and other sources of water thereby breaching their right to a clean and safe environment thus subdividing the land and issuing titles will resort in irreparable loss as the process of cancellation of such titles would be futile if appeal succeeds.

5. He contends that the appeal has high chances of succeeding and may be rendered nugatory if the application is not allowed.

6. The plaintiffs filed a replying affidavit dated 11/11/2024 where they contend that the defendants are in contempt of court orders as they have started encroaching on the plaintiffs remaining portions of land despite a clear order not to do so. They further contend that the defendants are causing wanton waste to the plaintiffs land by harvesting sand and building stones as well as cutting down trees.

7. On 12/11/2024 the court gave directions for the application to be heard by way of written submissions of which the parties were to file and serve short submissions within 10 days. There was no compliance by the parties whereby the applicants never filed any submissions while the plaintiffs filed submissions out of time on 25/1/2025.

8. I will therefore consider the application based on argument raised in the application and the replying affidavit.

9. The relief of stay of execution pending Appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

> " 6(1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order.....
>
> (2) No order for stay of execution shall be made under sub Rule (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 undue 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."

10. In Loice Khachendi Onyango v Alex Inyangu & another [2017] eKLR the court held as follows;

> " The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly 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. A perusal of the judgment of 28/6/2024 indicates that the defendants had proved their claim of adverse possession in respect of specific portions of plaintiffs' land where they have put up homes, homesteads, schools, churches and shopping centre. The court also gave an order that:

> " 63. The County Surveyor and Land Registrar for Laikipia County are directed to visit the suit property to survey and excise the specific portions of the suit property where the Defendants home, homesteads, schools, churches and the shopping centre are currently situated with a view to issuing titles for those specific portions to the Defendants. That exercise is to be undertaken within 90 days of today and a report filed in court. The County Commissioner is to arrange for security during the survey exercise.

64. The Defendants are restrained from encroaching or interfering with the Plaintiffs' occupation of the other portions of the suit property beyond where the Defendants homes, homesteads, schools, churches and the shopping centre are currently situated".

12. It is quite apparent that the grant of the orders sought may result in confusion turmoil, perhaps even anarchy, noting that the judgment restrained the defendants from encroaching on plaintiffs' land; that is beyond homesteads, schools etc of the defendants. It is not lost to this court that plaintiffs have already accused the defendants of encroaching on plaintiffs' parcels of land.

13. The court has discretion to grant or refuse an order of stay of execution pending appeal in that the court when granting such an order has to balance the interest of the applicants with those of the respondents' (Feisal Amin Jan Mohammed T/A Dunyia Forwarders v Shami Trading Co. Ltd (2014) eKLR). Thus in balancing the interests of the protagonist herein, I find that granting the orders sought would be tantamount to overturning the judgment and would in essence give the defendants' a blank cheque to encroach on parcels beyond their homesteads, schools churches and shopping centres. A situation which is unacceptable and untenable. This far, I find that the application is not merited.

14. I must also add that the judgment was delivered more than half a year ago and all that the applicants talk about is an intended appeal. They have not indicated to the court as to why a notice of appeal was not filed in time and they have not offered any security as dictated by the provisions of Order 42 Rule 6 of the Civil Procedure Rules.

15. In the end, I find that the application dated October 31, 2024 is not merited, the same is hereby dismissed with costs to the Plaintiffs'.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF FEBRUARY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE