



Nyang'au & another v Mang'era (Suing as an Administratrix of the Estate of Vincent Matwere Mogaka - Deceased) (Environment and Land Appeal E019 of 2022) [2023] KEELC 15827 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15827 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E019 OF 2022
JM KAMAU, J
FEBRUARY 28, 2023**

BETWEEN

FLORENCE NYAKERARIO NYANG'AU 1ST APPELLANT

MARK ANARIKO ONUNDA 2ND APPELLANT

AND

EBISIBA BOCHABERI MANG'ERA (SUING AS AN ADMINISTRATRIX OF THE ESTATE OF VINCENT MATWERE MOGAKA - DECEASED) RESPONDENT

(Being an Appeal from the Judgment and Orders of Hon. M.C. Nyigei – PM dated and delivered on the 30th day of November 2022 in MC. ELC Case No. 6 of 2020 at Nyamira)

RULING

1. The Appeal subject of this matter originates from the Judgment and orders of the Honourable M.C. Nyigei – PM, dated and delivered on the 30/11/2022 in Nyamira CMC NO. ELC 6 of 2020. The Judgment against which the Appeal has been preferred reads: -
 - i. The Counter Claim by the Defendants be and has failed.
 - ii. A permanent injunction is hereby issued restraining the Defendants herein by themselves, their agents, servants, family members and/or person acting on their behalf from entering onto, erecting any structures, digging, tilling and/or planting of any crops and/or in any manner interfere with land parcel LR. No. North Mugirango/Mokomoni/293.
 - iii. An order of Eviction directed against the Defendants themselves, their agents, family members and/or persons holding onto and/or acting in concert with the said Defendants from land parcel No. LR. No. North Mugirango/Mokomoni/293 and also an order for exhumation



of the remains of the said Joshua Anariko from the said land parcel No. LR. No. North Mugirango/Mokomoni/293.

- iv. Costs of the suit and interest at court rates.
 - v. The prayer for General Damages was never proved and none is granted.
2. Being dissatisfied with this Judgment the Defendants in the lower court, Florence Nyakerario Nyang'au and Mark Anariko Onunda filed an Appeal in this court on 30/12/2022 and sought from this Court orders that: -
- i. The Judgment and/or Decree of the Learned Magistrate dated and delivered on 30th of November 2022 be set aside and/or quashed.
 - ii. The Honourable court be pleased to order the Plaintiff/Respondent's suit dismissed.
 - iii. That the Defendant/Appellant pray for a stay of the Judgment issued by the subordinate court pending the Hearing and determination of this Appeal.
 - iv. That in the alternative, and without prejudice for the foregoing prayers, this court to revisit the issues raised by the Defendants/Appellants.
 - v. Costs be borne by the Respondents.
 - vi. Any such and/or further orders that the Honourable Court shall deem just and expedient in the circumstance.
- 2 The prayers were pegged on the following Grounds: -
1. The Learned Magistrate erred in law and fact in entering the Judgment in favour of the Plaintiff against the Defendants in spite of the Plaintiff's miserable failure to establish her case, especially on the sale of the said land parcel LR. NO. North Mugirango/Mokomoni/293.
 2. The Learned Magistrate erred in law and fact in that the Plaintiff/Respondent's husband the late Vincent Matwera Mogaka did not buy the land from Ikweri Nyandiko but the land was bought by Ndubi Mogaka.
 3. That the Learned Magistrate erred in law and fact that Ndubi Mogaka did not buy the entire parcel of land LR. No. North Mugirango/Mokomoni/293 but only 1 ½ Acres (one and a half).
 4. The Learned Magistrate erred in law and fact in failure to appreciate the impeccable defence of the Defendants/Appellants and thereby arriving at a wrong erroneous conclusion.
 5. The Learned Magistrate erred in law and fact in failing to appreciate the impeccable evidence of the Defendants/Appellants thereby arriving at a wrong erroneous conclusion by condemning the Defendants/Appellants to a permanent injunction, order of exhumation of the remains of Yoshua Anariko without giving alternative where he will be interned.
 6. The Learned Magistrate erred in law and fact in failing to appreciate long occupancy of the Defendant/Appellant in the land.



