



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL NO.E013 OF 2020

ZACHARY MULI.....APPELLANT

VERSUS

RICHARD MULI KILONZO.....RESPONDENT

(Appeal from the judgement made in the Chief Magistrates Court at Kangundo

by the Honourable Senior Principal Magistrate D. Orimba in CMCC

(ELC) No. 118 of 2019 – Formerly CC 63 of 2015 delivered

at Kangundo on October 7, 2020)

RULING

What is before Court for determination is the Appellant's Notice of Motion applications dated the 18th November, 2020 and 4th December, 2020, both brought pursuant to sections 1A, 1B, 3A, 63(E), 65 & 95 of the Civil Procedure Act as well as Order 42 Rule 6 & Order 45 of the Civil Procedure Rules including Article 159 (2) (d) & (c) of the Constitution. In the application dated the 18th November, 2020, the Appellant seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to issue an extension of the stay of execution order so granted on November 5, 2020 by Hon. D. Orimba pending hearing and determination of this application.

3. That this Honourable Court be pleased to issue an extension of the stay of execution order so granted on November 5, 2020 by Hon. D. Orimba pending hearing and determination of the intended appeal.

4. That this Honourable Court be pleased to issue an injunctive order restricting both parties, their servants, their agents or personal representatives from disposing of the subject matter in dispute pending hearing and determination of the intended appeal.

5. That the S.C.C.I.O Matungulu of the Directorate of Criminal Investigations do file a final report on the Complaint lodged by the Appellant/Applicant.

6. That if this Honourable Court is pleased to grant prayer No. 5, an Order Summoning Richard Muli Kilonzo, the wife of Richard Muli Kilonzo, Athanus Munyambo Ngozi and the wife of Athanus Munyambo Ngozi to record their statement as relates to the Complaint filed unless the individuals choose to waive the right to record statements once summoned;

7. That the costs of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of ALPHONSE O'MAKALWALA who is the Advocate in conduct of the matter on behalf of the Appellant where he deposes that on 8th October, 2020 he wrote to the Court Registry seeking certified copies of proceedings and judgement so delivered by Hon. D. Orimba SPM but the registry had technological challenges necessitating him to file a Certificate of Urgency dated 5th November, 2020 to seek extension of orders of stay of execution of the judgement delivered on 7th October, 2020 which orders were lapsing on 24th November, 2020 culminating in his filing the instant application. He

explains that he intends to file with leave of court at the appropriate juncture an audio recording accompanied with a transcript of the main hearing as evidence that serious substantive omissions of evidence including testimony as pleaded in the filed Memorandum of Appeal dated 18th November, 2020. He contends that the Judgement is a grave miscarriage of justice and consequences that arise thereof are extremely prejudicial to his client's right to a fair hearing. He claims all the parties herein are aware of the pending investigation by the Directorate of Criminal Investigations in which the Applicant intends to pressure the said office to conclude the investigation. Further, that the Investigating Officer has severally complained of the failure of the Respondent and his other three witnesses to obey summons to record their statements. He explains that he is unable to get his client due to poor network and intends to file an additional affidavit once he is able to reach him. Further, the prayers sought are for preservation of the subject matter to ensure neither party is prejudiced. He reiterates that the Applicant has not caused inordinate delay in bringing his predicament to the attention of the court.

While in the application dated the 4th December, 2020, the Appellant/Applicant seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to set aside its Order issued on 24th November, 2020 and review the Application dated 18th November, 2020 taking into consideration new evidence filed in this motion dated 4th December, 2020.

3. That this Honourable Court be pleased to issue a stay of execution order on judgement obtained in favour of the Respondent herein pending hearing and determination of this application.

4. That this Honourable Court be pleased to issue a stay of execution order so granted on November 5, 2020 by Hon. S. P. M Orimba pending hearing and determination of the intended appeal.

5. That this Honourable Court be pleased to issue an injunctive order restricting both parties, their servants, their agents or personal representatives from disposing of the subject matter in dispute pending hearing and determination of the intended appeal.

6. That the S.C.C.I.O Matungulu of the Directorate of Criminal Investigations do file a final report on the complaint lodged by the Appellant/Applicant.

