



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT HOMA BAY
ELC CASE (OS) NO. 60 OF 2021
(FORMERLY MIGORI ELC CASE NO. 614 OF 2017)

RHODA AWUOR ODUO.....PLAINTIFF

VERSUS

MONICA ATIENO OUMA.....1ST DEFENDANT

WILLIS ODHIAMBO OUMA.....2ND DEFENDANT

RULING

1) On 29th June 2021, the 2nd defendant (the applicant) Willis Odhiambo Ouma through the firm of M/S Oguttu Mboya, Ochwal and Partners Advocates, mounted an application by way a notice of motion dated 28th June 2021 brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 (The CPR, 2010) and Section 7, 13, 19 and 26 of the Environment and Land Court Act, 2015 (2011) (The ELC Act). He is seeking the following orders;

a) Spent.

b) Spent

c) The Honourable Court be pleased to grant an Order of Stay of Execution of the Judgment and Decree herein dated 15th day of June 2021, together with all consequential proceedings and/or orders and in particular, the limb thereof directing the Land Registrar to rectify the registrar of LR NO. KASIPUL/KOTIENO KOKECH/67 (*hereinafter referred to as the suit property*) to reflect the Plaintiff/Respondent as the proprietor of the suit property in lieu of the 2nd Defendant/Applicant pending the hearing and determination of the Intended Appeal to the Honourable Court of Appeal in terms of the Notice of Appeal dated 22nd June 2021.

d) Costs of this Application do abide the Appeal.

e) The Honourable Court be pleased to grant such further and/or other orders as may be deemed just, appropriate and/or Expedient be granted.

2) The application is founded on the applicant's supporting affidavit of twenty nine (29) paragraphs sworn on 28th June 2021 and the documents annexed thereto and marked as "WOO 1", "WOO 2" and "WOO 3" being copies of decree, notice of appeal and draft memorandum of appeal respectively. The application is also based on grounds (a) to (dd) set out on the face of the same.

3) Briefly, the applicant's lamentation is that the plaintiff, Rhoda Awuor Oduo (The Respondent herein) lodged the instant suit seeking, inter alia, a declaration that he is a lawful purchaser of the suit property, LR No. West Kasipul/Kotieno KOkech/67 and that upon hearing the suit, the court rendered judgment in favour of the That the applicant was aggrieved thereby and has lodged a notice of appeal (WOO 2) and a draft memorandum of appeal (WOO 3). That further to the judgment, the respondent is keen to proceed and execute the decree (WOO 1) thus the intended appeal is bound to be defeated and the applicant is likely to suffer substantial loss.

4) The respondent though M/S Odondi Awino and Company Advocates opposed the application by way of grounds of opposition dated 5th October 2021 and filed herein on 7th October 2021 in lieu of the instant application. The grounds include:

a) Other than the fact that the respondent received judgment on 15th June 2021 in her favour, no decree has been applied for nor

issued.

b) The appellant has not provided any security as required under Order 42 Rule 6 (2) (b) of the CPR, 2010.

5) It is noteworthy that the grounds of opposition refer to the Notice of Motion dated 1st March 2021. Clearly, the reference therein is in error as there is no such application filed in this suit as at 29th June 2021 save for the instant application. Furthermore, ground number two (2) of the grounds of opposition correctly refers to the judgment delivered on 15th June 2021. Thus, the said error is curable under Article 159 (2) (d) of the Constitution of Kenya, 2010.

6) The application was heard by way of written submissions pursuant to this court's orders and directions given on 24th November 2021; see Order 51 Rule 16 of the CPR and Practice Direction number 33 of the ELC Practice Directions, 2014.

7) In the submissions of four (4) pages dated 29th November 2021 and duly filed 1st December 2021, learned counsel for the applicant gave the gist of the background of the matter including the respondent's originating summons dated 2nd October 2008, the applicant's replying affidavit sworn on 25th September 2015 and the judgment delivered on 15th June 2021 herein. Counsel identified a sole issue for determination namely whether the applicant has satisfied the conditions set for the stay sought in the application. In the analysis of the issue in favour of the orders sought in the application, counsel cited Order 42 Rule 6 of the CPR, the case of **Ndegwa Gichine-vs-Sicily Warware Njira 2018 KLR and Butt-vs-Rent Restriction Tribunal (1979) eKLR 2010**, to fortify the submissions.

