



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 64 OF 2015

IN THE MATTER OF THE ESTATE OF OWINO RACHIER (DECEASED)

BETWEEN

JANES OTIENO OCHIDO.....APPLICANT

AND

PATRICK LUMUMBA OMEDO.....RESPONDENT

RULING

INTRODUCTION

1. On 25th July, 2019, this court after hearing an objection by **PATRICK LUMUMBA OMEDO (Respondent)** issued the following orders: **THAT**

a) The Certificate of Confirmation of Grant issued on 18th April, 2017 in favour of JANES OTIENO OCHIDO and AMBROSE ONYANGO OCHIENG is hereby revoked.

b) The certificates of ownership to Land Parcel No. KISUMU/BAR/1072 issued to JANES OTIENO OCHIDO and AMBROSE ONYANGO OCHIENG are hereby cancelled and the Land Registrar is directed to revert ownership of Land Parcel No. KISUMU/BAR/1072 to the name of OWINO RACHIER

c) Certificate of Confirmation of Grant shall issue in favour of PATRICK LUMUMBA OMEDO in his capacity as the administrator of the estate of JAKIM OMEDO AYIEKO alias JAKIM and the suit land shall in turn form part of the estate of JAKIM OMEDO AYIEKO alias JAKIM that is the subject matter of KISUMU SUCCESSION CAUSE NO. 1283 OF 2015.

d) The Petitioner/Respondent is hereby condemned to pay costs to the Objector/Applicant.

2. By a notice of motion dated 02nd September, 2019 filed on 05th September, 2019, brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 42 Rules 6(1), (2) and (3) and Order 51 of the Civil Procedure Rules, Applicant prays for orders **THAT:**

1) Pending the hearing and determination of the appeal, there be a stay of execution of the judgment of the court delivered on 25th July, 2019 and the consequential orders

2) Costs be in the cause

3. The application is based on the grounds among others that the appeal has high chances of success and will be rendered nugatory and that Applicant stands to suffer substantial loss if the application is not allowed and that the Respondent does not stand to suffer any prejudice if the orders sought are granted.

4. The application is supported by an affidavit sworn on 02nd September, 2019 by **JANES OTIENO OCHIDO (Applicant)** and filed on 05th September, 2019 in which he reiterates the grounds on the face of the application. Annexed to the affidavit is a copy of the impugned judgment, copy of notice of appeal and draft memorandum of appeal marked JOO1, JOO2 and JOO3 respectively

5. The application is opposed by on the basis of Grounds of Opposition dated and filed on 19th September, 2019 in which it is stated that the Applicant has not met the threshold required in law to merit the Orders sought.

6. I have considered the application in the light of the Supporting Affidavit and Grounds of Opposition, the Submissions by counsel and cited authorities.

7. The legal basis for grant of stay pending appeal is **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. Basically, the Applicant is required to demonstrate that: -

“Substantial loss may result unless the order is made. The application has been made without unreasonable delay. Such security as the court orders for the due performance of the decree has been given before the applicant.”

8. The common thread in the cases of **Kiplangat Kotuk Versus Rose Jebur Kipng’ok (2015) eKLR Kenya Commercial Bank Limited Versus Sun City Properties Limited & 5 OTHERS (2012) eKLR and Kenya Shell Limited Vs. Kibiru [1986] KLR** cited by the Respondent is that stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

9. The impugned judgment was delivered on 25th July, 2019. The notice of motion herein was filed on 19th September, 2019 which is 32 days after the time allowed for filing of an appeal. The delay has not been explained.

10. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. I have considered the Applicant’s averments and he does not disclose what substantial loss he is likely to suffer is an order of stay is not granted. The fact that this is land case does not exempt the Applicant from the Application of **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. I have considered **Mugah v Kunga (1988) KLR** where the the Court of Appeal stated;

“The practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort”.

11. I have also considered **Mukuma v Abuoga [1988] KLR 645** where the **Court of Appeal** stated that;

“Where a party is exercising his undoubted right of appeal the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard. The granting of a stay of execution in the high court is governed by Order XLI Rule 4(2) The discretion of the Court of Appeal under Rule 5(2) (b) of the Court of Appeal rules is at large but 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. In the circumstances of this case, the applicant stood to suffer substantial loss if she was evicted from the land at this stage. Moreover, it could not be said that her intended appeal had no chances of success.”

12. The decision of this court was based on issues among others that the court in **KISUMU CMCC NO. 27 OF 2011** had on 18.12.14 determined that the Respondent’s father had bought **Land Parcel No. KISUMU/BAR/1072(suit land)**. Even at the time the Objection was heard 5 years after the decision in **KISUMU CMCC NO. 27 OF 2011**, no appeal against that decision had been preferred.

13. Other than that this is a land matter which is emotive, the Applicant has not demonstrated what substantial loss he is likely to suffer is an order of stay pending appeal is not granted. There being no evidence of substantial loss, the appeal is therefore unlikely to be rendered nugatory.

14. While it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of **the Act** to afford the Appellant an opportunity to prosecute his appeal.

15. The upshot of the foregoing, the court makes the following orders:

1) The notice of motion dated 09th October, 2019 is has no merit and it is disallowed.

2) Pending the hearing and the determination of the appeal however, the Respondent is directed to within 7 days of this order execute a written undertaking not to offer for sale, sell, dispose off, transfer, charge or deal with the suit land in any manner that might cause it to be transferred from his name.

3) Costs of this application shall be costs in the appeal.

DATED AND DATED IN KISUMU THIS.....28th.....DAY OF.... November....2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Amondi/ Okodoi**

For the Applicant - **Mr Onyango**

For the Respondent - **N/A**