



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT HOMABAY

ELC APPEAL NO. E 007 OF 2021

BONFACE ODHIAMBO ODIRA.....APPLICANT/APPELLANT

VERSUS

1. SIPRIANO ODIRA MWAI.....1ST RESPONDENT

2. COUNTY LAND REGISTRAR HOMABAY.....2ND RESPONDENT

RULING

1) In an application by way of a Notice of Motion dated 13th August 2021 and filed herein on 14th October 2021 under Sections 3 and 3A of the Civil Procedure Order Act Cap 21 of the Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all enabling provisions of the law, the applicant/Appellant, Boniface Odhiambo Odira through the firm of Oscar Otieno and Company Advocates is seeking the following orders;

a) Moot

b) Moot

c) **THAT** pending the hearing and determination of the appeal to this court. This Honourable Court be pleased to grant an order of stay of execution of the Judgement and Decree of Hon. T. Obutu dated 16th September, 2021 in the **Environment and Land Court No. E008 of 2020 Sipriano Odira Mwai – versus –Boniface Odhiambo Odira and Another** pending the hearing and determination of this appeal.

d) **THAT** costs of this application be provided for.

2) The application is anchored on grounds (a) to (f) set out on its face and the applicant's 13-paragraphed affidavit sworn on even date and copies of letters requesting for typed proceedings and judgment of the trial court and memorandum of appeal duly filed herein marked as **BO-1 to BO2** respectively and annexed thereto. In summary, the applicant complains that Judgment was delivered in favour of the 1st Respondent on 16th September 2021 by the trial court in Homa-Bay Chief Magistrate's Court, Environment and Land case E008 of 2020. That the stay of execution of the judgment and decree granted by the trial court is lapsing and likely to expose him to substantial loss if the judgment and decree are executed. That he has filed the appeal herein and may the subject matter of the appeal be preserved by way of grant of the stay of execution sought in the application pending the hearing and determination of the appeal.

3) This court granted interim stay of execution of the trial court's judgment on 14th October 2021, orders were extended for ten (10) days on 16th November 2021.

4) The respondents, Sipriano Odira Mwai and the County Land Registrar failed to file any response to the application.

5) On 16th November 2021, the court fixed this date for ruling in respect of the application in the spirit of **Article 159 (2) (b) of the Constitution of Kenya, 2010** and **section 3 of the Environment and Land Court Act, 2015(2011)**.

6) So, the Deputy Registrar of this court issued notice on the same date accordingly.

7) On 4th November 2021, learned counsel for the applicant filed submissions dated 2nd November 2021. Counsel urged this court to allow the application and relied on **Order 42 Rule 6 (Supra)** and **Bethel Muiruri Benjamin –versus - Development Bank of Kenya (2006)**

eKLR, therein.

8) I have carefully considered the application and the applicant's submissions in their entirety. In that regard, has the applicant met the conditions for grant of the principal sought in the application?

9) **Order 42 Rule 6, sections 3 and 3A** (*supra*) under which the application is generated are all taken into account. Substantial loss may be occasioned on the applicant if the trial court's Judgment and decree are executed. By the letters (BO-1) alongside reason No. 4 on the face of the application and paragraph 7 of the applicant's supporting affidavit, there is explained delay in bringing the application. Further, no party is exempted from providing security for the due performance of the decree. However, it is within the discretion of the court.

10). Clearly, there are triable issues as disclosed in the memorandum of appeal (BO-2) in this appeal. The applicant has an undoubted right of appeal as noted in **Butt case** (*infra*).

11). In execution of trial court's decree, this appeal may be prevented; **See; Butt – versus- Rent Restriction Tribunal (1979) eKLR.**

12). It is the finding of this court that the application is unopposed, firm, cogent and merited. I proceed to allow the same per order number 3 sought in application and as stated in paragraph 1 (c) hereinabove.

13. Costs of the application be costs in the appeal.

RULING DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 30TH DAY OF NOVEMBER, 2021.

G M A ONGONDO

JUDGE

In the presence of;

Miss P. Amondi, learned counsel for the 1st Respondent

Court Assistant; A. Okello

G M A ONGONDO'

JUDGE