



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KISUMU**

**ELC APPEAL NO. 45A OF 2019**

**LAKE BASIN DEVELOPMENT AUTHORITY.....APPELLANT/APPLICANT**

**-VERSUS-**

**JOSEPH OCHIENG.....RESPONDENT**

**RULING**

**BRIEF FACTS**

The Applicant herein filed a Notice of Motion dated 2<sup>nd</sup> February 2021 under Section 3 and 3A of the Civil Procedure Act and Order 42 and Order 9 Rule 9 of the Civil Procedure Rules Cap 21 Laws of Kenya and all other enabling provisions of the Law seeking the following orders:

1. That the Application be certified urgent and be heard ex-parte at the first instance and be fixed for inter parties hearing thereafter.
2. That leave be granted to the firm of Otieno, Yogo & Co. Advocates to come on record on place of Amondi & Co. Advocates.
3. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to grant an order of stay of execution of the decree in Nyando SPM ELC No. 12 of 2018.
4. That costs of this Application be in the cause.

The Appellant's /Applicant's Notice of Motion Application was based on the following grounds:

1. That the Applicant has filed Kisumu ELC No. E013 of 2020 in which the Respondent and other Defendants in that suit have been sued.
2. That the title held by the Respondent and other Defendants are sought to be cancelled for having been obtained unlawfully and illegally as the same were public land allocated to the Appellant and therefore not available for allocation to individual persons.
3. That the court on 17<sup>th</sup> December 2020 did order the status quo to be maintained pending hearing of the suit.
4. That it is property that there be stay of Nyando SPM ELC No. 12 of 2018 herein to safeguard the substratum of the suit challenging the title, the basis of this suit.
5. That unless the application is urgent and heard ex-parte then the Applicants are likely to suffer as their liberties may be in jeopardy.

Michael Okuk who is the Legal Manager of the Appellant through a Supporting Affidavit to the Application stated that after intensive investigations, the Appellant discovered that the Respondent together with others obtained public land allocated to the Appellant for public use unlawfully and illegally obtained titles to the portions of the said land.

The Appellant has sued the Respondent together with others in Kisumu ELC No. E013 of 2020 and the court granted orders of status quo pending the inter parties hearing. The 1<sup>st</sup> Respondent has taken out warrants in Nyando SPM ELC No.12 of 2018 and has attached the Appellants motor vehicle registration number KBR 496U and may proceed to sell the same by public auction unless restrained by this court.

That unless the Respondent is restrained, the Appellant shall lose public property to the detriment of the public. He further stated that the Appeal is ready for Hearing and disposal and it is proper that the execution proceedings be stayed and that the said motor vehicle is used for public works and services to the public is being hampered.

The Respondent replied to the Appellant's Application dated 2<sup>nd</sup> February 2021 and stated that he is not a party in Kisumu ELC No. E013 of 2020. That Kisumu ELC No. E013 of 2020 was filed in 2020 and Nyando ELC No. 12 of 2018 was filed in 2018 and were concluded and therefore the Appellant is trying to re-litigate the suit afresh in an attempt to circumvent the Judgment in Nyando case.

The motor vehicle registration number KBR 496U has been attached and sold after following the due process and the instant application has been overtaken by events and there has never been any Appeal preferred against the Judgment of the lower court in Nyando ELC No. 12 of 2018.

That no Appeal has been lodged against the Judgment of the lower court since the Judgment in Nyando ELC No. 12 of 2018 was delivered on 21<sup>st</sup> May 2019.

On 10<sup>th</sup> December 2020, this court delivered a Ruling that affirmed the fact that the Applicant only pursued a Review instead of an Appeal and the Review was dismissed.

#### **APPELLANT'S /APPLICANT'S SUBMISSIONS**

The Appellant filed submissions on 8<sup>th</sup> June 2021 and in their submissions the Appellant's maintains that the Respondent has proceeded to take warrants in Nyando SPMC ELC No. 12 of 2018 and has attached the Appellant's motor vehicle registration number KBR 496U and may proceed to sell the same by public auction unless restrained by this court. The Appellant relied in the case of **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others, Civil Application No. NA131/2021**, where the court considered the requirements that an Applicant must satisfy for the court to grant orders for stay and stated inter alia:

**“This Court, in accordance with precedent, has to decide first whether the intended Appeal would be nugatory if these interim orders were denied. From the long line of decided cases on Rule 5(2) (b) aforesaid.....”That dealing with Rule 5 (2) (b), the court exercises original and discretionary jurisdiction and that exercise does not constitute an Appeal from the judge's decision on this court”**

The Appellant also relied on **Butt v Rent Restriction Tribunal 91982) KLR 417** where the court held that discretion ought to be exercised in a manner that would not prevent an Appeal.

The Appellant raised the following issues to be determined:

a) Whether the intended Appeal is arguable.

The Appellant submitted that in their Memorandum of Appeal dated 11<sup>th</sup> November 2019, the grounds outlined therein demonstrate that the intended Appeal is not frivolous and raises bonafide issues deserving full consideration of the court. The Appellant relied in the case of **Jaribu Holdings Ltd v Kenya Commercial Bank Limited CA No. 314 of 2007**.

