



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 67 OF 2013

TERAH JORAM..... PLAINTIFF

VERSUS

NAHASHON DAUDI KISIERO.....1ST DEFENDANT

BENJAMIN NDULULU MEINY KISIERO..... 2ND DEFENDANT

YONA BRAMWEL MUSEE..... 3RD DEFENDANT

ANN DAUDI.....4TH DEFENDANT

PHYLIS CHERUBET NDIEMA.....5TH DEFENDANT

SIMEON CHANGWANI NDIEMA..... 6TH DEFENDANT

ANN KAIBEI TENDETI.....7TH DEFENDANT

LAWRENCE CHERUI..... 8TH DEFENDANT

JONES CHERUI..... 9TH DEFENDANT

HAILA CHERUBET..... 10TH DEFENDANT

BEATRICE KIMIYEL..... 11TH DEFENDANT

JOHN CHEPKONYI KIMKUNG.....12TH DEFENDANT

BUGAA A.I.C PRIMARY SCHOOL..... 13TH DEFENDANT

RULING

1. By a plaint dated 13th March 2013, **TERAH JORAM** (the Applicant) sought the main remedy that **NAHASHON DAUDI KISIERO, BENJAMIN NDULULU MEINY KISIERO, YONA BRAMWEL MUSEE, ANN DAUDI, PHYLIS CHERUBET NDIEMA, SIMEON CHANGWANI NDIEMA, ANN TAIBEI TENDETI, LAWRENCE CHERUI** and **JONES CHERUI** (the 1st to 9th Respondents respectively) be evicted from the land parcel **NO ELGON/ KAPSOKWONY/478** (the suit land) for being trespassers thereon.

2. The 1st to 9th Respondents resisted that claim stating that the Applicant had in fact sold portions of the suit land either to some of them directly or through their relatives and that they were therefore not trespassers. They therefore Counter – Claimed that they were entitled to their various portions of the suit land by way of adverse possession having been in occupation and possession thereof for over twelve (12) years.

3. By a consent recorded herein on 29th April 2019, **HALLA CHERUBET, BEATRICE KIMIYEI, JOHN CHEPKONY KIMKUNG** and **BUGAA AIC PRIMARY SCHOOL** (the 10th to 13th Respondent) were joined as defendants in this case.

4. Having heard the parties, this Court delivered it's Judgment on 17th December 2021 in which it dismissed the Applicant's claim but

entered Judgment for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 10th, 12th and 13th Respondents as per their Counter – Claim. The Applicant was ordered to execute all the relevant documents within thirty (30) days of the delivery of the Judgment in order to facilitate the registration of the various portions of the suit land in favour of the Respondent and in default, the Deputy Registrar would be at liberty to do so on his behalf.

5. The Applicant felt aggrieved by that Judgment and filed a Notice of Appeal on the same day.

6. He also filed on the same 17th day of December 2021, a Notice of Motion under Order 42 Rule 6 of the Civil Procedure Rules seeking the following remedies: -

(a) Spent

(b) Spent

(c) That there be a stay of execution of the Decree issued on the 17th December 2021 pending the hearing and determination of the appeal to the Court of Appeal.

(d) Costs.

The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit dated 14th January 2022.

7. The gravamen of the application is that the Applicant lives on the suit land which is his only asset and the effect of the Judgment and decree sought to be appealed is that he will automatically be evicted from the said land if the decree is executed.

8. That this Court entered Judgment for the interested parties (later the 10th to 11th defendants) without regard that they had filed no Counter – Claim. That the appeal raises serious issues both of law and fact including the fact that this Court awarded the Respondents the entire suit land which the Applicant occupies and that will result in his homes being demolished yet that is where he and his family have lived for over sixty (60) years.

9. Further, that this application has been filed without inordinate delay and the Applicant is ready to abide by any orders with regard to security which this Court may impose for the due performance of any decree. That no prejudice will be occasioned to the Respondents and it is the Applicant who stands to suffer irreparable loss.