7. The Learned Magistrate erred in law and fact in failing to appreciate the long established principle of RES judicata precedent law thus bringing law into confusion and thereby deriving to an erroneous finding/conclusion in particular ordering for eviction, permanent injunction and exhumation of Yoshua Anariko remains.
8. The Learned Magistrate erred in law and fact in failing to appreciate as follows:
 1. A Plaintiff/Respondent's reading and evidence tendered in support thereof was in capable of leading to a conclusion of the order of permanent injunction, eviction and exhumation of Yoshua Anariko remains.
9. The Learned Magistrate erred in law and fact in failing to appreciate the fact that the Plaintiff/Respondent's husband fraudulently transferred the suit parcel of land to the detrimental of the Defendants/Appellants.
10. The Learned Magistrate erred in law and fact in failing to appreciate the Defendants/Appellants have a right to adverse possession having occupied the land since 1978.
11. The Learned Magistrate erred in law and fact in failing to appreciate the Defendants/Appellants Mark Anariki Onunda was never served with a court order to bar him from burying his son Yoshua Anariko thus arriving to a wrong conclusion of ordering exhumation of his body.
12. The Learned Magistrate erred in law and fact in failing to appreciate the impeccable evidence produced by the Defendants/Appellants that, that the land was not Nyang'au Nyandiko's Estate but Nyandiko Onunda's Estate whom the Plaintiff/Defendant claims that his wife sold without his consent, since he is not mentioned in what the Plaintiff/Defendant claim as the Gesima Land Case No. 103 of 1965.
13. The Learned Magistrate erred in law and fact in failing to appreciate the fact that in 1965 women did not own land thus the reason why all the early Title Deeds were written let all men know if Kemunto Nyandiko sold the land that is against the law then.
14. The Learned Magistrate erred in law and fact that the land tribunal of Ekerenyo sited in this case had different findings and the Submissions or decisions are different.
15. The Learned Magistrate erred in law and fact when all the witnessed of the Defendants/Appellants appeared before her they were never accorded the hearing but were subjected to embarrassment of being in court but judged as per their written Submissions.
16. The Learned Magistrate erred in law and fact in failing to appreciate that in court Case 128 of 2014 witness One Nyang'aya W.g.n. Joseph ID NO. 7305409 states that Ikweri Nyandiko the father of Mark Anariko he is the one who sold the land but in the court case ELC No. 6 of 2020 he changed the statement and says Kemunto Nyandiko sold the land alone as per the evidence



adduced in court. This is erroneous in the part of the Hon. Magistrate to have come up with the Judgment and orders of permanent injunction, eviction, and exhumation of the remains of Yoshua Anariko.

17. The Learned Magistrate erred in law and fact in failing to appreciate the fact that the Plaintiff did not produce any evidence in court to prove her case. All the evidence cited were produced by the witness who did not from the time on stated that he was an interested party in this case.
18. The Learned Magistrate erred in law and fact in failing to appreciate the fact that the so called Gesima Land Case No. 103 of 1965 is not a court document since it did not have a Magistrate's signature nor did the so called elder signature appear anywhere.
19. The Learned Magistrate erred in law and fact in failing to appreciate that when the producer of this document was close examined he changed the tune and called this document an agreement. Are sale agreements done in court? If so where are the signatures of the seller and buyer?
20. The Learned Magistrate erred in law and fact because she quotes the case of 03/01/1978 which she did not have a copy of the Judgment nor the proceedings of the same.
21. The Learned Magistrate erred in law and fact in failing to appreciate that the case she sites of No. 45 of 2005, Nyang'au Nyandiko responded and it is in record of the court, how come he did not attend the court hearings since he was aware of the case? The court record does not show that he attended even one single day, why?
22. The Learned Magistrate erred in law and fact in failing to appreciate that in this case there were two Defendants/Appellants Florence Nyakerario Nyang'au and Mark Anariko Onunda, the entire Judgment was about the Estate of Nyang'au Nyandiko who is not the father of Mark Anariko Onunda. Mark is a son of Ikweri Nyandiko who mentioned in the Ekerenyo tribunal as the seller of 1 ½ (one and a half) Acres of the land parcel LR. No. North Mugirango/Mokomoni/293, which is divided into four portions untitled for the four sons of Nyandiko Onunda as follows: -
 1. Ikweri Nyandiko.
 2. Nyauma Nyandiko.
 3. Ariemba Nyandiko.
 4. Nyang'au Nyandiko.
23. The Learned Magistrate erred in law and fact in failing to appreciate that Mark Anariko Onunda, the son of Ikweri Nyandiko lives in his father's Estate, which has a clear demarcation and boundary from the Estate of Nyang'au Nyandiko's Estate as indicated in the Judgment of this case. This leads to the erroneous conclusion reached in this case.
24. The Learned Magistrate erred in law and in fact in giving arbitrary orders without caring about the livelihood of the people who live on that land since



1978 that which is their ancestral land they have no other place to live. When ordering a permanent injunction did she consider that these people live in the same land since 1978, where are they expected to go? Is it practical? Does that mean they become landless, homeless and in turn into street people?

