REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 348 OF 2017

(FORMERLY KISII ELC CASE NO. 264 OF 2014)

FRANCIS NYAKWAKA OMOLLO.....PLAINTIFF/RESPONDENT

VERSUS

ZACHARIA OGUTU NYAURA (Sued as the legal administrator of the estate of

ABISALOM OGUTU NYAURA(Deceased)**.....APPLICANT/1ST DEFENDANT**

COUNTY LAND REGISTRAR, MIGORI COUNTY.....2ND DEFENDANT

COUNTY SURVEYOR, MIGORI COUNTY.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 14th August, 2020, the Applicant sought for the following orders: -

a) Spent.

b) THAT Applicant herein be given leave to serve the Respondents herein with a copy of NOTICE OF APPEAL dated 21st July 2020 and received under the seal of this Honourable Court on the same date by Deputy Registrar and a copy of the letter dated 17th day of July 2020 received in this Court Civil Registry on the 6th day of August 2020 requesting for certified copies of the Proceedings and Judgment of this instant suit to enable the Applicant appeal.

c) THAT Stay of Execution of the said Judgment and/or Decree till the determination of the intended Appeal.

d) Cost of this Application do abide the Appeal.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn by SAMWEL OKUMU ODINGO on 17.08.2020; the 1st Defendant's advocate on record. He avers that judgment was delivered in the matter on 15.07.2020 in open court and through an email, which judgment he intends to appeal against.

3. He also deponed that it is fair and equitable to grant the orders of stay pending the intended appeal since the Applicant is likely to suffer prejudice.

4. On the issue of leave to serve the Notice of Appeal, it was his contention that the said Notice of Appeal dated 21.07.2020 and received in court on the same date; was not served upon the Respondents within the required timelines of 7 days inadvertently.

5. He was apprehensive that the Notice of Appeal stands to be struck out for failure of service within the strict timelines hence the need to be granted leave to serve out of time.

6. The application was opposed. The Respondent filed a Replying Affidavit sworn and dated 21.10.2020 in response to the Application dated 14.08.2020. It is the Respondent's assertion that the Applicant has not given any explanation for the failure to serve the Notice of Appeal within the required timelines.

7. On the issue of stay of execution as sought by the Applicant, it was the Respondent contention that he has since taken possession of the re-established portion and is in occupation of the same, therefore, there is nothing capable of being stayed as sought by the Applicant.

8. He further stated that should the order of stay of execution be granted, then the same would serve to sanction further encroachment and perpetuate trespass at the instance of the Applicant, who has no interest on the said portion after the re-establishment of the correct boundary between the two properties.

9. It is also his contention that the portion having been restored to his property; the same belongs to him and he is entitled to absolute and exclusive possessory rights thereto.

10. He also averred that the Respondent had not satisfied the court on the substantial loss that he is likely to suffer nor provided proof of the same.

11. It was the Respondent's contention that he instituted the suit seeking the restoration of the correct boundaries between the suit property and property No. KANYAMKAGO/ KATIENO/ 1494. Consequently, the court issued directions on the same and the 2nd & 3rd defendants re-visited the suit property and re-established the correct boundary position between the 2 land parcels.

12. As a result, thereof, the portion of the suit property that had unlawfully been encroached into was reinstated and restored back to the suit property.

13. It was his position that the judgment of the court merely ratified and sanctioned the restoration/ correction of the distorted boundary between the suit property L.R. NO. KANYAMKAGO/KATIENO/381 and 1494.

14. The Application was disposed of by way of written submissions, both parties filed and exchanged their respective submissions. It was the Applicant's submissions that the Notice of Appeal was lodged within the 14 days' timelines as required in law. However, the same was inadvertently not served upon the Respondent within the required timelines hence the need for leave to serve the same out of time.

15. He further submitted that there was need to grant the ordersOf stay of execution so as not to render the intended appeal nugatory.

16. On the issue of stay of execution pending Appeal and the need to provide security for the due performance of the decree, it was the Applicant's submission that there was no requirement that security must be given and further that the decree in question rested on ownership of land as opposed to a money decree. He also urged the court to be guided by the provisions of Article 159 (d) of the Constitution and allow the Application.

17. The Respondent on the other hand submitted that on the issue of stay of execution; an Applicant has an obligation to establish sufficient cause and basis. He also submitted that no explanation has been offered by the 1st Defendant for non-service of the Notice of Appeal either within the statutory timelines or at all.

18. He thus stated that The 1st Defendant has neither sworn an affidavit nor placed before the court any material disposition or otherwise to enable the court appraise itself on the issue of substantial loss.

19. I have read and considered the Application, the responses thereto and the rival submissions by both parties and the various authorities cited in support of their respective cases in totality and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

20. This court is of the considered opinion that the issues arising for determination are as follows: -

a) Whether leave can be granted to serve the Respondent with the Notice of Appeal dated 21st July, 2020.

b) Whether an Order for stay of execution can issue against the decree and judgment dated 15th July, 2020,

A. Whether leave can be granted to serve the Respondent with the Notice of Appeal dated 21st July, 2020.

21. The Applicant has urged this court to grant him leave to serve the Notice of Appeal upon the Respondent which was inadvertently not done within the stipulated timelines in law. It is his position that failure to grant the leave may lead to the dismissal of the intended Appeal at the Court of Appeal.

