



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC APPEAL NO. E011 OF 2021

PAULINA AUMA AKOKO.....APPELLANT/APPLICANT

-VERSUS-

SAMSON NYANJA AKOKO.....RESPONDENT

RULING

1. On 28th October 2021, the Appellant, Paulina Auma Akoko (the applicant herein) through Messrs Ogwe and Company Advocates, filed an application by way of a Notice of Motion dated 27th October 2021 under Order 42 Rule 6, Order 40 (1) and (2) of the Civil Procedure Rules, 2010, sections 1A and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya. She is seeking the orders infra;

(a) Spent

(b) THAT this Honourable court be pleased to order stay of execution of the judgment delivered on the 13th day of October 2021 by the Senior Resident Magistrate, Hon. N.N Mosesti (Mr) pending the hearing and determination of the appeal.

(c) THAT an injunction, do issue restraining the defendant/respondent, agents or servants from further trespass onto and/or interfering with the current registration of L.R L/LAMBWE WEST "B" 375 (hereinafter referred to as the suit property) pending the hearing and determination of the appeal.

(d) THAT the cost of the application be in the cause.

2. The application is founded on grounds (a) to (j) as set out on its face. The same is further founded on a 12-paragraphed supporting affidavit sworn by the applicant on even date and copies of documents marked as "PAA 1" to "PAA 6" which include a copy of title deed in respect of the suit land, L.R No. Lambwe West "B"/375, a copy of the judgment and a copy of proceedings in Mbita SRM's Court Land case No. 17 of 2019 (PAA 1, PAA 2 and PAA 3 respectively) and annexed to the affidavit.

3. Briefly, the applicant laments that she is the registered proprietor of the suit land as shown by the title deed (PAA 1). That she sued the respondent before the trial court by way of a plaint dated 14th October 2019 seeking, inter alia, an order of eviction from the suit property. That by the trial court's judgment delivered on 13th October 2021, the applicant's case was dismissed with costs to the respondent. That the applicant was aggrieved thereby and commenced the instant appeal which has overwhelming chances of success and likely to be rendered nugatory as the respondent has proceeded to fence and built a house on the suit property in execution of the judgment.

4. In a 26-paragraphed replying affidavit sworn on 15th November 2021 and filed herein on 17th November 2021, the Respondent, Samson Nyanja Akoko through Messrs P R Ojala and Company Advocates, opposed the application, sought that it be dismissed and that he be allowed to proceed with execution of the judgment and subsequent decree. He deposed in part that the applicant has no arguable appeal. That the applicant has not disclosed the true position of what is happening to the court. That the applicant had filed before the trial court, an application dated 9th September 2020 for a temporary injunction and by the time it was allowed on 16th December 2020, the respondent had erected his house to almost its completion on the suit property.

5. The respondent also deposed, inter alia, that the applicant has not demonstrated compelling reasons for the grant of the stay sought in the application. That the applicant will not suffer any prejudice and that he is mischievous and under malicious intention to deny him the fruits of his judgment. That the applicant has not offered any security for the due performance of the decree as required by the law thus, under deserving the orders sought in the application.

6. On 29th October 2021, this court ordered and directed that the application be canvassed by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010** and **Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014**.

7. Accordingly, learned counsel for the applicant filed a 5-paged submissions dated 8th December 2021 on 9th December 2021 giving summary of the application, the reply thereto and implored upon the court to find that the application is merited and should be allowed. That the appeal has overwhelming chances of success and that therefore, the suit land be preserved pending the outcome of the appeal.

8. To fortify the submissions, counsel cited the Court of Appeal decision in Civil Appeal (Application) No. E131 of 2021, *The Public Service Commission and 72 others-vs-Okiya Omtatah and 4 others (2021) eKLR* that the applicant must demonstrate that the intended appeal is arguable and will be rendered nugatory (redundant) if the stay is not granted. Counsel further relied on **sections 24 and 25 of the Land Registration Act, 2016 (2012)**.

9. On the other hand, learned counsel for the Respondent duly filed a 5-paged submission dated 3rd December 2021 on 8th December 2021 where reference was made to the suit filed and subsequent judgment delivered by the trial court as well as the orders sought in application. Counsel framed three issues for determination; whether the application is spurious and based on misconception of the law, whether the applicant will suffer substantial loss if the orders sought are not granted and whether the applicant is deserving of the orders sought.

10. To buttress the submissions, counsel relied on inter alia, **Executive Estates Limited-vs-Kenya Posts and Another (2005) 1 EA 53** on positive orders or sanctions, **Co-operative Banking Insurance and Finance Union (Kenya) (2015) eKLR and Republic-vs-Retirement Benefits Tribunal Ex-parte Heritage A.I.I Insurance Company Limited Retirement benefits Scheme (2017) eKLR**. Counsel also made reference to **Order 42 Rule 6 (2)** (supra) and urged the court to consider the Respondent's opposition to the application and dismiss the application as the it lacks merit and the same is an abuse of due process only meant to deny the respondent the fruits of his judgment.