7. That this Honourable Court be pleased to grant That if this Honourable Court is pleased to grant prayer No. 5, an Order Summoning Richard Muli Kilonzo, the wife of Richard Muli Kilonzo, Athanus Munyambo Ngozi and the wife of Athanus Munyambo Ngozi to record their statement as relates to the Complaint filed unless the individuals choose to waiver the right to record statements once summoned;

8. leave to file the audio recording of the main hearing and the transcription of the said recording as part of the record of appeal;

9. That the costs for this application be in the cause.

The application is premised on the grounds on the face of it and supporting affidavit of the Appellant ZACHARY MULI, where he confirms the averments in the supporting affidavit of his Counsel ALPHONSE O'MAKALWALA. He explains that the absence of his supporting affidavit was due to the fact he was unreachable and his Counsel was also having the main hearing of the Court Record transcribed from an audio file which was completed on 27th November, 2020. He attached the Transcribed Record prepared by his Counsel and insists it is evidence of material inaccuracy of the certified proceedings attached by the Lower Court. He sought for the Court to review its orders and grant conservatory orders. He insists the subdivision process has already begun at Mukaa Mukuu Farmers Cooperative Society.

The applications are opposed by the Respondent RICHARD MULI KILONZO who filed a replying affidavit where he deposes that the said applications are unmeritorious and ought to be dismissed with costs as the same do not demonstrate grounds for review for there is no new evidence which was not within the knowledge of the Applicant for the investigation report dated 9th July, 2019 was raised and considered in the lower court and the same is res judicata. He explains that there were no audio recordings of proceedings as no party was given leave to do so and if the same happened it was done in contempt and therefore the transcripts are inadmissible. Further, there is no certificate of printage as per section 78 of the Evidence Act showing the status of the device of the recording and therefore the same is a fabrication as well as photoshop as there exists proper proceedings as per the transcripts of the trial Magistrate. He avers that this Court is not a Criminal Court and cannot force people to record statements of the alleged criminal offence. Further, there was a report before the lower court on a similar issue and an officer testified in the trial court. He insists it is only the Directorate of Public Prosecutions who can order Police and this not being a Criminal Court, cannot give orders for a criminal process. He reiterates that the property in question is not under threat of being sold and the Appellant has all along blocked him from utilizing his portion.

The application was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the two Notice of Motion applications dated 18th November, 2020 and 4th December, 2000 including the respective affidavits and rivalling submissions, the following are the issues for determination:

- Whether the Court should grant a stay of execution of the judgement delivered on 7th October, 2020.

- Whether the Court should admit additional evidence in the form of transcribed audio recordings of the proceedings in the lower court.
- Whether this court has jurisdiction to make an order for the DCI to summon witnesses to record statements and file a final report.

The Appellant in his submissions contended that he had established sufficient grounds for the review of the orders issued as relates to the first application. Further, that he has established sufficient grounds for issuance of stay of execution of the judgement emanating from the lower court. He avers that he has established grounds for the grant of interim orders pending appeal. To buttress his averments he relied on the following decisions: **Pancras T. Swai V Kenya Breweries Limited (2014) eKLR; JMM V PMM (2018) eKLR; James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR; Kenya Human Rights Commission V Attorney General & Another (2018) eKLR; and Hunker Trading Company Limited V Elf Oil Kenya Limited (2010) eKLR.**

The Respondent in his submissions insists the Appellant was in contempt of court by recording proceedings without leave of court. Further, there was no reasonable ground advanced to warrant leave to add additional evidence. He explains that this court does not have jurisdiction to issue orders to the Director of Criminal Investigations to file a final report and summon the Respondent, his wife, one Athanas Ngovi and his wife to record their statements with him. He reiterates that the Appellants has not demonstrated sufficient grounds to warrant an order for review of the Application dated the 18th November, 2020 and the stay of execution of the judgement of the Lower Court. To buttress his averments, he has relied on the following decisions: **Kenya Human Rights Commission V Attorney General & Another (2018) eKLR; Benson Ambuti Adegwa & 2 others V Kibos Distillers Limited & 5 others (2020) eKLR and Giella V Cassman Brown (1973) EA 358.**

As to whether the Court should grant a stay of execution of the judgement delivered on 7th October, 2020.

On stay pending Appeal, Order 42 Rule 6(2) of the Civil Procedure Rules provides inter alia: **‘ No order for stay of execution shall be made under sub rule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’**

In the current scenario, judgement was delivered on 7th October, 2020. The Applicant being dissatisfied with the whole of the said judgement filed a Memorandum of Appeal dated the 18th November, 2020. The Appellant claims the Respondent is in the process of subdividing the suit land to his detriment. He argues that the suit land should be preserved to ensure neither party is prejudiced. The Respondent insists there is no danger of wastage of the suit land since the Appellant has always blocked him from using his portion.