22. Justice Joel Ngugi in **Nakuru HCC NO. 193 OF 2011,** ***SAMMY KURIA NDUNG'U vs SAMUEL MBUGUA IKUMBU*** cited with authority the Court of Appeal decision in ***Trimborn Agricultural engineering Limited v David Njoroge Kabaiko and Another (2000) eKLR*** where, Shah J.A. stated as follows;

"*The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said: "In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of Edward Allan Robinson & 2 others vs Philip Gikaria Muthami, (Civil Application No 5 Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:*

'*Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.'*

Besides, from a careful reading of the provisions of rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time. The jurisdiction to restart the appellate procedures is not donated by section 7, above, but by rule 4 of the Rules. The rule, in effect, empowers the Court to reinstate the struck out appeal, while section 7, above, empowers the High Court to, in effect, assist a litigant in distress who otherwise would not seek help of either Court for any interim relief before he lodged his appeal for the first time."

23. Justice Ngugi in the above mentioned case went further to state that;

"*This is not a mere formalistic fetish which can be cured by an appeal to Article 159(2)(d) of the Constitution which admonishes Courts to eschew undue regard to technicalities in dispensing justice. It makes sense that once a Notice of Appeal has been lodged, any further applications related to the appeal should be filed at the Court of Appeal which is then seized of the matter. This prevents the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts. It provides for a predictable docket management system…" (emphasis mine)*

24. It has been held time and again that a notice of appeal is a primary document. It gives jurisdiction to the Court of Appeal where the intended Appeal will be heard and determined. Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal and not the High Court.

25. In the present case, the Applicant filed a Notice of Appeal to the Court of Appeal within the stipulated timelines. I wish to fully adopt and associate myself with the Court of Appeal reasoning in the *Trimborn* case (supra) as well as the dictum by Justice J. Ngugi in the above mentioned cases. The Applicant herein having filed a Notice of Appeal; this court's powers/jurisdiction has been ousted. The authority to extend time to serve it or any other action related to the said Notice of Appeal lies with the Court of Appeal.

26. In view of the foregoing, I accordingly find and hold that this court is functus officio and thus is unable to grant leave to serve the Notice of Appeal out of the stipulated timelines as sought. As a result, prayer no. 2 on the Application is dismissed.

B. Whether an Order for stay of execution can issue against the decree and judgment dated 29th July, 2019

27. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal and provides as follows: -

(*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.

28. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi**), the Court held that: -

"*The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory".*

29. From the above provisions in Order 42 Rule (2), there are three conditions for granting an Order for Stay pending Appeal which include:

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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.

30. As outlined above, it is evident, that the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 must be met simultaneously; they must all be satisfactorily proved to the required threshold. The Applicant thus, needs to prove to this honourable that he will suffer substantial loss, that the Application was brought without unreasonable delay and that he shall provide security for costs as may be ordered by the court.

(See ***M.O.M Amin Transporters Limited & Another vs Alexander Ndung'u Mbugua & 2 Others [2017] eKLR*****)**

31. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

> *"Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."*

32. The onus is on the Applicants to show the damages they would suffer if the order for stay of execution sought is not granted. This is for the reason that; by granting such stay, it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant the fruits of his judgment, which in my view should not be done unless the Applicant has given sufficient cause to the court to enable it to exercise its discretion in granting the orders sought. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. (See **New Stanley Hotel Ltd –vs- Arcade Tobacconist (1980) KLR 757**).

33. It is the Applicant's assertion that should the application be disallowed; his intended Appeal to the Court of Appeal will be rendered nugatory and further that he is likely to suffer prejudice.

34. The Respondent on the other hand maintains that the he has since taken possession of the re-established portion and he is in occupation of the said portion of the suit property. Thus, it his contention that there is nothing capable of being stayed. He further states that should there be a stay of execution then the same would serve to sanction further encroachment and perpetuate trespass by the Applicant.

35. On the issue of substantial loss, the Respondent maintains that the Applicant has not proved or demonstrated any substantial loss that he is likely to suffer.

36. In **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4** held as follows:

> *" . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; ….…..."*

37. I have looked at the Application and the Supporting Affidavit and I have noted with concern that the Applicant has failed to demonstrate/establish or prove that he will suffer substantial loss. No proof or sufficient explanation has been given in the affidavit on the prejudice that he is likely to suffer should the Stay of Execution not be granted. As has been held in a number of cases; it is not enough to merely state that one will suffer substantial loss, the onus is on the Applicant to demonstrate to the court the substantial loss he will suffer.

38. Be that as it may, I have also noted the Respondent's assertions that he has since taken possession and occupation of the disputed portion of the suit property; pursuant to the re-establishment/restoration of the correct boundary between the suit property L.R. No. KANYAMKAGO/KATIENO/381 and 1494; and thus there is nothing capable of being stayed.

39. In view of the foregoing, I find and hold that the Applicant has failed to satisfactorily prove the substantial loss he is likely to suffer in the event the orders for stay of execution are not granted. Further, the Respondent has already executed the said judgment and decree and has since taken possession and occupation of the disputed portion of the suit property. Thus, there is nothing capable of being stayed; the present Application has been overtaken by events. Consequently, prayer no. 3 on the Application fails.

40. As earlier stated, the three (3) prerequisite conditions for the grant of an order of stay of execution cannot be severed and they must all be met simultaneously and satisfactorily proved to the required threshold. Having held that the Applicant has not demonstrated the substantial loss that he is likely to suffer and further that the judgment and decree has already been executed, I find that the instant Application has been overtaken by events and is incapable of being stayed, therefore it would be an academic exercise to analyze the remaining grounds.

CONCLUSION

41. In the upshot, I accordingly find that the Application dated 14th August, 2021 is not merited and the same is therefore dismissed with no orders as to costs.

DATED, **SIGNED** and **DELIVERED** in open court at **MIGORI** on **8TH day** of **FEBRUARY 2022.**

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Nonappearance for the Applicant

Mr. Mulisa for the Respondents

Tom Maurice - Court Assistant