



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**APPEAL NO. 6 OF 2020**

**OLE NKOLIAI .....1<sup>ST</sup> APPLICANT**

**STEPHEN NKOLIAI.....2<sup>ND</sup> APPLICANT**

**DAVID NKOLIAI.....3<sup>RD</sup> APPLICANT**

**NDEGE KIPOS.....4<sup>TH</sup> APPLICANT**

**DAVID MPILEL.....5<sup>TH</sup> APPLICANT**

**-VERSUS-**

**JAMES OLOOLKENYTAI OLE SERIANI.....RESPONDENT**

**RULING**

What is before this court is a Notice of Motion dated 10/3/2020 brought under Section 1A,1B and 3 A of the Civil Procedure Act, Orders 42 Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules in which the Applicant is seeking the following Orders:-

1. Spent.
2. Spent.
3. Spent as the same appears to be similar to prayer number 2.
4. That there be stay of execution of the decree issued in Kilgrois Principal Magistrate's Environmental and Land case No. 15 of 2019 pending the hearing and determination of the Appeal filed in the High Court.
5. That the costs of this Application be provided for.

The Application is premised on the grounds that the Appellants are aggrieved by the decision of the trial court and therefore have an arguable appeal with very high probability of success. The Application is Supported by the Affidavit of Stephen Nkoliai sworn on 10/3/2020 in which the Applicant avers that pursuant to the Judgment of the trial court delivered by the trial court, the Applicant have preferred an Appeal against the Judgment which judgment ordered their eviction from the suit land within 90 days. The Applicants are apprehensive that if the Respondent is allowed to proceed with execution then their appeal would be rendered nugatory and the Respondent would be at liberty to dispose or charge the property. The Applicants further aver that they are willing to abide by the conditions that will be set by the court and that the Respondents will not be prejudiced since he is not in occupation of the 10 acres of land in dispute. That the Respondent will also not suffer prejudice, whereas the applicant stands to suffer loss and great monetary expenses. Most importantly that the court also awarded special damages that were not proved.

The Application is opposed by the Replying Affidavit of James Oloolkeyai Ole Seriani sworn on 17/3/2020 in which he contends that he is the registered proprietor of LR.No. TRANSMARA/OLOMISMIS/972 which the Appellants have trespassed and caused destruction on the suit property. That the Appellants have not demonstrated whether application of execution has commenced and the same is made in vacuum without regard to the law. The Respondent also contends that the Appellant have not met the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules. That the Appellants have also brought this application under Order 22 rule 22 in a mischievous manner since no execution has commenced. That the Appellants Counter claim was dismissed as it was found to be hopeless and baseless. That this instant application is a waste of court's time, with the sole aim of denying the Respondent the fruits of his judgment. That there is clear

misapprehension of the facts and the law and the same ought to be dismissed.

I have looked and carefully analysed the Notice of Motion Application, Replying Affidavit and the Submissions filed by both parties and the issue for determination is whether the Appellants herein are entitled to grant of stay of execution pending Appeal.

The principles for grant of stay of execution pending appeal are now well settled. Order 42 rule 6 of the Civil Procedure provides as follows:-

**(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.**

The Court of Appeal in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** provides guidance on how a court should exercise discretion and held that:-

**‘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 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.**

**5. The court in exercising its powers under Order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse’.**

On whether this court is satisfied that the Applicant will suffer substantial loss in the event that stay of execution is not granted, the Applicant has not demonstrated any way he will suffer substantial loss. A party that merely states that they will suffer substantial loss does not amount to sufficient ground to warrant stay of execution. On whether the Application has been made without unreasonable delay, I note that Judgment was delivered 30/1/2020 and the Notice of Motion Application filed on 10/3/2020. I see no unreasonable delay on this ground. The Appellants have stated in their grounds of the Application that they are ready, willing and able to give such security as the Honourable court may deem fit and proper in the circumstances. For the court to grant stay of execution, a party must meet and or satisfy all the requirements as stated above as a whole. Another aspect which is jointly related in this case is if there is any overwhelming hindrance. A quick perusal of the Judgment indicates that upon assessment of the suit land by the forest officer, it was established that there was massive destruction of felled trees estimated at Kshs. 72,755.37/= in the suit land and the same ought to be dealt with at the earliest opportunity by denying the Appellants time to continue destruction of the trees planted in the suit land.

The upshot of the above is that the Notice of Motion dated 10/3/2020 lacks merit and the same is dismissed with no Orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 1<sup>ST</sup> DAY OF JULY, 2021**

**MOHAMED N. KULLOW**

**JUDGE**

**1/7/2021**

In the presence of:

CA:Chuma

N/A for the parties and advocates