The Appellant also relied in the case of **Gitaru Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014) eKLR** where the court stated that the court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights and the public spiritedness that run through the Constitution.

b) Whether the Applicant will suffer substantial loss

The Appellant submitted that they stand to lose public property to the detriment of the public since the attaché motor vehicle is used for public works and services to the public is being hampered by the Respondent. The Appellant relied on **James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR** where the court stated as follows:

**“No doubt , in law , the fact that the process of execution has been put in motion, or is likely to be put in motion , by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is o because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate that very essential core of the Applicant as the successful party in the Appeal.....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”**

The Appellant also relied in **Shell Ltd v Kabiru and Another (1986) KLR, Platt JA** set out two different circumstances when substantial loss could arise as follows:

**The appeal is to be taken against a judgment in which was held that the present respondents were entitled to claim damages due to the negligence of the present applicant. It is a money decree. An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its**

money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts.

On the issue of security, the Appellant submitted that the Appeal is ready for hearing and disposal and it is proper that the execution proceedings be stayed so that the interests of both parties are secured.

**c) Whether the present application has been made without unreasonable delay.**

The Appellant submitted that the Application herein has been made without unreasonable delay. In **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR** the court held as follows”

**“We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant discharged this requirement on the balance of probabilities.**

The Appellant also relied on **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR**

**“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir Eldoret E&L 919 of 2012* the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”**

The Appellant therefore prayed that this court do grant interim stay of execution of the Decree and Judgment in Nyando SPM ELC No. 12 of 2018.

**RESPONDENT’S SUBMISSIONS**

The Respondent submitted that the Application filed by the Applicant on 22<sup>nd</sup> June 2020 seeking for review was ruled on 10<sup>th</sup> December 2020 which Application sought for the Court’s order issued on 22<sup>nd</sup> May 2020. The court dismissed the Application and the Respondent submits that the Application was for review and not Appeal.

The Respondent further submitted that he is not a party in Kisumu ELC case No. E013 of 2020 and that the Appellant filed a suit in Kisumu ELC case No. E013 of 2020 while aware of the fact that there was an earlier suit filed in Nyando ELC No. 12 of 2018 concerning the same parties over the same subject matter.

The Appellant is trying to relitigate the suit afresh in a desperate attempt to circumvent the Judgment in the Nyando case.

The Respondent in his submissions stated that the present Application has been overtaken by events since the motor vehicle in question KBR 496U was duly attached and sold after due process was followed.

The Appellant did not lodge any Appeal against the Judgment in the Nyando case and the Appellant only Appealed against the Ruling of the lower court on two applications dated 15<sup>th</sup> August 2019 and 22<sup>nd</sup> August 2019 which were both filed on 22<sup>nd</sup> August 2019.

The two Applications were dismissed by the lower court on 31<sup>st</sup> October 2019 and the Appellant preferred an Appeal against the two Applications which were dismissed.

On the issue of whether the Appellant has an arguable Appeal, the Respondent submits that he has demonstrated that there is no Appeal in this matter and that he is not a party to Kisumu ELC No. 013 of 2020. The Respondent has further stated that in the case of **James Wangalwa & Another v Agnes Naliaka Chesoto (2012)** relied by the Appellant is not in favour of their Application since the execution by the Respondent was lawful.

The Respondent submitted that the Application should be dismissed with costs.

**ISSUES FOR DETERMINATION**

The main issues to be determined herein are as follows:

- i. Whether the intended Appeal is arguable.
- ii. Whether the Applicant will suffer substantial loss
- iii. Whether the present Application has been made without unreasonable delay.

**ANALYSIS AND DETERMINATION**

On the issue of whether the intended Appeal is arguable; Order 42 Rule of the Civil Procedure Rules states as follows: -

**“ 6 (1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but , the court appealed from may for sufficient cause order stay of execution of such decree or order , and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such Appeal is preferred shall be at liberty, on application being made to consider such application and to make such order thereon as may to seem just ,and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such order set aside.”**

**(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 appellant 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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

***In the case of Butt Versus Rent Restriction Tribunal (1982) KLR 417,* the court held as follows;**

**(a) The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**(b) 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.**

**(c) 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.**

**(d) 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 that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.**

**(e) The court-exercising its powers under Order xvi 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 courts as ordered will cause this order for stay of execution to lapse.”**

**On whether the Applicant will suffer substantial loss; it is clear that the Respondent has already sold motor vehicle KBR 496U as due process was followed. The Appellant has submitted that they will lose public property since the said motor vehicle is used for public works and services to the public. Since the said motor vehicle has been sold, there is no loss that will occasion since the instant application has been overtaken by events.**

The court in **Peter Ngugi Kimani & another v Stephen Muturi Mwangi [2019] eKLR** held that:

**“The third and final condition is that of the provision of security for the performance of the decree. Whereas the applicants indicated in the grounds of their application and submissions that they are ready to abide by the terms set out by the court, this court has noted that the subject was not at all discussed in the affidavits supporting the said application, thereby denying the respondent the opportunity of responding to the same. In any event, this court has already determined that the threshold for substantial loss has not been met by the applicants”.**

**In this Application, the Appellant have submitted that on the issue of security that the Appeal is ready for hearing and it is my view that they have not disclosed how much security they will deposit to this court therefore they have not met the threshold of substantial loss.**

On the issue of whether the present Application has been made without unreasonable delay; I agree with the Appellant that this Application was filed without unreasonable delay which fact is not disputed by the Respondent herein. On whether the Respondent is a party to Kisumu ELC No. 013 of 2020, it is clear from the court record that the Respondent is not a party to that matter.

## **CONCLUSION**

I find that the instant application has been overtaken by events as execution process had already been put in motion and the Appellant has failed to demonstrate the substantial loss he will incur. The Appellant failed to offer security in terms of the costs awarded to the Respondent. I am of the view that an order of stay of execution at this juncture will not serve any useful purpose as the attached motor vehicle has since been sold. In the circumstances, I find the instant application unmerited and will dismiss it with costs.

**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**