



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL CASE NO. 39 OF 2019

JOSEPH OBACHI DIANGA & JOHN ROBERT OUKO ODONGO

(suing as Legal Representatives of the Estate of

PIUS DIANGA AUDNO – Deceased).....APPELLANT

VERSUS

KENNEDY ONYANGO OBIERO.....1ST RESPONDENT

AFRICAN BANKING CORPORATION.....2ND RESPONDENT

NYALUOYO AUCTIONEERS.....3RD RESPONDENT

RULING

The application before me is dated 2/12/2020 where the applicant seeks orders that this Honourable court be pleased to grant an order of stay directed to the Respondents herein either by themselves or their employees, servants and or agents restraining them from disposing off land parcel no. KISUMU/OJOLA/4330 through the intended public auction and or otherwise pending the hearing and determination of this Appeal.

That this Honourable court be pleased to grant an order of stay of the intended sale of Land Parcel No. KISUMU/OJOLA/4330 pending the hearing and determination of the Appeal.

This Honourable Court be pleased to grant an order for stay of proceedings in KISUMU CM ELC CASE NO. 42 OF 2019 pending the hearing and determination of this Appeal.

The application is based on grounds that **that at all material times, the Appellants herein were the beneficiaries of one pious Dianga, deceased who was the registered owner of all that parcel of land known as Kisumu/Ojola/4212.**

That sometimes on or about 5th day 2019, the appellants herein were informed that a portion of the said land which they later learnt was known as Kisumu/Ojola/4330 had been advertised by the 3rd Respondent for sale of public auction which had been scheduled on the 10th day of April 2019

That subsequently, the Appellant proceeded to the Kisumu Land Registry to confirm the Position of Land parcel known as Kisumu/Ojola/4212 only to informed that the said parcel had been subdivided sometimes on or about the year 2016 into three portions known as Kisumu/Ojola/4329 Kisumu/Ojola/4330 and Kisumu/Ojola/4331.

That the aforesaid subdivision of land Parcel no. Kisumu/Ojola/4212 was done 5 years after the sole proprietor, Pius Dianga had died, 2001, and without any succession cause having been done thus the same amounted to intermeddling.

That upon sub division, land parcel No. Kisumu/Ojola/4330 was registered in the names of Pius Dianga, deceased, on 5th June 2006 and later transferred to the 1st defendant herein on 6th August 2010 long after the death of the deceased on 16th March 2001 and in any event, without following the due process of succession.

That the appellants herein did file a suit being KISUMU CM ELC CASE NO. 42 2019 together with an application dated 9th April 2019 brought under certificate of urgency seeking inter alia an order of temporary injunction directed at the respondents, their employees, workers, agents and or whomsoever jointly and severally restraining them from disposing off land parcel number

Kisumu/Ojola/4330 by private sale, public auction or otherwise pending the hearing and determination of the suit.

That upon hearing, the trial court, vide a ruling of 27.09.2019, did dismiss the aforesaid application on the grounds that the Appellants had not established a prima facie case.

That aggrieved by the Trial Courts ruling and or order of 27th September 2019, the Appellants herein filed the instant appeal and an application dated 17th October 2019 before the trial court seeking inter alia, stay of execution being the intended sale of Land parcel no. Kisumu/Ojola/4330 and stay of proceedings in Kisumu CM ELC NO. 42 OF 2019 pending the hearing and determination of the intended appeal.

That the said application dated 27th October 2019 was equally, after interpartes hearing, dismissed by a ruling of 12th February 2020 on the ground that the Appellants had not demonstrated what loss they would suffer if the stay order is not granted and that they had not furnished any security.

That based on the aforesaid, the Appellants have approached this honourable court for orders of stay of any intended sale of land Parcel KISUMU/OJOLA/4330 which sale may happen at any time and without any notice to the Appellants yet the substantive suit is pending hearing and final determination before the Trial Court and the intended sale of the suit property would not only render the current appeal nugatory but also render the Trial a mere academic process.

That unless the orders herein are granted, the Appellants stand to suffer irreparable loss and damages as the suit property will be sold by public auction thus, not only rendering the Appellants herein destitute but also sanitize an illegality by rubber-stamping a flawed process of transmitting a deceased property to third parties without following the statutory procedure of succession.

In response to the application, the Respondent states that the issues raised in the application herein were raised in the lower court and dismissed. The applicant has not demonstrated that the respondent will not be capable of atoning the damage the applicant may suffer.

The applicant's loss is purely financial and therefore can be compensated. The Bank is not privy to any fraud.

I have considered the application and in view of the provisions of Order 42 (6) of the Civil Procedure Rules 2010 that provides: -

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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 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.

The import of the foregoing is that the court has the jurisdiction to **to consider this application and to make such order thereon as may to it seem just.**

The court has to consider the delay in making the application. On unreasonable delay, I do find that the application was dismissed on 27/09/2019. The appellant was aggrieved with the ruling and filed an appeal on the 15th October 2019 and application dated 17/10/2019 for stay of the sale. The application was dismissed on 12/2/2020. The application before me was filed on 2/12/2020, 9 months after the ruling. This court finds that 9 months is inordinate and unreasonable delay. No explanation has been given.

The second ground for stay of execution pending appeal is demonstration of substantial loss. The applicants do not explain to court what substantial loss they are likely to suffer. Moreover, the order of the lower court was a negative order dismissing the application and therefore can't be stayed by the court. I do find the application without merit and dismiss the same with costs.

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