



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC APPEAL NO E008 OF 2021

LYNETTE ADHIAMBO OTENG.....APPELLANT/APPLICANT

VERSUS

KOJ (Suing on behalf of FAJ Minor and SAJ).....RESPONDENT.

RULING

1. By an application dated 18th October 2021 and duly filed in this court on even date under, inter alia, **section 13 (7) of the Environment and Land Court Act, 2015 (2011)**, the appellant, Lynette Adhiambo Oteng (the applicant herein) through learned counsel, Mr Oliver Onyango Owaka is seeking the following orders;

a) Spent

b) Spent

c) Spent

d) THAT pending the hearing and determination of this application inter-partes, there be a stay of execution of the Judgment and decree delivered by Hon. J. S. Wesonga in Homa Bay Chief Magistrate's Court Environment and Land Case No. 26 of 2020

e) Costs of this Application be in the cause.

2. The application is premised on the applicant's supporting affidavit and annexed documents namely copies of the trial court's judgment delivered on 20th September 2021 and the memorandum of appeal dated 14th October 2021 and lodged herein on 15th October 2021. The application is also based on grounds 1 to 8 stated on the face of the same and they include;

a) THAT Applicant has lodged Memorandum of Appeal in readiness to kick off her intended Appeal.

b) THAT the Applicant's intended Appeal is arguable and has high chances of success.

c) THAT the Applicant shall be condemned to suffer substantial loss, being an innocent purchaser for value in the event executed shall ensue.

d) THAT the Applicants Appeal stands to be rendered nugatory if stay is not granted, notwithstanding the success of the Appeal.

e) THAT the Applicant is willing to abide by any condition that shall be given by the court upon grant of the prayers sought.

3. The respondent through the firm of Nyauke and Company Advocates, opposed the application by way of grounds of opposition dated 29th October 2021 and duly filed in court on 2nd November 2021. The grounds are;

a) The application lacks merit and is an abuse of the Court process.

b) The application is mischievous and meant to defeat the course of justice.

c) The application has not been in good faith.

4. The application was heard by way of written submissions further to this court's directions of 3rd November 2021 and **Order 51 Rule 16 of the Civil Procedure Rules, 2010**. In the applicant's submissions dated 6th December 2021, counsel urged the court to grant the orders sought in the application on the basis that the requisite conditions have been met thereof. In the respondent's submissions dated 25th January 2022, counsel relied on **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** alongside the case of **Kiplangat Kotut-vs-Rose Jepor Kipngok (2015) eKLR**, termed the application unmeritorious and an attempt to delay execution herein hence, urged the court to dismiss the application.

5. I have duly considered the application, the grounds of opposition and the parties' respective submissions including **Kipngok case (supra)** in their entirety. In the circumstances, is the application merited?

6. I bear in mind the provisions of the law under which the application has been brought. I also note the special circumstances of the case including the applicant's allegations that he is an innocent purchaser for value and that he is likely to be evicted from the suit land, LR No.Kanyada/Kanyango/4788, if the stay order sought in the application is not granted; see also the Court of Appeal decision in the case of **Butt-vs-Rent Restriction Tribunal (1979) eKLR**.

7. In the foregone, the possible prevention of this appeal and nugatory aspects of it, come into play. Triable issues including trespass, innocent purchase for value and fraud are discerned in the memorandum of appeal hence the appeal has to be heard on merits. Moreover, the application was mounted without unreasonable delay in obtaining scenario. This court has the discretion regarding security for the due performance of the judgment and the decree since no person is exempted thereby as held in **Doshi Iron Mongers Limited-vs-Kenya Revenue Authority and another (2020) eKLR**.

8. In the **case of Board of Governors, Moi High School Kabarak and another-vs-Malcolm Bell (2013) eKLR** the Supreme Court of the Republic of Kenya held that the court has the inherent jurisdiction and also to make any essential or ancillary orders. The court proceeded to hold that stay of execution orders are for;

'Safeguarding the character and integrity of the subject matter of the appeal, pending the resolution of the contested issues.'

9. Access to justice is anchored under **Article 48 of the Constitution of Kenya, 2010**. Therefore, the applicant has an undoubted right of the present appeal as noted in Butt case (supra).

10. Indeed, preservation orders as stipulated under section 13 (7) (a) of the Environment and Land Court Act, (2015 2011) do not exclude the stay of execution of the judgment and decree sought in this application. Indeed, the orders are meant to preserve, in the interim, the subject matter of this appeal pending the termination or determination of the appeal.

11. In the result, I find merit in the applicant's notice of motion dated 18th October 2021 and filed herein on even date. The same is hereby allowed on terms that;

- a) The stay of execution of the judgment per prayer 4 therein and as stated in paragraph 1 hereinabove, be and is hereby granted.
- b) The applicant to deposit security in the sum of Kshs. 50,000/- (Fifty thousand shillings only) in this court within the next 30 days from this date, failure of which the stay order granted herein shall lapse without further orders being necessary in regard to the application.
- c) Costs of the application to abide this appeal

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 28TH FEBRUARY 2022

G.M.A ONG'ONDO

JUDGE

PRESENT

MS ODERA INSTRUCTED BY THE FIRM OF NYAUKE AND COMPANY ADVOCATES FOR THE RESPONDENT

OKELLO- COURT ASSISTANT