



M’Mwirichia v Gitunga; M’Ndegwa (Interested Party) (Environment and Land Appeal 21 of 2018) [2022] KEELC 2663 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 21 OF 2018**

CK NZILI, J

JULY 6, 2022

BETWEEN

GILBERT KIOGORA M’MWIRICHIA APPELLANT

AND

JUDSON MWENDA GITUNGA RESPONDENT

AND

KENNETH GITONGA M’NDEGWA INTERESTED PARTY

RULING

1. Through an application dated 29.12.2021 the 1st interested party seeks stay of execution of the judgment and decree made on 20.12.2021 pending the hearing and determination of his intended appeal. The application is supported by an affidavit sworn on 29.12.2021 and 12.2.2022 respectively. The grounds of the application are that; the applicant owns 3 acres which is part of L.R Abogeta/ U- Kithangari/2734 as a bonafide purchaser for value from the appellant and has occupied and or developed it since 2016; that his issues were not addressed by the honourable court in its judgment; he is likely to suffer irreparable loss and damage and there has been no inordinate delay in filing the application.
2. In the supporting affidavit the applicant avers the initial L.R No. Abogeta/U-Kithangari/123 belonged to the late M’Mwirichia Muthera and out of Meru H.C Succession No. 630 of 2009 it was distributed and he bought and was transferred a subdivision thereof being L.R No. Abogeta/U-Kithangari/2734 by the appellant for Kshs.3.6m, took vacant possession and has developed the same; that being aggrieved by the judgment he has filed an appeal hence seeks for the stay of the judgment.
3. The application is opposed by the respondent through a replying affidavit sworn on 17.1.2022 on the basis that the application is incompetent, bad is law and an abuse of the court process. It is averred there is no positive order capable of being stayed since the appeal was dismissed.



4. It is averred Order 42 Rule 6 *Civil Procedure Rules* is inapplicable in these proceedings since the application is brought by an interested party.
5. It is further averred the appellant had not sought any orders against the interested party in the appeal. As such there was nothing that the interested party was directed to do or cease from doing hence an order of stay would be superfluous.
6. Additionally, it is averred that upon delivery of judgment the respondent took vacant possession and obtained a title deed hence is an absolute proprietor of the suit land duly protected by law who is likely to suffer loss should he be stopped from enjoying the fruits of his judgment.
7. Therefore it is averred that since the land has been decreed to the respondent, the interested party's remedy if any lies elsewhere.
8. Lastly, the respondent denies the alleged developments and insists he was the one who made the alleged developments on his land.
9. In his supplementary affidavit sworn on 12.2.2012 the applicant states he obtained orders of stay on 30.12.2021 and served the same on 5.1.2021 upon the respondent and the firm of Mwirigi Kaburu & Co advocates on 10.1.2022; that the respondent defied the orders and obtained a transfer of the land on 13.1.2022 which was 7 days after the service of the order despite the fact that there was a pre-existing caution and inhibition. That there was no court order removing or setting aside the caution and inhibition hence the title deed is tainted with illegality and ought to be cancelled.
10. As regards the appellant he responded to the application through a replying affidavit sworn by Gilbert Kiogora, M'Mwirichia sworn on 11.3.2022 stating that upon delivery of the judgment, his advocates on record filed a notice of appeal without his knowledge or instructions which he has since withdrawn, hence was opposed to the application for stay, given his appeal has been determined on merits and the matter should rest there to avoid unnecessary expenses on his part.
11. In his written submissions dated 20.3.2022, the applicant/interested party states his application demonstrates a prima facie case to warrant the issuance of orders of stay pending hearing and determination of his intended appeal. It is submitted the existence of the Githongo PMCC No. 57 of 2017 is conceded by the appellant and the respondent hence it was not true there was no positive order made in the decree capable of being executed.
12. Further the interested party submits since the Githongo Law Courts pleadings formed part of the record of appeal he had locus standi to seek for stay.
13. Lastly, he submits the withdrawal of the notice of appeal by the appellant was in bad faith and a conspiracy between him and the respondent to repeat his intended appeal.
14. On his part the respondent by written submissions dated 23.3.2022 states the interested party applied to be joined in the appeal which has been dismissed with no positive order capable of being executed.
15. Reliance was placed on *George Ole Sangui and 12 others vs Kedong Ranch Ltd* [2015] eKLR, *David Kiprute Chingi & another vs D.P.P and 2 others* [2016] eKLR, *Western College of Arts and Applied Sciences v Vonaga & others* [1976] KLR 63 *Donald Oyatsi vs Disciplinary Ethics Committee & 3 others* [2021] eKLR, *Gilbert Kimani Nyumu vs Gedion Kipkoech Kiptisia* [2020] eKLR, *Heshimart enterprises vs Kenya Women Microfinance Bank Ltd* [2021] eKLR.
16. On the part of the appellant it is submitted that having withdrawn his notice of appeal, there was no pending appeal before the Court of Appeal by the interested party since he was not a party in



