



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT SIAYA

ELC NO. 27 OF 2021

WILLIAM OLOTCH OWAKO.....PLAINTIFF

VERSUS

CHRISTOPHER OSIRO OGUTU.....1ST DEFENDANT

CAROLINE ADHIAMBO OKELLO.....2ND DEFENDANT

RULING

Applicant's case

1. Pursuant to the provisions of **Section 3A** of the **Civil Procedure Act** and **Orders 40, 42** and **51** of the **Civil Procedure Rules**, the plaintiff has filed a notice of motion dated 30/06/2021 against the defendants seeking the following main verbatim reliefs:

a. Spent...

b. Spent...

c. Spent...

d. That pending the hearing and determination of the intended appeal the Honourable court be pleased to issue an order for temporary injunction restraining the 2nd Respondent from developing, disposing or dealing in any manner with the land parcel known as L.R. Number Uholo/Ugunja/1993.

2. The motion is supported by the affidavit of the plaintiff dated 30/06/2021. The grounds upon which the motion is hinged upon are that: (i) the plaintiff's suit was dismissed on 10/05/2019, (ii) the plaintiff intends to file an appeal and (iii) if stay of execution is not granted, the appeal will be rendered nugatory.

Defendant's case

3. The 1st defendant did not file a response to the motion while the 2nd defendant filed a replying affidavit dated 27/07/2021. She opposed the application and stated that the appeal has no merit and that the plaintiff was guilty of inordinate delay in filing the motion. She urged the court to dismiss the motion with costs.

The defendant's rejoinder

4. In a further affidavit dated 23/08/2021, the plaintiff reiterated averments in the motion and averred that his appeal had high chances of success. He contended that the delay in filing the motion was occasioned by failure of the court in availing typed proceedings to him in time.

The plaintiff's submissions

5. The plaintiff filed written submissions dated 11/01/2022. The plaintiff relied on **Order 42 Rule 6 (1)** of the **Civil Procedure Rules** which governs the legal framework of stay pending appeal. He placed reliance on the Court of Appeal decision of **Consolidated Marine vs Nampijja & Another, Civil Appeal No. 93 of 1989 (Nairobi)**. He submitted that he had established sufficient cause because the 2nd defendant has started developing the suit property and he would end up suffering substantial loss. He stated that he was willing to furnish

such security as shall be ordered by the court. Placing reliance on **Butt vs Rent Restriction Tribunal [1982] KLR**, he urged the court to exercise its discretionary powers in granting him stay of execution.

The 1st and 2nd defendants' submissions

6. The 1st and 2nd defendants filed their written submissions dated 20/01/2022 in opposition to the motion. They contended that the plaintiff had not met the criteria for the grant of injunction pending appeal. They placed reliance on the celebrated case of **Giella vs Cassman Brown [1973] EA 358**. They asserted that they will be highly prejudiced if the injunction is granted because the suit property had an ongoing construction. It was their case that the defendant had not made a case for injunction pending appeal.

Analysis and determination

7. Having considered the motion, supporting affidavit, annexures, replying affidavit and rival submissions, this court is of the considered view that the only issue falling for determination is whether the motion is merited.

I will proceed to analyze the legal and jurisprudential framework on the issue.

8. This court's jurisdiction to grant a temporary injunction pending hearing and determination of an appeal lies with **Order 42 Rule 6 (6) of the Civil Procedure Rules** and not **Order 40** as posited by the motion. This provision of law grants the court with discretionary powers to grant orders on such terms as it deems fit as long as the procedure for filing an appeal from subordinate court has been complied with. It provides thus: -

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.”

9. This court has observed that the plaintiff submitted as if he was dealing with a stay of execution pending instead of an injunction pending appeal. However, the settled principles for grant of an order of stay of execution or injunction pending appeal are more or less similar. In the case of **Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others [2021] eKLR**, the court held thus on this similarity;

“The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay of execution or injunction are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal... Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory”.

10. The defendant is praying that this court do issue an injunction against the defendants to restrain them from dealing adversely with the suit property to the prejudice of the plaintiff until the intended appeal is determined.

11. The question that then arises, does this court have jurisdiction to grant an injunction pending an appeal against its own decision? My understanding of **Order 42 Rule 6 (6)** of the **Civil Procedure Rules** is that this court sitting as an appellate court against the decisions of the lower court can grant an injunction against the decisions of the lower court. However, it cannot grant an injunction pending an appeal against its own decision. This court is persuaded by a line of judicial decisions including **Bartholomew Mwanyungu & 3 others v Florence Dean Karimi [2019] eKLR**, **Tahir Sheikh Said Investments Ltd v Administrator, TSS Grain Millers Ltd & 2 others [2019] eKLR** and **Chembe Katana Changi v Ministry For Lands & Settlement & 4 others [2014] eKLR** where the courts held that once the Environment and Land Court has rendered a judgement, the court became *functus officio*. This court rendered its judgement on 10/05/2019 and the plaintiff filed a notice of appeal against the decision of this court on 13/08/2019. On this ground, it is my finding that this court does not have the jurisdiction to entertain the motion and grant the orders sought by the plaintiff. Because the plaintiff has filed a Notice of Appeal in the Court of Appeal, he is at liberty within the provisions of **Rule 5(2)(b)** of the **Court of Appeal Rules** to move the Court of Appeal in an appropriate manner.

12. Even if this court would have had jurisdiction to entertain this application which it does not, this motion was filed two years after the decision of this court was rendered and in my view, a delay of two years to file an application for injunction pending appeal without giving any plausible explanation is inordinate and unreasonable.

13. Ultimately and for these reasons, I dismiss the Plaintiff's motion dated 30/06/2021 with costs to the defendants.

14. It is so ordered.

Ruling delivered virtually.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY, 2022

In the presence of:

Mr. Ochieng for the Plaintiff.

No appearance for the Defendant.

Court Assistant - Ishmael

HON. A. Y. KOROSS

JUDGE

10/2/2022