



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELCA CASE NO. 25 OF 2020**

**JOSHUA OUMA.....1<sup>ST</sup> APPELLANT**

**JAMES OTIENO.....2<sup>ND</sup> APPELLANT**

**CAREN OMWARE.....3<sup>RD</sup> APPELLANT**

**SAMSON GUYA.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**HEZEKIAH ONG'UNDI OKUMU.....RESPONDENT**

*(Being an Application for stay of the ORDERS of the Principal Magistrates Court pending the hearing and determination of an Appeal from the JUDGMENT and DECREE of the Principal Magistrates court of Kenya at Maseno, delivered by Hon. C.L. Yalwala on 22<sup>nd</sup> May, 2020 in Maseno PM ELC Suit No. 23 of 2018)*

**RULING**

Joshua Ouma, James Otieno, Caren Omware, Samson Guya (hereinafter referred to Appellants) have come to this court on appeal from the Judgment and decree of the Principal Magistrates Court of Kenya at Maseno delivered by Hon. C.L. YALWALA on 22/5/2020, in Maseno PM. ELC suit no. 23 of 2018. The appellants have also lodged an application for stay of execution pending appeal. The appellant precisely prays for orders that the firm of Gordon Ogola, Kipkoech & Co. Advocates be granted leave to come on record for the Defendants/Appellants in the matter Maseno Principal Magistrates Court ELC Case No. 23 of 2018 (Hezekiah Ongu'ndi v. Joshua Ouma and others).

**The appellants further pray for an order of stay of execution of the Judgment and consequential Decree delivered by Hon. C.L. Yalwala on the 22<sup>nd</sup> day of May, 2020 in the matter Maseno Principal Magistrates Court ELC Case No. 23 of 2018 (Hezekiah Ongu'ndi v. Joshua Ouma and Others) pending hearing and determination of this Application.**

The application is based on grounds that the Respondent intends on evicting the Applicants from their land parcel known as KISUMU/KARATENG/839. The Respondent claims that the Applicants have trespassed and occupied his parcel of land and thus leading to the institution of the matter Maseno Principal Magistrates Court ELC Case No. 23 of 2018 (Hezekiah Ongu'ndi v. Joshua Ouma and Others) by the Respondents. The honourable court on the 22<sup>nd</sup> day of May, 2020, rendered its judgment in the matter and upheld the Respondent's suit with costs, and dismissed the Applicant's counter-Claim with costs. The applicants being dissatisfied with the said judgment, have moved with speed and lodged their Memorandum of Appeal before Environment and Land Court at Kisumu. In these circumstances, it is clear that unless this Honourable Court intervenes, the Applicants stand the risk of being evicted from their property and the said property being disposed of by the Respondent, anytime from now.

The suit property belongs to the Applicants who have occupied the same for over 40 years, and thus the property is of immense sentimental value to the Applicants, and which will now be out of the Applicants' reach forever.

Unless this Application seeking a stay execution of the Judgment and consequential orders in the matter Maseno Principal Magistrates Court ELC Case No. 23 of 2018 (Hezekiah Ongu'ndi v. Joshua Ouma and Others) is allowed, the Appeal will be rendered nugatory.

The balance of convenience clearly weighs in favour of the Applicants in this matter owing to the nature of the property in question, sentimental attachment and substantial amount of money involved.

The Applicants are willing and ready to abide with any conditions that the honourable court may impose pursuant to this application.

In the replying affidavit, the Respondent states that Judgment in the Lower court was entered in favour of the Respondent on 22<sup>nd</sup> May 2020 by Hon. C.L. YALWALA IN Maseno ELC Case No. 23 of 2018 and the court ordered the Appellants to vacate parcel no. Kisumu/Karateng/839 and had over possession to the Plaintiff failing which eviction to issue and the Appellants to pay the costs of the suit.

That subsequently, the Applicants filed the instant Application on 16<sup>th</sup> June, 2020 which is almost a month after delivery of judgment and hence the delay in filing this Application is unreasonable.

That in response to paragraph 5 of the Replying Affidavit the Applicants have not annexed a copy of the Memorandum of Appeal, therefore it is impossible to know whether their alleged filed Memorandum of appeal arguable Appeal with any chance of success as purported therein.

That in reply to paragraph 6 and 8 of the Supporting Affidavit the trial did not have Jurisdiction to handle matters of adverse possession since the same is a reserve of the high court as provided by Section 38 of Limitation of actions Act and therefore the Applicants do not have an arguable Appeal.

That in Response to 7 of the Replying Affidavit the Applicants the court should take Judicial notice that the Lands Registry is open and the Applicants are merely delaying the conclusion of the matter by stating they need to apply for the green card which they ought to have done at the trial in the lower court.

That in reply to paragraph 12 and 14 of the Supporting Affidavit the Applicants have not demonstrated at all the actual or substantial loss he would suffer if the order of stay is not granted and as such mere allegations or averments without tangible proof is not enough to meet the requirement for proof of substantial loss.

That in reply to Paragraph 9 of the Supporting Affidavit, the Applicants have not demonstrated whatsoever that his Appeal raises any triable issues of law or fact or that the Appeal has any high chances of success to warrant grant of stay orders.

That the Applicants have not provided any security for the alleged Appeal as a required under Order 42 rule 6 of the Civil Procedure Rules.

That in view of the foregoing, the Applicants have not met the pre-requisite conditions for grant of stay as sought herein.

I have considered the application and do grant prayer 2 thus **the firm of Gordon Ogola, Kipkoech & Co. Advocates be granted leave to come on record for the Defendants/Appellants in the matter Maseno Principal Magistrates Court ELC Case No. 23 of 2018 (Hezekiah Ongu'ndi v. Joshua Ouma and others).**

On stay of execution pending appeal Order 42 Rule 6 (2) provides:

**“(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.”**

I do find that Judgment was entered on 22/5/2020 and the application made on 16<sup>th</sup> June 2020. Taking consideration that the events happened during the peak of covid 19 Pandemic, the delay in filing the application is not unreasonable. Moreover, I do find that the appellants are likely to be evicted if stay is not granted and therefore they will suffer substantial loss.

The upshot of the above is that I do grant an order of stay of execution of the decree herein pending appeal. The appellants to deposit in court security for costs valued at Kshs. 150,000/=. Costs in the appeal.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 1<sup>ST</sup> DAY OF OCTOBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

**ANTONY OMBWAYO**

**JUDGE**