25. The Learned Magistrate erred in law and fact by ordering to restrain Mark Anariko Onunda from the land when the only time they have instructed on this matter of land is in the case CIVIL CASE NO. 128 of 2014 and we were ordered to each stay where nobody has a dispute.
 26. The Learned Magistrate acted in error when the same failed to properly evaluated evidence on record, thus reaching an erroneous decision.
3. On 03/01/2023 the Appellants (Defendants in the lower court) asked this court to grant orders that: -
- “Pending the Hearing and determination of the Appeal herein, there be issued an order staying the execution and/or implementation of the Judgment and Decree issued on 30/11/2022 in Nyamira CMCC ELC. Case No. 6 of 2020.”
4. The Grounds upon which this Application is premised are as follows: -
- a. If the remains of the 2nd Appellant’s son, One Yoshua Anariko are exhumed this would render this Appeal nugatory.
 - b. If the eviction of the Appellants takes place the Appeal would not serve its purpose.
 - c. If this court does not stay execution of the impugned Decree, the Appellants will suffer irreparable damage and mental anguish and this Appeal would be rendered a mere academic exercise.
 - d. The Respondent would not suffer any prejudice if the orders sought are granted.
5. I asked both parties to file written Submissions and also gave them an opportunity to highlight on the same which oral and written Submissions I have considered before making my Ruling.
6. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#):
- “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 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.”
7. Therefore, an Applicant for stay of execution of a Decree or Order pending Appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned, namely;
- (a) that substantial loss may result to the Applicant unless the Order is made,
 - (b) that the Application has been made without unreasonable delay, and



- (c) that such security as the Court orders for the due performance of such Decree or order as may ultimately be binding on the Applicant has been given.
8. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution Order pending Appeal, in the following words:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
9. As to what substantial loss is, Ms. Ochwal has tried to distinguish it from the rendering of an Appeal nugatory. The distinction is not very bald-faced. In Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & Another vs. Agnes Naliaka Cheseto* the Court had the following to say on the subject:
- “The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”
10. It was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
11. The Applicants’ main concern is that if the execution of the impugned Decree is not stayed, then;
- the remains of the 2nd Appellant’s son, One Yoshua Anariko would be exhumed.
 - the eviction of the Appellants would take place.
 - the Appellants would suffer mental anguish and this Appeal would be rendered a mere academic exercise.
12. Even without going into the other fears, the idea of exhuming a body is very painful to say the least and the same should await the final result of the ultimate appellate Court. If execution takes place in execution of the Decree at hand and the deceased’s body exhumed and buried elsewhere and then the Appellant succeeds on appeal, then it means that the body may have to be exhumed for the second time to be reburied where it is lying now. And I don’t know what would happen if the Appellants are



successful in the instant appeal and then this Court's Decision is upset by the Court of Appeal on a second Appeal.

13. Taking the above into account and in order not to render the intended Appeal nugatory as well as to give effect to the overriding objectives of the *Civil Procedure Act*, I find and hold that the Applicants have fulfilled the requirements for grant of stay of execution pending Appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*.

14. I therefore order that:

- a. Pending the Hearing and determination of this Appeal herein, the execution and/or implementation of the Judgment and Decree issued on 30/11/2022 in Nyamira CMCC ELC. Case No. 6 of 2020 be and is hereby stayed.
- b. The Appellant shall file and serve the Record of Appeal within the next twenty one (21) days of this Ruling;
- c. Costs shall be in the cause;
- d. This matter shall be mentioned on 22nd March 2023 for Directions on the Hearing of the Appeal.

I so order.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF FEBRUARY 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Appellant: Mr. Bonuke

Respondents: Mr. Ochoki holding brief for Mr. Ochwal

