



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 759 OF 2017

(Formerly Kisii ELC Case No. 169 of 2013)

JARED AJINA OKWACH

BENARD JUMA OTIENO.....PLAINTIFF/RESPONDENTS

Versus

VICTORIA ACHIENG YONGO

GEORGE OTIENO YONGO.....DEFENDANTS/APPLICANTS

RULING

1. The present Ruling is in regard to a Motion on Notice date 13th December 2019 duly filed in court on even date under Order 42 Rule 2, 3, & 4 and Order 51 of the Civil Procedure Rules 2010 and Section 63 (e) of the Civil Procedure Act Chapter 21 Laws of Kenya and all other enabling provisions of Laws of Kenya. (The motion herein). The 2nd defendant, George Otieno Yongo (The applicant herein) who appears in person further to a notice of intention to act in person dated and filed on even date, is seeking orders infra;

a) Spent

b) THAT this honourable court be pleased to issue an order for stay of execution pending the hearing and determination of the appeal preferred in this matter.

c) That costs of this application be provided for.

2. The Motion is anchored on a seventeen (17) paragraphed supporting affidavit sworn on even date by the applicant and annexed documents marked as "GOY -1" and GOY -2" being judgment delivered on 29th October, 2019 and Notice of Appeal dated 11th November 2019 respectively. The motion is further anchored on grounds (a) to (g) set out

In its face and noted accordingly.

3. Briefly, the applicants laments, inter alia, that judgment herein was rendered as per document marked as "GOY-1" and there was no stay of judgment thereof. That he has filed an appeal against the said judgment as shown by the notice (GOY-2). That he currently ploughs the suit parcels of land, reference numbers Suna West/Wasweta 1/15650 and 15644 that form the source of his livelihood. That, he is bound to suffer a lot of hardship if the decree herein is executed. That he has mounted the motion without any reasonable delay and that this court has the powers to grant the orders sought herein in the interest of justice.

4. The plaintiff namely **Jared Ajina Okwach and Bernard Juma Otieno**, the 1st and 2nd respondents respectively through M/s Oguttu, Ochwangi, Ochwal and Company Advocates, opposed the motion by way of a statement of grounds of opposition of even date and filed in court on 16th January 2020. The grounds are that:-

i) The instant Notice of Motion Application, is Pre-mature, misconceived, incompetent and otherwise legally untenable.

ii) The 2nd Defendant / Applicant herein, having hitherto been represented by a firm of Advocates, upto and including the delivery of the judgment, same cannot mount and/or commence the instant application in own name. Consequently, the instant Application is void and/or otherwise defective.

iii) In any event, the instant Application is contrary to and in violation of the Provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

iv) In any event, the 2nd Defendant/ Applicant, has not espoused and/or established the conditions, to warrant grant of Orders of Stay of Execution, pending the hearing and determination of an Appeal. Consequently, the Application herein is misconceived.

v) On the other hand, the 2nd Defendant / Applicant has not laid before the Honourable Court any scintilla of evidence, pertaining to and/or concerning substantial loss. Consequently, the Application by the 2nd Defendant /Applicant is deficient and/or otherwise devoid of sufficient cause.

vi) in any event, the instant Application filed and/or mounted on behalf of the 2nd Defendant / Applicant, does not meet the minimum threshold, established pursuant to and/or by dint of Order 42 Rules of the Civil Procedure Rules, 2010.

vii) Notwithstanding the foregoing, the Plaintiff / Applicant herein has not espoused and/or established any sufficient basis and/or cause, to warrant the granting of the instant Application.

viii) Consequently, the 2nd Defendant / Applicant herein has not espoused and/or established any sufficient basis and/or cause, to warrant the granting of the instant Application.

x) In the premises, the Notice of Motion Application dated 13th December 2019 herein is devoid of merits, whatsoever and / or howsoever.

5. Simultaneously filed with the said grounds, is a thirty-five (35) paragraphed replying affidavit sworn on even date by the 1st respondent. He deposed inter alia, that the motion is devoid of bona fides and is otherwise inspired by ulterior motives to use the delay in the issuance of titles in favour of the respondents who lawfully bought the suit parcels of land. That the 2nd applicant is the stunting block thereof as revealed in the court proceedings and the judgement herein.

6. The 1st respondent also deposed that the applicant has failed to meet the requisite minimum conditions as the motion has been made with undue delay which has not been accounted for and there is no evidence of loss that the applicant is expected to suffer. That the order of stay has been sought in a vacuum. He termed the motion premature, irregular and legally untenable in the circumstances.

7. On 15th January 2020, this court ordered and directed that parties to argue the motion by written submissions, see Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.

8. The orders of 15th January, 2020 were extended on 14th November 2020. However, the applicant failed to file and serve submission or at all.

9. Learned Counsel for the respondents filed and served six (6) paged submissions dated 20th December, 2020 on 24th February, 2020. Reference was made to the background of the case and framed two issues for determination namely whether the applicant has satisfied the conditions set for the grant of stay of execution pending the appeal and which party is entitled to the costs of the motion.

10. Counsel cited Order 42 (supra) and analyzed the issues not in favour of the grant of orders sought in the motion. Counsel further relied on three (3) decisions namely **Dr. G. N. Muema P/A Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another (2018) eKLR**, **Ndegwa Gichine vs Sicily Warware Njira (2028) eKLR** and **Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR 417** that the three (3) prerequisite conditions set out in Order 42 (supra) cannot be severed and have not been satisfied in the motion, among other things.

11. I have carefully considered the entire motion, the statement of grounds of opposition, the replying affidavit and the respondent's submissions including all the authorities cited therein. In that regard, the issues for determination herein are as identified in the respondents' submissions and proceed to embrace the twin issues accordingly.

12. The motion is generated under **Order 42 Rule 2 (supra)** which sets out the three (3) prerequisite conditions for the grant of stay of execution pending appeal thus:-

“ No order for stay of execution shall be made under subrule (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 out 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 added)

13. In respect of substantial loss, I am guided by the case of **New Stanley Hotel Ltd vs Arcade Tobacconist Ltd (1980) KLR 757**. The applicant contends that he is bound to suffer a lot of hardship and substantial loss in case the Judgment decree is executed and the appeal is thereafter allowed as disclosed at ground 5, paragraphs 7 to 10 of his supporting affidavit and submissions. That the title of the suit property, **LR NO. Suna West/Wasweta 1/ 155650 and 15644** may revert to original status thus, causing him loss beyond proportion.

14. The respondents asserted that the applicant has not offered sufficient evidence in support of this contention. That the 2nd applicant is dishonest and the stumbling block in concluding the transactions concerning the transfer and registration of the suit property in the name of the 2nd respondent. That the doctrine of estoppel to apply thereby.

15. There is no doubt that a party has a vested right to the judgment which ought to be effectual; see **Shahmad =vs= Shamji Bros and another (1957) EA 438**.

16. In **Blue Shield Insurance company Ltd =vs= Mahinda (2009) KLR 551, at 561**, the Court of appeal held, inter alia;-

“...That the applicant is likely to suffer great hardship in the nature of financial loss which would be out of proportion to the loss that the respondent is likely to suffer”

17. In the instant scenario, the applicant has shown that the suit parcels of land form the source of this income and livelihood. There is no dispute that the respondents have substantially developed the suit parcels of land. Therefore, they may further develop the same, acquire proprietorship thereof and if the stay sought herein is not granted, the applicants are likely to suffer substantial loss as envisaged in **Muema Gichine and Blue Shield Insurance Ltd cases (supra)**.

18. In regard to delay, it is also not in dispute that judgment was rendered on 29th October, 2019, notice to appeal is dated 11th November 2019 while the present application was initiated on 13th December 2019, Quite clearly, there was delay of approximately forty-five (45) days in commencement of the application bearing in mind Order 50 of Rule 8 of the Civil Procedure Rules,2010 on computation of days.

19. This court is aware of the application of the principles of equity which include; that delay defeats equity as stipulated under **Article 10 (2) (b) of the Constitution of Kenya,2010**. In the motion, was the delay inordinate?

20. In the case of **Philip Chemwolo and another =vs= Augustine Kubende (1982-88) KAR 103**, Apaloo , JA opined inter alia, that four weeks delay to enter appearance, judged against the facts of the case and the surrounding circumstances, would be wrong and just. That the appellant should be let to defend. Indeed, I subscribe to the said decision and find that the period of delay herein is not inordinate and that the applicant be let in to have his intended appeal as envisaged in the notice of appeal marked as “GOY-2”, heard on it’s merits in the spirit of **Articles 25 (c) , 48 and 50 (1) of the Constitution (supra)**.

21. As regards security, it is trite law that no party is exempted from providing security for the due performance of a decree as prescribed; see **Doshi Iron Mongers Ltd=vs= Kenya Revenue Authority and another (2020) eKLR**.

22. I take into account the assertion for and against the grant of orders sought in the motion. It is within the discretion of the court based on genuine conditions, grounds, merit and dispatch as observed by the Court of Appeal in the case of **Malindi Law Society of Kenya =vs= Law Society of Kenya Nairobi Branch and 5 others (2017) eKLR, Butt case (supra)** alongside the provisions of sections 1A,1B,3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, Sections 3 and 13 (7) (a) of the Environment and Land Court Act,2015 (2012) to grant the orders sought in the motion in order to preserve the suit property.

23. Moreover, it is settled law that the court has the constitutional and statutory mandate to safeguard the character and integrity of the subject of the intended appeal, pending the resolution of the contested issues; see the case of Board of **Governors Moi High School Kabarak and another =vs= Malcolm Bell (2013) eKLR**.

24. To that end, I find that the applicant has satisfied the cumulative conditions set out in **Order 42 Rule 6 (2) (a) and (b) supra** as held in the case of **Trust Bank Ltd =vs= Ajay Shah and 3 others (2012) eKLR** at page 22. The motion is merited in the circumstances.

25. A fortiori, I hereby proceed to allow the motion in the terms infra;-

a) Stay of execution as per prayer number 3 sought therein is granted accordingly.

b) The applicant shall deposit security in the sum of Kshs. 200,000/= (Two Hundred Thousand only) in this court within the next thirty days (30) from this date in default the orders of stay granted herein to lapse automatically.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of January, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Mulisa learned counsel for the respondent.

Tom Maurice - Court assistant