the Nkubu PMCC No. 95 of 2015 and secondly he did not file any appeal or raise any claim in the dismissed appeal capable of being determined by the court hence lacks locus standi to file an appeal to the Court of Appeal and therefore the application herein is an exercise in futility.

17. Having gone through the application and the written submissions the issues for my determination are:
 - (i) Whether the applicant has made a case for the grant of stay of execution.
 - (ii) If the applicant has any pending appeal.
18. By a ruling dated 27.11.2019 the interested party was allowed to participate in this appeal. Thereafter the court directed the interested party's file no. 57 of 2017 be availed to be considered alongside the appeal. Parties opted to dispose the appeal through written submissions.
19. Order 42 Rule 6 *Civil Procedure Rules* grants the court powers to entertain an application for stay where there is a second appeal upon sufficient cause being shown.
20. In *TSC v Knut & 3 others* [2015] eKLR the Supreme Court of Kenya stated that the general stand of the law is that there must be in existence a pending or an intended appeal as a basis for the court to entertain an application for stay of execution.
21. In *Okiya Omtata Okoiti v Central Bank of Kenya and 7 others* [2019] eKLR the court held orders cannot be granted in vacuum or on a whim since it is the substratum of a party's case which informs the court on whether to grant a stay or not.
22. In this matter the interested party avers the issues he raised before this court were not considered in the judgment hence his intended to appeal against the judgment to the Court of Appeal.
23. As indicated above the interested party sought to be enjoined as a party to this appeal. The court allowed his request. The interested party upon coming on board never filed any cross appeal and or sought for any specific prayer or grounds for or against the appeal.
24. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See *IEBC v Stephen Mutinda Mule* [2013] eKLR. Once the interested party came on board, he did not plead any ground of appeal or make any request for or against the appellant and the respondent.
25. The court could therefore take up other grounds of appeal not included in the memorandum of appeal before it.
26. It could only adjudicate upon the specific matters before it as raised by parties in their pleadings. To do otherwise would have been speculative. The parties in an adversarial system normally sets the agenda with no room for any other business. See *Basu Mining Ltd vs Commissioner of Mines and another; Cortec mining (K) Ltd & 5 others (I.P)* Civil Appeal 187 of (2016) [2021] KECA 175 (KLR) Environment & Land) 5.11 (2021) Judgment.
27. The applicant herein seeks stay of execution on the basis that should the decree be executed he stands to suffer irreparable loss and damage.
28. The appeal before the court was against a specific ruling dated 27.6.2018 in which the trial court had determined two applications by the appellant and the respondent.
29. Given that the interested party did not clearly define its issues and seek for specific prayers in the appeal despite been granted an opportunity to do so by this court and noting the appeal brought by the appellant was dismissed with no positive orders, there is nothing to stay.



30. Further, the applicant has not attached a draft memorandum of appeal for this court to have a glimpse of the grounds of appeal more so now that the suit property has changed hands.

31. In the premises, I find no merits in the application dated 29.12.2021. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 6TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

Karanja for respondent

Mukaburu for Interested party

Magiria for appellant

HON. C.K. NZILI

ELC JUDGE

