



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ELC PETITION NO. 10 OF 2021

(Formerly Migori ELC Petition No. 3 of 2020)

REBECCA ACHOLA OUKO.....1ST PETITIONER

JOSEPH ONDEYO OTENGO.....2ND PETITIONER

JOHN ODOYO & 28 OTHERS.....3RD PETITIONER

VERSUS

SEVENTH DAY ADVENTIST

CHURCH (EAU) LTD.....1ST RESPONDENT

COUNTY GOVERNMENT

OF HOMA-BAY.....2ND RESPONDENT

THE LAND ADJUDICATION

AND SETTLEMENT DEPARTMENT.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By a Notice of Motion Application dated 4th December 2020, mounted under **Sections 1A, 1B, 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules 2010**, the petitioners through H. Obach & Partners Advocates, have sought the orders infra:

a) Spent

b) **THAT** there be a stay of execution of the decree in Homa Bay CMC ELC No. 58 of 2016 and intended eviction of the Kigoto Maize Milling Factory by the 1st respondent, its servants, agents or anyone acting under it or its authority from L.R No. 772 East Kubia Adjudication section pending the inter-partes hearing of the application herein.

c) **THAT** pending the hearing and the determination of the petition herein, there be a stay of execution of the decree in Homa Bay CMC ELC No. 58 of 2016 and intended eviction of the Kigoto Maize Milling Factory by the 1st respondent, its servants, agents or anyone acting under it or its authority from L.R No. 772 East Kubia Adjudication section pending the inter-partes hearing of the application herein and the petition.

d) **THAT** costs be in the cause.

2. The application is anchored on the affidavit of Rebecca Achola Ouko, the 1st Petitioner herein. The petitioners contend that the 1st respondent is in the process of evicting the 2nd respondent, their servants, agents or anyone acting under their authority from L.R. No. 772 East Kubia Adjudication Section, which land the 2nd respondent has erected a maize miller factory to be used as a public facility by the petitioners and other members of the public.

3. Briefly, it is the Petitioners' case that unless an order is issued against the 1st respondent to stop the intended eviction, the Maize Mill factory will be demolished and removed from the suit land at the expense of the petitioners and other members of the public in the locality. That therefore, the purpose of this application will be rendered nugatory.

4. The defendants, duly notified, failed to file any response to the application.

5. The application came up for inter-parties hearing on 23/03/2021 but there was no appearance for both parties. The matter was fixed for directions on 4th October 2021. Again, there was non-attendance by parties. The court then directed that the suit be transferred to Homa Bay Environment and Land Court for hearing and determination since the suit land is situated within Homa Bay County.

6. On 2nd February 2022, the Honorable court directed that the application be heard by way of written submissions. The parties failed to file submissions in respect of the application.

7. I therefore rely on the entire application on record. So, is it merited?

8. This court is pretty aware of the conditions as regards an order for stay of execution under **Order 42 Rule 6** of the Civil Procedure Rules alongside the Constitutional and statutory provisions under which the application is mounted. **Order 42 Rule 6** (supra) provides in part thus:

(2) 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.

9. **Article 48 of the Constitution of Kenya, 2010** anchors the right of access to justice. Furthermore, the petitioners are entitled to fair hearing of the Petition as stipulated in **Article 50 (1) of the same Constitution**.

10. It is established law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system: see **James Kanyiita Nderitu and another-vs- Marios Philotas Ghikas and another (2016) eKLR** and **Onyango Oloo-vs- Attorney General (1986-89) EA 456**.

11. I also subscribe to the Court of Appeal decision in **Butt –vs- Rent Restriction Tribunal (1979) eKLR**, where it was observed that;

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson –vs – Church (No. 2) 12 Ch D (1879) 454 at p 459.....and the appellant has an undoubted right of appeal.” (Emphasis added)

12. In the instant case, there is an impending eviction of the 2nd respondent from the suit property as disclosed in prayer 1 of the application. **Section 13(7)(a) of the Environment and Land Court Act,2015(2011)** empowers this court to grant interim preservation orders including the stay order sought herein.

13. In the foregone, I find that the application has met the requirements for the grant of stay of execution sought therein. The application is merited.

14. A fortiori, the stay order sought in the application dated 4th December 2020 and filed in court on 7th December 2020 and as stated in Paragraph 1(c) hereinabove, be and is hereby granted pending the hearing and determination of this Petition.

15. Costs of the application be in the cause.

16. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

DELIVERED, DATED AND SIGNED AT THE ENVIRONMENT AND LAND COURT AT HOMA-BAY ON THIS 2ND DAY OF MARCH, 2022.

G.M.A ONG'ONDO

JUDGE

Parties; absent but duly notified by the Deputy Registrar via email on 22nd February 2022 at 3:38pm.