



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**HIGH COURT CIVIL CASE NO.92 OF 2017**

**AGGREY AMBENJE WAL..... APPLICANT**

**VERSUS**

**CHARLES OMNDI AGORO.....1ST RESPONDENT**

**BILHA MUTOLA LITUNDA..... 2ND RESPONDENT**

**MARTHA A. OWINO (suing for and on behalf of**

**WENSCO SELF HELP GROUP)..... 3RD RESPONDENT**

**RULING**

1. This is a ruling on **application** dated **16th July 2019**. It seeks to stay execution of ruling issued on 11th July 2019 pending hearing and determination of intended appeal.
2. Grounds on the face of the application is that being aggrieved by the ruling of this court, the application has expeditiously filed this application and notice of appeal and if stay is not granted, the applicant stands to suffer substantial loss and damage and it would render the intended appeal nugatory if the respondents proceed to execute.
3. He averred that there are several persons and parcels of land involved and there is real apprehension of eviction causing disharmony and breach of peace if stay is not granted in the interim; that the applicant is willing to abide by any conditions that this court may deem fit to impose.
4. The application is supported by affidavit sworn by ...the applicant on 16th July 2019. He averred that the ruling has far reaching implications and its execution may cause disharmony and breach of peace.
5. Further, that the intended appeal raises serious issues of law to be canvassed at the appeal and it is only fair and just that stay of execution is granted in the interim; that there are several cases namely **Nakuru ELC No.182, 193 and 158** all of **2016** and **Criminal Case No.1464 of 2016** which touch on the same subject matter and the ruling will have a bearing on the said suits.
6. In response, the respondents filed replying affidavit dated 28th August 2019. He averred that he is the current member of the self-help group christened **Wesco Self Help** with 25 active members. He averred that the applicant was the chairman of the said self-help group but was voted out of office and expelled from the group sometimes on the 1st of November 2015 and he did not lodge any complained to police or any other authorities on being voted out and expelled; that he ceded to the circumstances and handed over documents of the group and undertook to refund group money.
7. He further averred that as the group reorganized itself from his leadership they realized that the applicant had misappropriated funds from the group and was involved in double sales of some group land parcels.; that he belatedly complained and maintained that he was still a group member and its chairman and started to interfere with the group and its officials
8. He averred that that due to the applicant's illegal actions, the group was forced to file suit against him being **Nakuru CMCC No.584 of 2016** seeking to injunct him from purporting to be the group chairman; and not being satisfied with the judgment or just to frustrate the group, the applicant filed appeal in the High Court and the applicant was not successful on appeal in judgment delivered on 11th July 2019. He stated that the respondents are the successful litigants having won in 2 successive courts and should not be deprived if fruits of their judgment.
9. Counsel for the respondents further submitted that the applicant has not filed or served the notice of appeal and request for proceedings in

time or at all and the same are not annexed to the application as required by law and due to lack of notice of appeal, the application has no *locus standi* and should be dismissed with costs.

10. Further that the court should not condone dilatory actions of the applicant and the clear abuse of court process; that the applicant has no arguable appeal; that the case is not about any money or land but it is about a group and its leadership; that the applicant has no claim and did not file counterclaim in the lower court and the applicant has always been mentioning land or money to give weight to his averments. That the applicant is no longer a group member and the court has no jurisdiction to return him to the group or elect him a group chairman.

11. He averred that the applicant is not specific in what he wants stayed; whether he wants to stay group meetings, group money collections, group projects or stay groups from purchasing land; that the stay orders should be specifically defined and actively directed to stay defined subject matter or preserve clear subject matter.

12. Respond averred that this matter proceeded for appeal without any formal orders of stay and there is no need for stay orders at this stage; he stated that when the ELC matters came up before **Justice Sila Munyao** he set hearing of the matters *suo moto* and the stay order was lifted after the High Court judgment; ELC No.182 of 2016 was dismissed for being filed by the applicant without *locus standi* and the ELC matters ordered to proceed. He averred that the respondents will be greatly prejudiced if the matters in court fail to proceed.

13. He averred that the applicant has failed to show sufficient cause, substantial loss, no unreasonable delay and deposit security and this court should not come to his aid over meaningless and unrelenting endless litigation. Respondents urged court to dismiss this application.

