



**Ministry & another v Were & 4 others (Suing on behalf of themselves and on behalf of the members of the Holy Trinity Church In Africa) (Environment & Land Case 879 of 2015) [2022] KEELC 2926 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2926 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ENVIRONMENT & LAND CASE 879 OF 2015**

**A OMBWAYO, J**

**MAY 13, 2022**

**(FORMERLY H.C.C.C. NO. 114 OF 2011 (O.S))**

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 (NOW REPEALED)**

**AND**

**IN THE MATTER OF SECTIONS 7,17,38 OF THE**

**LIMITATIONS OF ACTIONS ACT,CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF PARCEL OF LAND NO. SUNA EAST/WASWETA 1/13108**

**AND**

**IN THE MATTER OF AN APPLICATION TO BE REGISTERED BY ADVERSE POSSESSION**

**BETWEEN**

**HERA GOSPEL FELLOWSHIP MINISTRY ..... 1<sup>ST</sup> APPLICANT**

**JAMES HESBORN OLANDO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JACOB OGUTU WERE ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD ASOL OKOWA ..... 2<sup>ND</sup> RESPONDENT**

**JAMES OMOLO OLOO ..... 3<sup>RD</sup> RESPONDENT**

**MOSES WAYUMBA OKOTH ..... 4<sup>TH</sup> RESPONDENT**

**HOLY TRINITY CHURCH IN AFRICA ..... 5<sup>TH</sup> RESPONDENT**

**SUING ON BEHALF OF THEMSELVES AND ON BEHALF OF THE MEMBERS**

**OF THE HOLY TRINITY CHURCH IN AFRICA**



## RULING

### Brief Facts

1. The defendants/applicants herein filed a notice of motion application under certificate of urgency on July 5, 2021 under section 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules of 2010 and other enabling provisions of Law seeking for the following orders:
  1. That this application be certified as urgent and the same be heard ex parte in the first instance.
  2. That this Honourable court be pleased to stay the execution of the Decree that has been issued in respect of the Judgment entered herein on September 5, 2019 by Hon. S. Kibunja, pending Appeal.
  3. That the costs of this Application be provided for.
2. The Application was based on the grounds that the Applicants have an arguable Appeal with a high probability of success and if the said stay of execution is not granted the Applicants' appeal will be rendered nugatory and the Applicants will suffer irreparable damage and embarrassment.
3. It was stated that unless the Application is granted, the Respondents may levy execution against the Applicants, that the Applicants are ready and willing and able to deposit such sum as this Honourable court may order to be deposited in a joint escrow account to the order of both the Applicants and the Respondents Advocates on record.
4. That substantial loss will result to the Applicants unless the orders sought are granted, the application is made without unreasonable delay and it ought to be granted in the interests of equity and justice.
5. The Application was supported by the Affidavit of James Hesbon Olando who deposed and stated that Judgment in this case was delivered on 5<sup>th</sup> September 2019 in favour of the Plaintiffs/Respondents and that him and his co-defendant were aggrieved and dissatisfied with the Judgment and instructed their advocates on record to appeal against the same.
6. That he was surprised when he was served with notice to show cause why execution should not issue specifically seeking that he be committed to jail unless he pays the total sum of Kshs.513,524.06 as more particularly disclosed in the aforesaid notice.
7. He stated that he believes if the decretal amount is paid over to the Plaintiff's the intended appeal will be rendered nugatory and they will suffer irreparable loss and damage. That unless the Application for stay is heard urgently on a priority basis, the Plaintiff threaten to levy execution and with a danger that he might be committed to civil jail.
8. He requested the court to be minded to grant stay of execution of the decree pending appeal from the judgment of this court made on September 5, 2015 and that the Application is made without unreasonable delay. He further stated that the intended appeal is not frivolous and raises substantial matters for consideration by the court of appeal and if the order sought is not granted, the Appeal will be rendered nugatory and the Applicants will suffer substantial loss and damage.
9. The matter was placed before the Judge and the same was not certified and the court directed that the Applicants to serve the Respondents and the matter shall be heard on September 21, 2021.



10. The plaintiffs/respondents filed grounds of opposition on 20<sup>th</sup> september 2021 under order 51 rule 14(1)(c) of the [Civil Procedure Rules](#) on the following grounds:
  - a. That the Defendants’ Application is frivolous and vexatious and has been made in bad faith and solely with a view to frustrating the Plaintiffs from enjoying the fruits of the Judgment made in their favour.
  - b. That the Defendants/Applicants are guilty of laches; the present application has not been “made without unreasonable delay” as required by the provisions of order 42 rule 6 (2) (a) of the [Civil Procedure Rules](#), in that the Judgement was delivered on 5<sup>th</sup> September 2019 and the costs were thereafter taxed on 17<sup>th</sup> December 2019, and the application has been filed on 5<sup>th</sup> July 2021 almost two years after the Judgment was delivered and no explanation has been given for this delay.
  - c. That the Defendants have not presented anything which would satisfy this court that substantial loss may result to him if stay is not granted as required by the provisions of order 42 rule 6 (2) (a) of the [Civil Procedure Rules](#).
  - d. That the Defendants have not given any security for the due performance of such decree or order as may ultimately be binding on him as required by the provisions of orders 42 rule 6 (2) (b) of the [Civil Procedure Rules](#);
    - i. If stay of proceedings is to be granted, it must be granted on terms.
    - ii. By his Affidavit sworn on 2<sup>nd</sup> June 2021 and filed on 3<sup>rd</sup> June 2021, the 2<sup>nd</sup> Defendant had stated on oath that he was willing “to liquidate the sum of Kshs. 513,524/= by equal monthly instalments of Kshs. 100,000/= with effect from June 30, 2021 and thereafter on 30<sup>th</sup> day of subsequent month till payment in full” but despite that clear statement, he has not paid even one single installment, thereby confirming that this application has not been made in good faith.
    - iii. In their supporting Affidavit, the Defendants have not offered to deposit the taxed costs in an interest earning account as a sign of their good faith and as part of their effort to offer security for the due performance of such decree or order as may ultimately be binding on them as required by the provisions of order 42 rule 6 (2) (b) of the [Civil Procedure Rules](#).
  - e. That the Defendants /Applicants have not demonstrated that they have an arguable appeal that is to say that this appeal is not frivolous in terms of the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules.
  - f. That the Defendants /Applicants have not demonstrated that their appeal if it were to succeed, would be rendered nugatory or worthless if stay is not granted.
  - g. That the Defendants/Applicants’ Application in its totality does not satisfy the conditions for the grant of stay of execution as set out under the provisions of order 42 rule 6 of the [Civil Procedure Rules](#).
11. The Plaintiffs/Respondents prayed that the Defendants’ Application for stay of execution be dismissed with costs.
12. On September 21, 2021 when the matter came up for hearing parties were absent and the court directed that the matter shall be mentioned on November 10, 2021. On November 10, 2021 when the matter



came up for Mention before the Judge, parties were directed to file, serve and exchange submissions within 15 days from the date of service.

13. I have perused this file and do confirm that parties failed to comply with the orders of the court. I have also analyzed the Application and do find that it lacks merit. This Application is therefore dismissed with costs the Plaintiffs/Respondents.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF MAY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the Covid-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

