



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 9 OF 2020

NTISHO MAYIAMEI.....1ST APPELLANT

PARMITO POLONG.....2ND APPELLANT

VERSUS

NTIPAPA TUTA SENCHA.....1ST RESPONDENT

LONGOJO TUTA SENCHA.....2ND RESPONDENT

PARSTAU SENCHA.....3RD RESPONDENT

NENGOTOK KILELU.....4TH RESPONDENT

TINALAU TUTA SENCHA.....5TH RESPONDENT

RULING

What is before me for determination is the Appellants' Notice of Motion dated the 30th June, 2020 brought pursuant to sections 1A, 1B, 3A and 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. The Appellants seek for stay of execution of the judgement delivered on 7th May, 2020 pending the hearing and determination of the Appeal.

The application is premised on the grounds on the face of it and the supporting affidavits of NTISHO MAYIAMEI and PARMITO M. POLONG where they depose that judgment in this matter was issued on 7th May, 2020 in the absence of the parties. They confirm lodging an appeal in the matter by filing a Memorandum of Appeal. They insist the Appeal has high chances of success since the Magistrate failed to consider the evidence of record. They reiterate that they will suffer substantial loss if the Decree is executed. Further they are willing to deposit security if ordered by the Court, and that the application has been made without delay.

The Respondents opposed the application by filing a replying affidavit sworn by the 1st Respondent NTIPAPA TUTA SENCHA where he deposes that their father was a member of Enkorika Group Ranch and was allocated land therein. He confirms there was a dispute involving all the parties at the Kajiado Land Dispute Tribunal whereby it was agreed by consent that the Appellants return land which belonged to the Respondents in land reference numbers Kajiado/ Dalalekutuk/ 947 and 948 respectively. Further, the said Ruling was filed in Court. He insists this matter was heard and a consent recorded at the Kajiado Magistrates Court. He reiterates that any aggrieved party should have filed for Judicial Review. He contends that this matter proceeded for hearing in Case No. 442 of 2014 before Honourable Kasera who upheld the decisions of the previous magistrates. He explains that whenever they have tried to enforce the said orders, the Appellants have filed suits to discourage them. He reaffirms that the current application is an abuse of the process of the court and seeks for the same to be dismissed with costs.

Both the Appellants and the Respondents filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Appellants' Notice of Motion dated the 30th June, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether there should be a stay of execution of the Judgement delivered on 7th May, 2020 pending the determination of the Appeal.

The Appellants in their submissions reiterated their claim and contended that the Appeal has high chances of success since the Court did not decide the case on merit but relied on technicality. They submitted that the Honourable Magistrate enforced an Order of the Land Dispute Tribunal in this matter in violation of section 28 and Order 22 of the Civil Procedure Rules. They reiterate that the Honourable Magistrate relied on a disputed consent order which is null and void. Further, she failed to consider that the Appellants have their title deeds and the Respondents were trespassers. They insisted the court did not have power to address the issue of adverse possession and failed to address the Appellants' prayer for eviction and damages. To buttress their averments, they relied on the case of **Aman Hauliers Ltd V Abdulnasir Abukar Hassan (2017) eKLR**. The Respondents in their submissions contended that the Appellants had not established a prima facie case. They submitted that even if the Appellants had their title deeds, this has been overtaken by the decisions of the Land Disputes Tribunal and Chief Magistrates Court. Further, that the Appellants are disregarding a Court Order. They reiterate that balance of convenience cannot exist as there are straight forward orders for re survey of land parcel numbers Kajiado/ Dalalekutuk / 947 and 948 currently Kajiado/ Dalalekutuk/ 1663. They claim the matter is res judicata as it had already been dealt with by a court of competent jurisdiction. Further, both the Appellants and Respondents participated in LDT No. 24 of 2007 against the 1st Respondent and now they have enjoined the brothers so as to demonstrate it is a new matter. They reaffirm that the orders sought is an abuse of the court process.

The legal provision governing stay of execution pending appeal is Order 42 Rule 6(2) which provides that: **'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.'**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed while dealing with an application for stay pending appeal and opined thus:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.'**

In this instance the Appellants seeks a stay of execution pending Appeal which application has been opposed by the Respondents. In the respective affidavits, I note in the proceedings in the lower court, the Appellants mainly sought for eviction of the Respondents who had trespassed on the suit land. It further emerged that there was an Award from the Kajiado Land Disputes Tribunal in respect to the suit lands where the Appellants had consented to granting a portion of the suit lands herein to the Respondents. Further, the said Decree was not appealed from and there is a valid Court Order/Decree which is yet to be implemented. Appellants were aggrieved with the Learned Magistrate for relying on the Award from the Tribunal which was adopted as an Order of the Court and a Decree has been issued to that effect. Insofar as the instant Application has been made without unreasonable delay, however from the averments in the Appellants' supporting affidavit, I find that they have not demonstrated the substantial loss which may result to them if the orders sought are not granted. It is worth noting that even though the Respondents are residing on the suit land, the appellants hold titles to it. In relying on Order 42 of the Civil Procedure Rule and based on the facts as presented including associating myself with the decision cited above, I find that the Appellants have not met the threshold set for stay of execution and will decline to grant the same.

It is against the foregoing that I find the Appellants' Notice of Motion dated the 30th June, 2020 unmerited and will dismiss it.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF MARCH 2021.

CHRISTINE OCHIENG

JUDGE