



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 261 OF 2010

BETWEEN

**NICK ODHIAMBO OLOO.....APPELLANT/
APPLICANT**

AND

**CHRISTOPHER OYIEYO
BATIRESPONDENT**

**(Being an appeal from the judgment and decree of Hon. C.L. Yalwala, RM, dated and delivered on
the 23rd November 2010**

in Oyugis PMCC NO. 82 of 2010)

RULING

- 1.** The appellant/applicant was the defendant while the respondent was the plaintiff in Oyugis PMCC No. 82 of 2010. Judgment in the said suit was delivered on 23rd November 2010 whereby an order of permanent injunction was granted restraining the applicant herein from interfering with the disputed portion of land measuring 1.06 Hectares in Title Number **WEST KARACHUONYO/KAWADHGONE/709** by burying his late brother thereat. The applicant was also condemned to pay costs of the application.
- 2.** The applicant has appealed to this honourable court against the whole of the said judgment and decree.
- 3.** By the Notice of Motion dated 15th December 2010 and filed in court on the same date, the applicant prays for an order of stay of execution of the judgment and decree dated 23rd November 2010 issued vide Oyugis PMCC No. 82 of 2010, together with all the consequential orders pending the hearing and determination of the appeal herein. It is the applicant's prayer that the costs of this application abide the outcome of the appeal.
- 4.** The application is supported by the affidavit sworn by Nick Odhiambo Oloo on 15th December 2010 and also by the following grounds:-

- a) **The Appellant/Applicant has already preferred an Appeal to this Honourable Court against the Judgment and Decree issued on the 23rd November 2010, vide OYUGIS SRMCC NO. 82 OF 2010.**
- b) **The Appeal, which has already been preferred, raises salient, plausible and/or pertinent issues of law and hence same has overwhelming chances of success.**
- c) **The Judgment appealed against has tactically awarded the Respondent a substantial portion of LR NO. WEST KARACHUONYO/KAWADHGONE/709, (hereinafter referred to as the suit land), without a pleading and/or claim to that effect.**
- d) **The award of a portion of the suit land in favour of the Respondent has conferred and/or clothed the Respondent with interests (sic) over the disputed portion.**
- e) **Consequently, the Respondent is likely and/or bound to enter and/or take possession of the disputed portion.**
- f) **In the premises, the entry upon and/or taking possession of the disputed portion of the suit land, would affect and/or alter the character of the disputed portion of the suit land.**
- g) **Besides, the Respondent is likely to destroy and/or damage the houses, Homestead and properties of Zablon Ojwang Oloo, now Deceased, which is situate on the disputed portion of LR NO. WEST KARACHUONYO/KAWADHGONE709.**
- h) **The entry and/or taking possession of the disputed portion, would occasion and/or inflict substantial and irredeemable loss to the Appellant/Applicant.**
- i) **Consequently, it is necessary to preserve and/or protect the substratum of the Appeal.**
- j) **At any rate, the instant Application has been made without unreasonable delay.**
- k) **The Respondent would not suffer any prejudice if the orders sought herein are granted.**
- l) **Nevertheless, the Respondent herein, would still be entitled to the disputed portion of the suit land, should the Appeal so far preferred, be eventually dismissed.**
- m) **This Honourable Court is obliged to afford the Appellant/Applicant reasonable opportunity and/or facilities, to pursue the Appeal.**
- n) **Consequently, the Honourable Court should not obstruct and/or circumvent the Appellant's/Applicant's pursuit of the Appeal.**
- o) **It is in the interest of justice that the application herein be heard and allowed.**

5. The application is opposed vide the Replying Affidavit of Christopher Oyieyo Bati dated 23rd February 2011. The deponent avers that the applicant's Notice of Motion is untenable, an abuse of the process of the court and supported by a false affidavit. The deponent also avers that the report of the District Land Registrar which the applicant now seeks to rely on was rejected by both parties as the same contains no useful information on the disputed portion of land. He also says that the applicant has misled the court by alleging that his deceased brother had established a home on the disputed portion of land in the year 2000 when the same was done in the year 2005. The deponent thus contends that because of these falsehoods, this appeal has no chances of success. He wants the application dismissed with costs.