8) On the other hand, learned counsel for the respondent filed four (4) paged submissions dated 2nd December 2021 on the 7th day of December 2021 urging the court to dismiss the application. Counsel submitted, inter alia, that the respondent is entitled to the fruits of the judgment rendered on 15th June 2021 in this suit. That in the event the stay order is granted, the applicant be directed to deposit security of Kshs. 5,000,000. Counsel relied on the case of **Kwamboka Daphney-vs-Kithinji Joy and another (2021) eKLR which applied the decision in Kenya Shell Ltd-vs-Kibiru and Another (1986) KLR 410 and Charles Kariuki Njuri-vs-Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased) (2020) eKLR**, among other authorities.

9) I have thoroughly considered the application, the grounds of opposition and the submissions inclusive of the issues framed and the authorities cited therein. By the nature of the application, I approve the single issue for determination as framed in the applicant's submissions as pointed out at paragraph 7 hereinabove and as stipulated under 42 Rule 6 (2) of the CPR, 2010 for determination herein. Therefore, has the applicant met the threshold for grant of the sought in the application?

10) As regards substantial loss, the applicant contends that the respondent is likely to execute the decree (WOO 1) and the suit property is bound to be transferred to the respondent to the detriment of the applicant's rights over the suit land.

11) The respondent asserted that a decree has not been applied for or issued herein. That there is no evidence that she has initiated the execution proceedings and hence, the applicant will suffer irreparable loss. Indeed, a party has a vested right to the judgment which ought to be effectual as held in the case of **Shamad-vs-Shamji Bros and another 1957 EA 438**.

12) Be that as it may, there is a decree issued on 24th June 2021 (WOO 1) in this suit. In case the same is executed, the applicant who depends on the suit property for livelihood, is bound to suffer substantial loss; see also **New Stanley Hotel Ltd-vs-Arcade Tobacconist Ltd (1980) KLR 757**.

13) Concerning delay in mounting the application, **Article 10 (2) (b) of the Constitution of Kenya, 2010** provides for the principles of equity which include; delay defeats equity and equity aids the vigilant and not the indolent. Bearing in mind the date of the judgment and the date the application was filed, it is the finding of this court that the application was brought with due promptitude inordinate.

14) On the aspect of security, it is trite law that no party including a statutory body is exempt from providing security for the due performance of a decree; see **Doshi Iron Mongers-vs-Kenya Revenue Authority and another (2020) eKLR**.

15) The respondent has urged the court to direct the applicant to deposit a specific amount of security as stated at paragraph 8 hereinabove, if the application is allowed. This is a discretion of the court and depends on the obtaining circumstances of the case.

16) In addition, the applicant has duly filed Notice of appeal (WOO 2) and a Draft memorandum of appeal. By dint of Order 42 Rule (6) (4) of the CPR, 2010, the appeal is duly filed. So, the applicant has an undoubted right to pursue the appeal as subscribed to the decision in Butt case (supra) and that the applicant has the rights captured under **Articles 48, 50 (1) and 25 (c) of the Constitution of Kenya, 2010** and being guided by the case of **Philip Chemwolo and another-vs-Augustine Kubende (1986) eKLR** with regard to the appeal.

17) In the foregone, I find the application meritorious. On that score, the grounds of opposition must fail

18) Wherefore, the application dated 28th June 2021 and filed herein on 29th June 2021, is hereby determined thus;

a) The application is hereby allowed in terms of an order of stay of execution of the judgment rendered on 15th June 2021 and a decree issued on 24th June 2021 and that costs of the application to abide the appeal as sought in the application and as stated at paragraph 1(c) and (d) herein above.

b) The applicant shall deposit in this court a sum of Kshs.75,000 (Kenya shillings seventy five thousand only) as security for the due performance of the decree or order as may ultimately be binding upon him, failing which the stay granted herein, shall lapse

automatically without further orders of this court.

19) It is so ordered.

Dated and delivered at Homa Bay this 31st January 2022

G M A ONGONDO

JUDGE

Present;

a) Ms Odera holding brief for Ms Ochwal, learned counsel for the applicant

b) Mr Odondi Awino, learned counsel for the respondent

c) Okelo, court assistant

G M A ONGONDO

JUDGE