10. When the application was placed before me on 17th January 2022, I directed that it be canvassed by way of written submissions. The Applicant would file and serve the submissions within 14 days and the Respondents were also required to respond within 14 days of service. The matter would then be mentioned on 16th February 2022 to confirm compliance and take a date for ruling.

11. However, when the matter was mentioned on 16th February 2022, only **MR BW'ONCHIRI** Counsel for the Applicant had filed and served his submissions. **MR KHAKULA** Counsel for the Respondents did not attend Court although there was an affidavit of service filed. The Notice of Motion dated 14th January 2022 and filed on 17th January 2022 and filed on 17th January 2022 is therefore not opposed.

12. Notwithstanding the fact that the application is not opposed, I must consider if it meets the threshold of the relevant law and precedents.

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that: -

6(1) "No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) 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." Emphasis mine.

13. The Applicant was therefore required to satisfy the following conditions to entitle him to the order of stay of execution pending appeal: -

1. Show sufficient cause.
2. Demonstrate that unless the order for stay is granted, substantial loss will ensue to him.
3. File the application without unreasonable delay.
4. Offer security.

The Applicant has annexed to his application a Notice of Appeal filed on 17th December 2021. That is sufficient cause. He also moved to Court on 17th January 2022 exactly a month after the delivery of the Judgment sought to be appealed. There is no unreasonable delay. In paragraph 10 of his supporting affidavit, he has deponed as follows: -

10 “That I will abide with such security as the Hon Court may order for the due performance of the decree.”

In my view, that averment satisfies the requirement of offering security.

14. What has caused me some concern is whether the Applicant has in fact met the requirement of demonstrating that unless the order for stay of execution is made, he will suffer substantial loss which, as was held by **PLATT Ag J.A** (as he then was) in **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410**, is the **“cornerstone”** of such an application. He stated thus: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
Emphasis mine.

15. In trying to demonstrate that he will suffer substantial loss if the order sought is not allowed, the Applicant has pleaded in paragraph 7(a) of his affidavit as follows: -

7(a) “That I stay on the suit parcel and the defendant’s Counter – Claim having been allowed and if the decree is implemented at this stage means that I will have to be evicted or my homes demolished due to the fact the Hon Court awarded to the defendants and interested parties the entire parcel a fact that will put me into great loss and damage.”

That is not entirely correct. The Green Card to the suit land shows that it measures 15.5 Hectares which is 38.2 acres. The total acreage of land which this Court awarded to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 10th, 12th and 13th defendants as per their Counter – Claims including the plot measuring 132 x 38 feet awarded to the 10th defendants adds up to slightly over 29½ acres. That is the only portion of the suit land that stands to be affected by the Judgment sought to be appealed. So it is not true that the Applicant will be deprived of the **“entire parcel”** of land should the decree herein be executed. In any event, there is no evidence to suggest that the defendants intend to dispose of the portions of land which this Court has ordered to be registered in their names. Why for example, would the Cabinet Secretary Treasury dispose off the 4 acres on which **BUGAA A.I.C PRIMARY SCHOOL** stands?

16. Having said so, however, and taking into account that the application was not opposed and that the defendants will not be prejudiced by any orders of stay since they will remain in occupation of their respective portions as awarded in the Judgment, this Court is inclined to grant an order of stay of execution but on conditions.

17. The up – shot of all the above is that the Notice of Motion dated 14th January 2022 is hereby allowed in the following terms: -

1. A stay of execution of the Judgment dated 17th December 2021 is granted on the condition that the Applicant deposits with the Deputy Registrar within 30 days the title deed to the land parcel NO ELGON/KAPSOKWONY/478.
2. The Applicant shall also deposit with the Deputy Registrar within 30 days signed blank transfer forms for each of the defendants who have been awarded land as per their Counter – Claims.
3. The above documents to be kept in safe custody by the Deputy Registrar until the appeal in the Court of Appeal is heard and determined or until further orders.
4. In default of (1) and (2) above, the order of stay shall lapse.
5. No orders as to costs.

BOAZ N. OLAO.

J U D G E

24TH MARCH 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 24TH DAY OF MARCH 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

BOAZ N. OLAO.

J U D G E

24TH MARCH 2022.