



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CIVIL APPEAL NO. E4 OF 2020

BENEDICT OBAT.....1ST APPELLANT

LAWRENCE OLOO UDUNY.....2ND APPELLANT

JACOB OGOS TALO.....3RD APPELLANT

PETER ODUOR WANDEI.....4TH APPELLANT

VERSUS

PIUS ONYANGO OBAT.....RESPONDENT

RULING

Martin Onyayo Uduny, Benedict Obed, Lawrence Oloo Udony, Jacob Ogost Talo and Peter Oduor Wandei have appealed from the Judgment of honourable C.N. Sindani Senior Resident Magistrate in Ukwala ELC No. 70 of 2018 delivered on 9/9/2020, the Appellants pray for a stay of execution of decree on Ukwala ELC No. 70 of 2018 pending hearing and determination of the appeal against the Judgement made by the Hon. C.N. Sindani on the 9th September, 2020.

They further pray for an order of temporary injunction restraining the respondent, his agents, servants and all those claiming through him from interfering, erecting barriers, constructing, transferring, alienating, occupying and/or in any way dealing with Land Title No. UHOLO/MAGOYA/221 pending hearing and determination of appeal. Conservatory orders pending hearing and determination of the appeal. The costs of this application be provided for.

The application is based on grounds that **the Hon. C.N. Sindani Senior Resident Magistrate delivered a judgement in Ukwala ELC No. 70 of 2018 on 9th September, 2020 awarding the respondent sole proprietorship of Title No. UHOLO/MAGOYA/221 and costs of the suit which parcel was jointly owned with others before a consent was made to sell part of it.**

Moreover, that Land Parcel No. UHOLO/MAGOYA/221 had earlier been sold and the money, being Kshs. 7,550,000/= is held in a joint account in the names of Ouma Okutta advocate and Mugoye Advocate for the Applicants and respondent respectively, by consent of both appellants and Respondent, hence joint entitlement to sell property.

There is a Land Dispute Tribunal Award dated 9th July, 2006 later upheld by Honourable D.A.A. KAYILA in an order dated 26th June, 2013 that cancelled the registration of the whole parcel of land and ordered for the land to be re-surveyed.

The applicants contend that the suit land No. UHOLO/MAGOYA/221 ceased to exist as at 2.10.2019 the judgement is not implementable.

They lament that If a stay of execution is not granted substantial loss may result to the appellants and others as once the suit land is occupied and/or alienated by the respondent and the sum of money to the tune of Kshs. 7,550,000/= accessed, both may not be recoverable from Respondent who is 90 years old.

The appeal herein has a reasonable chance of success and if execution is carried out it will render the appal nugatory, among the issue raised being plea of Res-judicata and jurisdiction of trial Court.

They further contend that there has been no delay in bringing this application and that the Appellants/Applicants are willing to abide by any conditions and terms as to security for cost. The Respondent is likely to execute the decree herein at any time as the automatic temporary stay granted in lower Court lapses on 9.10.2020. The Record of Appeal is ready and directions for hearing can be taken within 30 days from date of determining this application.

In the replying affidavit, the Respondent states that he is a co-registered owner of the suit property with other persons who are deceased. The decision of the Land Dispute Tribunal was of nullity because of an illegality as the tribunal did not have jurisdiction. The applicants were never given any right in the property.

The money deposited in the advocates' account was for the benefit of the applicant and the families of the co-owners who are deceased.

I have considered the rival submissions and do find that the appeal was lodged on 9/10/2020 whilst the application was filed on 22/10/2020 after a period of 13 days. I do find that there was no unreasonable delay in filing the application for stay pending appeal.

I do also find that there is a deposit of Kshs. 7,550,000 made in the names of Counsels for both parties and that if stay is not granted the same will be released to the parties and that if money is released to the respondent, and the appellants succeed in appeal, they will suffer substantial loss.

On security since the money is in the accounts of the two lawyers representing parties, the same serves as security.

Application is allowed and I do grant a stay of execution of decree on Ukwala ELC No. 70 fo 2018 pending hearing and determination of the appeal against the Judgement made by the Hon. C.N. Sindani on the 9th September, 2020.

I do further grant an order of temporary injunction restraining the respondent, his agents, servants and all those claiming through him from interfering, erecting barriers, constructing, transferring, alienating, occupying and/or in any way dealing with Land Title No. **UHOLO/MAGOYA/221 pending hearing and determination of appeal. Costs in the cause.**

DATED AT KISUMU THIS 11th DAY OF FEBRUARY, 2021

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 15th March 2019.

ANTONY OMBWAYO

JUDGE