



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 103 OF 2017 (O.S)

JOSHUA KAMOING.....PLAINTIFF/APPLICANT

VERSUS

SIMON BARCHOK.....1st DEFENDANT/RESPONDENT

DANIEL BARCHOK.....2nd DEFENDANT/ RESPONDENT

PHILIP KIPSANG MARITIM.....3rd DEFENDANT/ RESPONDENT

FLORENCE CHEPKWONY (sued in her capacity as the Administrator of the estate of

PAUL KIPYEGON CHEPKWONY(deceased).....4th DEFENDANT/RESPONDENT

RULING

1. The application, for determination is the Notice of Motion dated the 23rd September 2021 filed pursuant to the provisions Section 1A, 3A and 98 of the Civil Procedure Act as well as Article 159 of the Constitution, was determined by way of written submissions. The said application is premised on the grounds therein as well as on the sworn affidavit by Joshua Kamoing dated the 23rd September 2021 wherein the Applicant seeks orders that the District Land Surveyor do visit the suit lands No. **Kericho/Boito/140** and **Kericho/Boito/1218**, cause survey and sub division of the properties and thereafter prepare mutation forms so as to facilitate the implementation of the court's judgment and decree of the 6th May 2020. The Applicant further seeks that the Deputy Registrar of this court do execute the application for consent to sub-divide and transfer as well as the mutation and transfer forms, and further that the OCS Commanding Koinin police station do provide security to both the Applicant and the District Surveyor for the purpose of enforcing peace during the survey and sub division exercise.

2. His submission is to the effect that pursuant to the holding in the judgment of 6th May 2020 which was entered in his favour entitling him to a third of the total acreage compromised in these properties known as No. **Kericho/Boito/140** and **Kericho/Boito/1218**, **the Respondents have rebuffed all the efforts to have the said judgment implemented as they continue to enjoy the exclusive occupation of the suit properties.**

3. **That there had been no stay of execution pursuant to the delivery of the judgment as the application seeking for the same had been dismissed by a ruling delivered on 21st May 2021 and there were no orders for stay from the Court of Appeal. The Applicant's submission was to the effect that court orders were not made in vain but were meant to be complied with and if for any reason a party had difficulty in complying, the honorable thing was to go back to court and explain the difficulty faced. That once a court order was made, the same was valid unless it was set aside on review or Appeal.**

4. The said application is opposed to the Replying Affidavit of the 2nd Respondent who did not file written submissions but who deponed that the same was frivolous, vexatious and an abuse of the court process as it was devoid of merit, was incompetent and misconceived and ought to be dismissed in the first instance for reasons that the same was tailored towards frustrating an ongoing process of Appeal against the Judgment of 6th May 2020, the Notice of Appeal dated the 27th May 2020 having been lodged in the Court of Appeal on 29th May 2020 as per the draft Record of Appeal herein annexed.

5. That the Appeal had not been filed as they awaited certified copies of the proceedings as evidenced by their letters of request herein annexed. That vide an application to the Court of Appeal in Civil Appeal No. E36 of 2021, the Respondents had sought orders of stay of execution of the orders of the honorable Court's Judgment which application was to be heard inter parties on the 8th November 2021 by the Court of Appeal.

6. That pending the Appeal in the Court of Appeal, it would be judicious and necessary for the status quo to be maintained in order to safeguard and/or preserve the suit properties. That no prejudice would be occasioned to the Plaintiff/Applicant if the status quo was maintained as he had his own property. That if the application was allowed and the Applicant proceeded to survey and transfer the suit properties, the intended Appeal would be an exercise in futility thus occasioning the Respondents irreparable damage, and justice would have been defeated.

Determination.

7. I have considered the application herein and the argument for and against it and the same is based on the grounds that pursuant to a judgment having already been entered in favour of the Applicant, that he now seeks orders that the district land surveyor do visit the suit lands No. **Kericho/Boito/140** and **Kericho/Boito/1218**, cause survey and sub division of the properties and thereafter prepare mutation forms so as to facilitate the implementation of the court's judgment and decree of the 6th May 2020. The respondent on the other hand has opposed the application for reasons that there is a pending application for stay of execution in the Court of Appeal. That if the application is allowed and the subject suit is surveyed and subdivided and transferred before the hearing of the said application in the Court of Appeal, the intended Appeal would be an exercise in futility thus occasioning the respondents irreparable damage.

8. I find the issue for determination in the circumstance being **whether to grant an order of execution of the judgment of 6th May 2020 pending the hearing and determination of the application pending before the Court of Appeal.**

9. The law is explicit under Order 22, rule 6 of the Civil Procedure Rules which provides as follows;

Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

10. Further the provisions of the act under Order 22, rule 22 stipulates that;

(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

11. Having this in mind, and further in consideration of the fact that the matter is before the Court of Appeal for interparty hearing on an application of stay of execution, of the judgment, Decree and subsequent process which in my view could either be dismissed or allowed, and further keeping in mind that the said application was to be heard inter-parties on the 8th November 2021, I am willing to indulge the Respondent by holding this application in abeyance awaiting the decision of the Court of Appeal. We can revisit this application thereafter. The matter shall now be mentioned after 30 days from today to confirm the status of the decision of the court of appeal and for further directions.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 24TH DAY OF MARCH 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE