



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 161 OF 2017

LEONORA AUMA OINGO PAINTIFF

VERSUS

CLEMENTINA AMODING WAKASIKA.....DEFENDANT

R U L I N G

On 29th June 2020, this Court delivered Judgment herein ordering the defendant to vacate the land parcel **NO BUKUSU/SOUTH KANDUYI/2061** (the suit land) within 6 months and awarding the plaintiff the sum of Kshs. 20,000/= being damages for trespass. Plaintiff was also awarded costs of her suit and the dismissed Counter – Claim by the defendant.

What calls for my determination in this ruling is the defendant/Applicant's Notice of Motion dated 18th January 2021 in which she seeks the following orders:-

(a) Spent

(b) Spent

(c) That there be a stay of execution of the decree herein pending hearing and determination of the Court of Appeal Case No 121 of 2020.

(d) The costs abide the outcome.

The application is based on the grounds set out therein and is also supported by the affidavit of **CLEMENTINA AMODING WAKASIKA** the Applicant herein.

The gist of the application is that the Applicant has lived on the suit land from 1982 and has no other home. Her eviction therefore will cause her total hardship, prejudice and irreparable loss yet the plaintiff/respondent has never lived on the suit land. That being dissatisfied by the Judgment of this Court, she has filed at the Court of Appeal, appeal **No 121 of 2020** which will be rendered nugatory and an academic exercise.

Annexed to the application is Notice of Appeal lodged herein on 2nd July 2020 as well the decree issued on 28th August 2020.

The application is opposed and the Respondent herein (**LEONORA AUMA OINGO**) has filed a replying affidavit and described the application as lacking in merit, defective and not meeting the threshold for stay of execution as envisaged under **Order 42 Rule 6** of the **Civil Procedure Rules**. That the application has failed to establish any arguable appeal nor attached a Memorandum of Appeal. That the Applicant admitted that she still owes the Respondent the balance of the purchase price of the suit land since 1982 and that is why her Counter – Claim for adverse possession was dismissed. That there is nothing to show that appeal **No 121 of 2020** has in fact been filed at the Court of Appeal. That this application has been filed some seven (7) months out of time which delay is inordinate and aimed at denying the Respondent an opportunity to reap the fruits of her Judgment. That what triggered this application is the Respondent's letter dated 5th January 2021 and this application has not been brought in good faith and should be dismissed.

The application was canvassed by way of written submissions. The same were filed both by **MR SICHANGI** instructed by the firm of **J. W. SICHANGI & COMPANY ADVOCATES** for the Applicant and by **MS SHIMOLI** instructed by the firm of **SHITSAMA & COMPANY ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and the submissions by Counsel.

The application is predicated on the provisions of Sections 3, 3A and 63(1) of the Civil Procedure Act, Order 42 Rule 6, Order 49 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules.

Order 42 Rule 6(1) and (2) which is the relevant provision provides as follows: -

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 added.

It is clear from the above that the Applicant was required to satisfy the following conditions in order to justify the grant of the orders of stay of execution pending appeal: -

1. Sufficient cause.
2. Demonstrate that she will suffer substantial loss unless stay is granted.
3. Offer security.
4. File the application without unreasonable delay.

In KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410, PLATT Ag J.A. (as he then was) stated thus: -

“It is usually a good rule to see if Order XL1 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 it’s various forms is the cornerstone of both jurisdiction for granting 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.”

In VISHRAM RAVJI HALAI & ANOTHER .V. THORTON & TURPIN 1963 LTD, 1990 KLR 365, the Court of Appeal held thus: -

“Thus the superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly, the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.” Emphasis added

It is clear from the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules that the Applicant must satisfy all the conditions set out therein, not only some of them, to be entitled to orders of stay of execution pending appeal.

That the Judgment being appealed was delivered on 29th June 2020 is not in dispute. There is nothing to suggest that the Applicant did not become aware about that Judgment until a subsequent date. The record shows that the Judgment was delivered on 29th June 2020 by way of electronic mail through the respective email addresses of both Counsel. When a Judgment or ruling or indeed any order is made in presence of Counsel, it is to be presumed that the party has knowledge of it unless and until sufficient reasons are shown to the contrary. This application was filed on 18th January 2021 some seven (7) months later. That delay is clearly inordinate and has not been explained at all. The Court exercises discretionary power in an application such as this one. That discretion must however be exercised judiciously and on sound principles. It must not be exercised whimsically. Of course what is un-reasonable delay must be determined on a case by case basis. In FLORENCE NAMACHITU & ANOTHER .V. DORIS WANYAMA 2020 eKLR, I found that an un-explained delay of three (3) months was un-reasonable. The grant of an order of stay of execution pending appeal is not to be granted as a matter of course. That is why the law sets out clear conditions that must be met by a party seeking the exercise of the Court’s discretion in his favour. One of that condition is that the Court must be moved *“without unreasonable delay.”* The Applicant herein has failed to surmount that condition and her application must therefore fail.

Secondly, the Applicant must offer security or at least confirm that she is willing to abide by any conditions that this Court may grant as a condition for the order of stay. No such offer has been made either in the body of the application itself or in her supporting affidavit. She is more preoccupied about justice being served to her pending her appeal in the Court of Appeal. But the sword of justice cuts both sides. The Respondent, as a decree – holder, is equally entitled to enjoy the fruits of her Judgment. That right may only be put on hold for *“sufficient cause”* and I do not see an evidence of that in this case.

Finally, it is clear to me that the Applicant only moved to this Court when the execution process commenced and she was reminded vide a letter dated 5th January 2021 to vacate the suit land and pay the costs of Kshs. 452,595/= as taxed by the Deputy Registrar. That is clear evidence that the Applicant has not come to Court with clean hands. Rather, her main intention is to scuttle the execution process. If, as she avers, the pending eviction will cause her *“hardship, prejudice and irreparable loss”* there was no reason as to why she did not move the Court timeously.

The up – shot of all the above is that the Notice of Motion dated 18th January 2021 is devoid of merit. It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

25th February 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 25th day of February 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

25th February 2021.