6. The background to this appeal is that the Respondent herein sued the applicant in Oyugis PMCC No.

82 of 2010, contending that 1.06 hectares of Title Number KARACHUONYO/KAWADHGONE/709 had been encroached upon by the deceased Zablon Ojwang Oloo, who was a brother to the applicant herein. The Respondent alleged that he was the registered owner of the suit land, hence the proceedings by which the Respondent sought and obtained a restraining order against the applicant.

7. It was contended at the hearing of this application that if the orders of the lower court were to be executed as has been threatened, substantial injustice and loss will be suffered by both the applicant and the deceased Zablon Ojwang' Oloo and that no amount of monetary compensation can pay for such injustice/loss. Counsel for the applicant also submitted that the applicant was ready and willing to furnish such security as this honourable court may order.

8. On the other hand, counsel for the Respondent argued that the applicants, having failed to comply with the conditional order of stay issued by the court in Kisumu on 15th December 2010 should not be heard to be asking for the stay orders that were irregularly extended on 16th February 2011 to be confirmed. Counsel submitted that the said orders which were given for 14 days only, had lapsed by the time they were extended on 16th February 2011.

9. Counsel for the Respondent also submitted and contended that the applicants have falsified all the information they have placed before the court. The Respondent has also accused the applicants of stalling each and every step undertaken by the Respondent towards administering the estate of the deceased; and therefore that the applicants have not come to court with clean hands.

10. It was also submitted that the applicant's appeal has no chances of succeeding since the award made by the Migori District Land Disputes Tribunal was neither appealed against nor brought into the High Court for quashing by way of a Judicial Review application.

11. It was further contended that the applicants are not likely to comply with the terms of any orders that may be issued by this Honourable court because they are in the habit of not complying with court orders.

12. In reply to the submissions made on behalf of the Respondent, counsel for the applicants submitted that the order issued by the court on 15th December 2010 had a life span upto and including 15th January 2011 because of the provisions of **Order 50 Rule 31** of the **Civil Procedure Rules**. Counsel also submitted that the Respondent's submissions that the applicants had failed to pay taxed costs were misplaced because there was no execution due to the stay orders that were in force.

13. After weighing the two contending views, the issue that arises for determination is whether the applicants have satisfied the conditions for the granting of a stay order as stipulated by **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. These conditions, all of which must be fulfilled by the applicants are that:-

- a) *the applicants must demonstrate to the satisfaction of the court that they will suffer substantial loss unless the order sought is grant; and*
- b) *The application has been brought without undue delay; and*
- c) *The applicant is ready and willing to furnish such security as may be ordered by the court as security for the due performance of such decree or order as may be binding on him.*

14. After weighing the submissions made and the facts of this case, I am satisfied that the applicant has satisfied the three conditions for the granting of the order for stay of execution. The applicants have demonstrated that there are a number of legal issues that need to be cleared concerning the estate of the deceased. I am also satisfied that this application was brought without undue delay and thirdly the applicant has confirmed to comply with such conditions as the court may impose.

15. Accordingly, the application dated 15th December 2010 be and is hereby allowed. The order for stay of execution is granted on condition that the applicants deposit into court the sum of Kshs.150,000/= into court within the next 7 days from the date of thi ruling for the due performance of this order. In default of the deposit, the stay order shall lapse after the 7 day period.

16. The Respondent shall have the costs of this application.

Dated and delivered at Kisii this 07th day of April, 2011.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mrs. Asati for Oguttu (present) for the Applicant

Mr. Onyino (present) for the Respondent

Mr. Bibu (present - Court Clerk.