



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KITALE

ELC APPEAL NO. 1 OF 2019

PATRICK LUNGALIA (Suing as the personal representative of
the estate of **GEORGE LUNGALIA SHIVEKA**.....**APPELLANT**

VERSUS

VINCENT KILOPO.....**1ST RESPONDENT**

SIMON MATAIYWA.....**2ND RESPONDENT**

RULING

The Applicant

1. The background to the instant notice of motion application dated **14/10/2020** and filed on **22/10/2020** is that the appellant successfully appealed to this against the decision of the lower court in **Kapenguria PMCC ELC No 1 of 2018**.

2. The respondents in the appeal have brought the instant application under **Order 42 Rule 6, Order 51 Rule 1** of the **Civil Procedure Rules** and they seek the orders which I replicate verbatim herein below as follows:-

a. ...spent.

b. That the *status quo* obtaining on 30/6/2020 be maintained pending the hearing and determination of the applicants' Notice of Motion dated 28/9/2020 to wit Eldoret Court of Appeal Civil Appeal No. 35 of 2020 pending before the Court of Appeal and pending the determination of the intended appeal.

c. ...spent.

d. Costs of this application do abide the outcome of the application pending before the Court of Appeal.

3. The application is supported by the sworn affidavit of the 2nd applicant sworn on **14/10/2020**. The grounds upon which the application is made are that the judgment of the court was delivered on **30/6/2020** without notice to either the applicants or their advocates on record; that the 2nd applicant has been on the suit property since **2004** and has conducted permanent developments thereon; that the applicants intend to exercise their right of appeal; that the applicants stand to suffer substantial loss if stay orders are not granted and that there has been no unreasonable delay in the filing of this application. The applicants also maintain that they are ready to provide security in whatever terms the court may direct.

The Response

4. The appellant filed a replying affidavit sworn on **24/11/2020**. In that affidavit he depones that the instant application is overtaken by events; that the late George Lungalia Shiveka on behalf of whose estate he had brought the instant appeal successfully had built a house on the suit land and was interred on the same land upon his demise; that the appellant resides on the suit land with his family but the respondents in the appeal have continued erecting structures on the same land; that the orders sought would lead to his eviction and that all parties were notified of the judgement.

Submissions

5. The court directed that the instant application be disposed of by way of written submissions. The respondents who are the instant applicants filed their written submissions on **9/12/2020**. I have perused through the court record and found no submissions filed on behalf of

the appellant.

Determination

6. The issue that arises in the instant application is whether the *status quo* obtaining as at **30th June 2020** should be maintained pending the hearing of an appeal.

7. In essence despite its framing as an application for maintenance of *status quo*, the application before me is essentially one for a stay of execution of judgment and it is indeed brought under **Order 42 Rule 6 of the CPR**. It must be subjected to scrutiny for compliance with the provisions of that rule, namely, whether:-

- (i) **There is an appeal in place;**
- (ii) **The application was made without unreasonable delay;**
- (iii) **Substantial loss may result unless the order is made; and**
- (iii) **The Applicant is prepared to offer security.**

8. In respect of the first issue as to whether there is an appeal in place there is neither a substantive appeal nor a notice of appeal in place. What the applicants are attempting to do in the Court of Appeal is to obtain an extension of time to file and serve a Notice of Appeal. That is an admission that there is no notice of appeal on record or a substantive appeal filed in the appellate court against this court's decision.

9. As to whether the application was made without unreasonable delay the judgment was delivered on **30/6/2020** while the instant application was lodged on **22/10/2020** after a period of more than three months, which is quite a lengthy period. The excuse that the applicants rely on for the delay is that the judgment was delivered without notice to them. I have perused the court records and found that there is no notice that judgment would be delivered on **30/6/2020**. Notice was therefore inadvertently not served on the parties. There was therefore no possibility of the applicant knowing that the judgment would be read on that date, and in this court's view, the delay in lodging the application is not inordinate or inexcusable.

10. Coupled with the problems in operations of many registries nationwide during the early days of the Covid 19 pandemic, and the judiciary registries were not spared either, it is the opinion of this court that the applicant's lack of awareness of the judgment date had far reaching ramifications on his ability to lodge an application for stay of execution.

11. The third issue is whether substantial loss may result if the orders sought are not granted. I have perused the supporting affidavit and found evidence of developments on the suit land which the applicants claim ownership of. The appellant on his part admits that the respondents/applicants operate a shop on the premises but he does not claim that the said shop was established recently. The applicants aver that they have been on the suit land since **2004**. It would appear that the occupation of the suit premises had been shared between the applicants and the appellant for quite a while. In this court's view substantial loss would result if the orders sought were not granted.

12. This court has noted that the applicants are ready and willing to abide by any order as to security as may be imposed upon them.

13. The conditions for the grant of an order of stay are usually construed conjunctively and not disjunctively, that is to say that all of the conditions set out in **Order 42 rule 6** must be present in order for stay of execution to issue. As one of the conditions that is, the existence of an appeal has not been met, the application dated **14/10/2020** would ordinarily have failed. However, it would appear in the instant case that a mere mechanical application of the "conjunctive" construction rule may lead to injustice, and that it must therefore be determined on its own merits.

14. In view of the extenuating circumstances set out in **paragraphs 9 and 10** above, it is clear that the applicants' failure to file an appeal was not deliberate or negligent.

15. The Court of Appeal has an application before it and the decision thereon would determine the course the dispute herein takes. Granting the instant application would not be in my view a matter of speculation over the decision likely to be arrived at by the Court of Appeal, but an unusual and positive action meant to safeguard the applicants' right to be heard in the Court of Appeal on his application until that application is heard and determined.

16. This court is inclined to take that unusual course of action for the reason that the right to be heard in a dispute that can be determined by law is sacrosanct and protected by **Article 50** of the **Constitution**, and allowing the applicants to suffer the consequences of an execution process in the circumstances of this specific case would be a great injustice to them. Besides, the contents of **Article 159 2(d)** provide that justice shall be administered without undue regard to procedural technicalities. In this court's view failure to file a Notice of Appeal within the stipulated time remains a procedural technicality possibly to be frowned upon by **Article 159 (2) (d)**, but the justification for which must be now done in the application before the Court of Appeal.

17. Taking a deviation from the normal conditions for stay set down by case law and written rules in the present application would not occasion the respondent any injustice in my view, as the court's only intent is to protect one party from deleterious effects of a possible execution when that party has come to court with clean hands as the applicant has done herein.

18. In the circumstances of this case therefore this court can not and should not insist on the existence of an appeal as a precondition for the grant of the *status quo* order sought as that would amount to punishing the applicant for matters that were beyond his control.

19. I therefore find that applicant's application has merit and I grant it in terms of **prayer (b)** and **(d)** thereof.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 2nd day of February, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.