### **APPLICANT'S SUBMISSIONS**

14. The applicant's submission is that the lower and High Court judgment is giving the appellant's certificate **No.12710** the basis of grabbing the land known as **Menengai/Kampi ya Moto 1388** and **1389** measuring approximately 12 acres purchased over 15 million shillings. Appellant's submission is that the parties are fighting over a project, which means parcel of land.

15. Applicant submitted that for applications of this nature the applicant must prove that he has arguable case, is likely to suffer substantial loss and that appeal has been filed expeditiously.

16. On arguable appeal, the applicable submitted that he has arguable appeal especially on the ground that the respondents formed a parallel group and obtained their own certificate of incorporation which is the basis of this proceedings. Applicant submitted that midway the court on its own wisdom took appellant's certificate and gave it to opposing group; that the legality of the two certificates and the elections is an issue for determination before the Court of Appeal.

17. On substantial loss, the applicant submitted that the property was purchased for over 15 million and the property is associated with the office; that there can be no office of a self-help group without a project; that land and self-help groups are synonymous to each other. That a fight to office is fight for land/project. The applicant submitted that the respondents want to use orders of this court to do mass evictions to people already in occupation; that the appellant together with his members will lose their money and land.

18. Applicant submitted that the orders for stay are seeking to preserve status quo otherwise the appeal would be rendered nugatory. That the respondent's group was registered independently from appellants and each group has a certificate.

### **RESPONDENT'S SUBMISSIONS**

19. The respondents restated averments in the replying affidavit. They submitted that the applicant has no arguable appeal and this court cannot issue orders for the sake of it as it is enjoined to do justice to parties. They further submitted that this matter is about self-help group; that the group validly and legally changed its officials; that one person who is the applicant herein claims to be aggrieved by groups vote and its actions and he wants to maintain and is pushing the court to maintain him as a member; respondents submit that the appeal is not arguable appeal as he wants the appeal filed to make him a member or chairman of a group of 25 members.

20. Further, the respondents submitted that the applicant has been mentioning people and land parcels just to make weight in his defence yet he did not file any counterclaim or any claim vis -a-vis the group or any specific land parcel; the respondents aver that the subject matter of the suit was about the group and its leadership and not about property.

21. The respondents further submitted that the applicant has not demonstrated what substantial loss he is likely to suffer if stay is not granted; that since the issuance of the two judgments, the applicant has not filed any claim or stated where he has been prejudiced.

### **ANALYSIS AND DETERMINATION**

22. The applicant has indicated that the judgment delivered on 11th July 2019 will have a bearing in the cases pending before ELC Court and the criminal case pending in the chief magistrates' court. From the pleadings in the lower court and the High Court judgment, which affirmed the lower court judgment, issues placed before court for determination concern the validity of incorporation certificate of the self-help group and its office bearers.

23. It is not disputed that the applicant was a member and first chairman of the self-help group; it is not also disputed that two certificates

existed in respect of the group. This court upheld the lower court's determination in respect to issues pleaded.

24. The applicant has not come out clearly, as to what his claim is. It is evident that the suit filed in the lower was about certificate of incorporation of the self-help group and a determination as to whether the officials in the office were rightfully in the office. That is what the court made a determination upon. No counterclaim was filed in the lower court file. For the court to make a determination on what is not pleaded will be going beyond its scope.

25. From the foregoing I am not convinced that the applicant has arguable appeal neither has he demonstrated that he stands to suffer any substantial loss in the event that he succeeds in the appeal. He also talked of a group of people alleged to be on his side who are likely to suffer loss.

The said people were not enjoined in this suit as parties. From the foregoing, I find that the application does not meet the criteria for grant of stay pending appeal.

**26. FINAL ORDERS**

**1. Application dated 16th July 2016 is hereby dismissed**

**2. Costs of the application to the respondents.**

**Ruling dated, signed and delivered via email at Nakuru This 30th day of April 2020**

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**RACHEL NGETICH JUDGE**

**TO:**

Machage Advocates – Counsel for Applicant

Ochieng Gai Advocates – Counsel for Respondent