



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 19 OF 2020

ARTHUR KAHURANI NG'ANG'A.....APPELLANT/APPLICANT

VERSUS

COUNTY COUNCIL OF OL KEJUADO.....1ST RESPONDENT

LILLIAN A. DICKSON.....2ND RESPONDENT

RULING

What is before me for determination is the Appellant's Notice of Motion dated the 21st October, 2020 brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act; Section 13 (7) of the Environment and Land Court Act, and Order 42 Rule 6; Order 40 Rules 1(a) & (b) and 4; Order 51 Rule 1 of the Civil Procedure Rules. The Appellant seeks orders to restrain the Respondents, their employees, agents, servants or any other persons acting on their behalf from interfering, dealing with the suit plot namely Plot No. 185 Business/ Commercial Noonkopir Trading Centre in execution of the judgement delivered on 9th September, 2020.

The application is premised on the grounds on the face of it and the supporting affidavit of ARTHUR KAHURANI NG'ANG'A where he deposes that on the 25th September, 2020, he lodged an appeal against the entire judgement of the lower court by Hon. Kahuya I. M (Mrs) Principal Magistrate made on 9th September, 2020 dismissing his case. He confirms having filed a Memorandum of Appeal. He contends that on 19th October, 2020, his advocate was served with a letter authored by the 2nd Respondent's Advocates threatening to demolish a structure he had erected on the suit plot which he has since 1994 leased out to the Grace of the Cross International Church previously Ruling Jesus Christ Ministry Church, Kitengela. He claims the Respondents are set to commence execution proceedings of the impugned judgement/ decree herein against him as the thirty (30) days stay of execution granted by the lower court have since lapsed. He reiterates that his Appeal has high chances of success. Further, vide a letter dated 15th September, 2020 his advocates applied for typed proceedings from the lower court for purposes of compiling the Record of Appeal. He insists if the orders sought are not granted, his tenants namely the Grace of the Cross International Church who have been in occupation of the suit plot since 1994 to date are likely to be evicted. Further, that it is only fair for the court to issue injunctive orders against the Respondents as sought under the doctrine of *lis pendens* to preserve the substratum of the Appeal. He is willing to abide by any condition set by the court. He reaffirms that the application has been filed timeously.

The 2nd Respondent LILLIAN A DICKSON opposed the application by filing a replying affidavit where she opposed granting of stay of execution pending appeal and highlighted proceedings in the lower court. Further, she delved on issues which will be dealt with in the substantive appeal.

Both the Appellant and the 2nd Respondent filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Appellant's Notice of Motion application dated the 21st October, 2020 including the respective affidavits and rivalling submissions, the only issue for determination is whether there should be a stay of execution of the Judgement delivered on 9th September, 2020 by Hon. Kahuya I. M in Kajiado CMC ELC No. 115 of 2018.

The Appellant in his submissions reiterated his claim and contended that the application is merited. Further, that he had established a prima facie case/ appeal where the court's discretion would tilt in favour of granting a stay of execution. He reiterates that he would suffer irreparably if a stay of execution is not granted as he has been in possession of the suit plot and leased it to the aforementioned Church from 1994 to date. To buttress his averments, he relied on the following cases: **Sarah Nandacha Mayeku V Aden Noor Aden (2020) Eklr and Grace Chemutai Koeh V Francis Kiplangat Chebiror & 2 Others (2018) Eklr**. The 2nd Respondent in her submissions contended that the Appellant had not established a prima facie case with a probability of success as she was confirmed as the owner of the suit plot by the 1st

Respondent. Further, that she is a bona fide purchaser for value. She insists the Appellant will not suffer irreparable loss if the orders sought are declined as the structure on the suit plot is temporary and of little value. She reiterates that the balance of convenience tilts in her favour. She sought for security of costs amounting to Kshs. 1,000,000/=. To support her arguments, she relied on the following authorities: **Giella V Cassman Brown (1973) EA 358; Lawrence P. Mukiri V Attorney General & 4 Others (2013) eKLR and Salome Warware V George Muna & Another (2015) eKLR.**

Order 42 Rule 6(2) 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 to exercise its discretion in instances where a party seeks a stay of execution and stated 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 the current scenario the Appellant seeks a stay of execution which application has been opposed by the 2nd Respondent. In the respective affidavits, I note both parties admit that the Appellant has been on the suit land and has put up a temporary structure thereon. I note in the lower court both the Appellant and the 2nd Respondent also produced their respective documents of title issued by the 2nd Respondent. The 2nd Respondent states that an injunction pending appeal should not be granted as the structure on the suit land is of a little value. The 2nd Respondent however did not deny she is in the process of executing the Decree herein. She insists the Appellant has not demonstrated a prima facie case to warrant a stay of execution pending Appeal. I note this Application has been brought without unreasonable delay and a Memorandum including Record of Appeal already filed. I note in the Replying Affidavit the 2nd Respondent is dealing with issues which will be handled in the substantive Appeal. On perusal of the Memorandum of Appeal, I find that it raises triable issues and it is pertinent if the substratum of Appeal was preserved to avoid rendering the Appeal nugatory. Order 42 Rule 6 is clear that filing an Appeal alone does not operate as a stay of execution. I opine that since a right of Appeal is a Constitutional right of an aggrieved party and a right to fair trial can only be guaranteed if stay pending appeal is granted to the Appellant. Further, since it is the Appellant who has been on the suit land from 1994 to date, while the 2nd Respondent is attempting to claim possession of the said suit plot, I opine that he is indeed the disadvantaged party herein. Based on the standards set in the above cited case and in applying them to the circumstances at hand, I find that the Appellant has met the threshold set for stay of execution and will grant him the same.

It is against the foregoing that I find the Appellant’s Notice of Motion dated the 21st October, 2020 merited and will allow it. I will proceed to make the following final Orders:

1. That pending the hearing and determination of the Appeal herein, an injunction be and is hereby issued restraining the Respondents, their employees, agents, servants or any other person (s) whether acting on their own or on the Respondents’ behalf from interfering and/or dealing, howsoever with the Appellant’s possession, occupation and ownership of the suit plot namely: Plot No. 185 Business/ Commercial Noonkopir Trading Centre in execution of the judgement delivered on 9th September, 2020.
2. That costs of this application will be in the cause.
3. Parties are urged to expedite the hearing of the Appeal.

Dated Signed and delivered via email this 17th Day of March 2021.

CHRISTINE OCHIENG

JUDGE