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal while dealing with an issue of stay of execution pending appeal held that it is a discretionary power, a stay must be granted so that an appeal may not be rendered nugatory and judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

While in the case of **James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR** the Court of Appeal held that:

“an Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party”.

From a perusal of the lower court judgement, it emerged in evidence that the suit land is registered in the joint names of the Appellant and the Respondent, which fact the Appellant is opposed to. Further, from the averments in the Appellant’s supporting affidavit, insofar the application was filed without inordinate delay; it is my considered view that the Appellant has not demonstrated what substantial loss he stands to suffer if the stay order was declined. I opine that the suit land will still be registered in his name.

Based on the foregoing, while relying on the legal provisions cited above and associating myself with the decisions quoted, I find that the Appellant has failed to meet the **threshold set for granting stay of execution pending appeal and will decline to grant the orders as sought.**

As to whether the Court should admit additional evidence in the form of transcribed audio recordings of the proceedings in the lower court.

The Appellant has sought for orders to admit additional evidence and annexed in his supporting affidavit the transcribed audio recordings of the proceedings in the lower court. The Appellant has not confirmed to this court whether he was granted permission in the lower court to record the said proceedings. The Appellant insists insofar as there was no leave sought to record the proceedings, he relied on section 1A, 1B & 3 A of the Civil Procedure Act as well as Article 159 (2) (d) of the Constitution.

On admission of additional evidence on appeal, Section 78 of the Civil Procedure Act which provides that: -

“(1) Subject to such condition and limitations as may be prescribed, an appellate court shall have power—(a) to determine a case finally; (b) to remand a case; (c) to frame issues and refer them for trial; (d) to take additional evidence or to require the evidence to be taken; (e) to order a new trial. (2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

Further, Order 42 rule 27 of the Civil Procedure Rules that:-

“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reasons for its admission.”

In the case of **Walter Joe Mburu V Abdul Shakoore Sheikh & 3 Others [2015] eKLR** it was stated that:

“Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice. Being a plea to the Court’s discretion, we take the view that the length of time it takes to bring the application, in this case well over a decade, is a relevant consideration that militates against a favourable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice.

.....that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage.”(emphasis added).

See also the case of **Nayan Mansukhlal Salva v Hanikssa Nayan Salva [2019] eKLR** and **Kenya Human Rights Commission V Attorney General & Another (2018) eKLR**.

In relying on the legal provisions I have cited above and based on the facts as presented while associating myself with the decisions quoted, I find that since the Appellant never sought leave of Lower Court to record proceedings and has simply produced the said transcribed proceedings as a claim to have additional evidence; Further, he has also availed typed proceedings from Lower Court, I opine that the oxygen rules as well as Article 159 (2) (d) of the Constitution is not available to him at this juncture since the matter had been concluded in the Lower Court and the said proceedings cannot be deemed to be additional evidence. To my mind, I am not satisfied that the audio transcribed proceedings actually meet the definition of additional evidence as envisaged above. It is my considered view that since the Appellant felt dissatisfied with the proceedings in the Lower Court, he has already lodged an appeal and should await its determination. In the circumstance, I find that he is not entitled to the orders sought and will decline to grant them.

As to whether this court has jurisdiction to make an order for DCI to summon witnesses to record statements and file a final report.

On the prayers sought that the S.C.C.I.O Matungulu of the Directorate of Criminal Investigations do file a final report on the Complaint lodged by the Appellant/Applicant and obtain an Summoning Richard Muli Kilonzo, the wife of Richard Muli Kilonzo, Athanus Munyambo Ngozi and the wife of Athanus Munyambo Ngozi to record their statement as relates to the Complaint filed unless the individuals choose to waiver the right to record statements once summoned. I note in the proceedings in the lower court, a report dated 9th July, 2019 from the DCI was actually presented. I further note the Appellant is seeking for orders to obtain additional evidence in support of his case. In accordance with section 13 of the Environment and Land Court Act, which confers jurisdiction to this court, I find that this court is devoid of jurisdiction to grant the orders as sought.

It is against the foregoing that I find the Appellant’s Notice of Motion applications dated the 18th November, 2020 and 4th December, 2020 unmerited and will dismiss them.

Costs will be in the cause

DATED SIGNED and DELIVERED VIRTUALLY this 28TH day of FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE