



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELCA CASE NO. 35 OF 2020**

**AGAI OCHOM alias ANGAI OCHOM.....APPELLANT**

**VERSUS**

**SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA LIMITED) (SDA CHURCH)....RESPONDENT**

**RULING**

The appellant in the notice of motion dated 15/9/2020 seeks orders that **there be a temporary injunction restraining the Respondents, their servants, agents or assigns from in any way dealing and/or interfering, trespassing, fencing, selling, constructing, building, evicting the Appellant from parcel of land namely L.R. No. Kisumu Kanyakwar 'B'/483 AND L.R. No. 15037/2,3,4,5,6 & 7 purportedly acquired by the Respondents pending the hearing and determination of the appeal.**

**That there be a stay of execution of the ruling delivered herein on the 27/08/2020 pending the hearing and determination of this Appeal No. 35/2020.**

**That there be a stay of the proceedings in Kisumu Chief Magistrate's Court ELC No. 21 of 2020 pending the hearing and determination of the Appeal herein. That costs of this application be in the cause.**

The application is grounded on the fact that there is an appeal filed on record against the ruling of the trial Learned Magistrate. The appeal raises weighty and substantive issues. The Respondents are likely to be evicted.

The Respondent submits that the appellant filed a similar application in the lower court seeking similar orders. The lower court dismissed the application with costs to the respondent.

The respondent argues that the appellant's plot L.R. No. Kisumu Kanyakwar 'B'/483 is different from the respondent's plot L.R. No. 15037/2, 3,4,5,6 & 7 and that there is no encroachment.

The Respondent further argues that the appellant has not demonstrated a prima facie case with a probability of success and that the appellant has no proof of ownership of L.R. No. Kisumu Kanyakwar 'B'/483 AND L.R. No. 15037/2, 3,4,5,6 & 7.

Moreover, the Respondent argues that the appellant has not demonstrated that he would suffer irreparable injury or loss that can't be compensated by an award of damages if the application for temporary injunction is not allowed. The respondent further argues that the balance of convenience lies in favour of the respondent.

I have considered the application, brought under Order 42 Rule 6 of the Civil Procedure Rules 2010, responses and rival submissions. Order 42 Rule 6 provides that:

Order 42 Rule 6 of the Civil Procedure Rules which states as follows:

***“6 (1) No appeal or second appeal shall operate as a stay of execution or proceedings 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, 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*

*(3) Notwithstanding anything contained in sub-rule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) for the purposes of this rule an appeal to the Court of appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with.* ”

This court has Jurisdiction to grant orders of injunction as prayed as it is exercising its appellate jurisdiction. For the court to grant an order of injunction, it must be satisfied that the applicant has a prima facie case with a likelihood of success. The applicant must be able to demonstrate that he has an appeal that raises weighty issues of law and fact.

In the case of Machupaper International Ltd vs Korr (1985) Eklr the Court of Appeal held that where a Judge dismisses an application for interlocutory injunction, he has jurisdiction to grant an applicant an injunction pending appeal so as to prevent the appeal being rendered nugatory in the event the appeal is successful.

In the Court of Appeal case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR , it was held that:-

*“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”*

I do find that the applicant/appellant has not demonstrated a prima facie case with a probability of success as the property is registered in the names of the Respondent. Moreover, he has not demonstrated that the injury he is likely to suffer is irreparable and can’t be compensated in damages. The application for injunction is dismissed.

The application for stay of proceedings is equally dismissed as it will prejudice the fair and expeditious hearing of the matter in the lower court. The prayer for stay of execution is superfluous as the order for dismissal was negative and therefore cannot be stayed. The upshot of the above is that the application is dismissed with costs.

**DATED AT KISUMU THIS 18<sup>th</sup> DAY OF MARCH, 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 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**