11. I have carefully considered the application, the replying affidavit and the rival submissions together with the issues framed and the authorities cited in their entirety. In that regard, has the applicant satisfied the set conditions for the grant of the orders sought in the application?

12. In regard to prayer number two (2) sought in the application, the **Concise Oxford English Dictionary 12th Edition at page 1411**, defines the term "Stay of execution" thus;

"Delay in carrying out a court order."

13. Order 42 Rule 6 (2) (supra) provides for conditions for stay of execution in case of appeal. The applicant lamented that she is bound to suffer substantial loss as the Respondent has commenced fencing and erection of a permanent structure on the suit property in the execution of the impugned judgment. Ground (i) of the application and paragraph 8 of the Respondent's replying affidavit speak to detriment of the appeal and respondent's house erected on the suit land respectively. The same are captured in the parties' respective submissions. Due to the character of activities being carried out on the suit land by the respondent, the applicant is likely to suffer substantial loss unless the stay sought is granted.

14. The principles of equity including delay defeats equity are anchored under Article 10 (2) (b) of the Constitution of Kenya, 2010. The trial court's judgment was delivered on 13th October 2021 while the instant application was filed herein on 28th October 2021. Therefore, I am of the considered view that fourteen (14) days delay to mount the application charged against the surrounding circumstances of the matter would not be inordinate and inexcusable as subscribe to the view of Apaloo JA in the case of **Philip Keipto Chemwolo and another-vs-Augustine Kubende (1986) eKLR**.

15. On the requirement of security for the performance of the decree, it is trite law that no person inclusive of a statutory body is exempt from providing security thereof; see **Doshi Iron Mongers Ltd-vs KRA 2020**. Furthermore, the Honourable court has the absolute and unfettered discretion to order the nature of security to be provided by the applicant.

16. In addition, the applicant has an unlimited right to fair hearing of the appeal under **Article 50 (1) as read with Article 25 (c) of the Constitution**. In the case of **Butt-vs-Rent Restriction Tribunal (1979) eKLR**, the Court of Appeal held in part;

"...and the appellant has an undoubted right of appeal...."

17. Notably, by dint of the draft memorandum of appeal annexed to the application, this court admitted the present appeal on 23rd November 2021. Clearly, there are triable issues including proprietorship of L R No. Lambwe West "B"/ 374 and the suit property as well as alleged fraud and trust thereof as disclosed therein; See also the Public Service Commission case (supra).

18. So, the appeal should be heard on it's merits as stated in Philip **Chemwolo case (supra)**. More fundamentally, the applicant's right to access justice including this appeal is secured under **Article 48 of the Constitution of Kenya, 2010**.

19. As regards the injunctive relief sought in the application. I am guided by the case of **Giella-vs-Cassman Brown and Company Ltd 1973 EA 358** cited in **Nguruman Ltd-vs-Jan Bonde Nielsen and 2-others 2014 eKLR**, among other authoritative pronouncements. The duration of an injunction is within the discretion of the trial judge and depends on the circumstances of the case as noted in **National Bank of Kenya Ltd-vs-Shimmers Plaza Ltd 2009 KLR 278 at 283**. The court is aware of the conditions under Order 40 Rule 2 of the Civil Procedure Rules, 2010 that are meant to curb the abuse of temporary injunctive orders.

20. Moreover, this court has the mandate to grant interim preservation orders including injunctions under **section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)**. Status quo orders regarding the property in dispute are also envisaged thereunder.

21. In the emerging scenario, the merited interim preservation order is the maintenance of the prevailing status quo order in respect of the suit

property in lieu of the injunctive order as per prayer number three (3) in the application; see the Court of Appeal decision in the case of **Ogada-vs-Mollin (2009) KLR 620** and **PKA-vs-MSA 2009 KLR 745**.

22. Wherefore, I find merit in the application dated 27th October 2021 and filed herein on 28th October 2021 hence hereby allow it in the following terms :

- a) stay of execution of the judgment rendered on 13th October 2021 in Mbita SRM's Court Land Case number 17 of 2019 is granted pending the hearing and determination of this appeal.
- b) status quo order over the suit property is hereby issued and in particular, the respondent shall not continue to erect and complete the erection of any permanent structure on the suit property and the applicant shall not sell or dispose of in any manner the suit property or any part thereof pending the hearing and determination of the appeal.
- c) The applicant shall deposit in court within the next seven (7) days from this date, the original title deed in respect of the suit land as security for the due performance of such decree or order as may ultimately be binding upon her, failing which the stay shall lapse without a further order of this court.
- d) Costs of the application be costs in this appeal.

DATED AND DELIVERED AT HOMA BAY THIS 19TH JANUARY 2022

G M A ONGONDO

JUDGE

In the presence of:

- i. Mr R.J Ogwe learned counsel for the applicant
- ii. The respondent
- iii. Okello, court assistant

G M A ONGONDO

JUDGE