



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL NO. E011 OF 2021

HENRY NYONGESA.....APPELLANT/APPLICANT

VERSUS

HUDSON WANJALA BITONYAKE.....1ST RESPONDENT

ANAZETUS WAFULA WEKESA.....2ND RESPONDENT

R U L I N G

HENRY NYONGESA (the Applicant herein) has moved to this Court vide his Notice of Motion dated 23rd August 2021 seeking the following orders: -

(a) Spent

(b) Spent

(c) Pending the hearing and determination of the substantive appeal, there be a stay of execution of the ruling delivered on 7th June 2021 in BUNGOMA CHIEF MAGISTRATE'S COURT MISC APPLICATION No 196 of 2021 and consequential orders therefrom.

(d) Costs of the application be provided for.

The application is founded on the provisions of **Sections 1A, 1B and 63(e)** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules**. It is predicated on the grounds set out therein and supported by the Applicant's affidavit also dated 23rd August 2021.

The gravamen of the application is that by a ruling dated 7th June 2021 in **BUNGOMA CM CIVIL APPLCIATION NO 196 OF 2021**, the trial Court **HON. A. ODAWO (SENIOR RESIDENT MAGISTRATE)** allowed the application by **HUDSON WANJALA BITONYAKE** (the 1st Respondent herein) whose import was to allow part of the Applicant's land to be used as an access road between land parcel **NO EAST BUKUSU/NORTH SANG'ALO/5031** belonging to the Applicant and the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/5032** and **5033** belonging to the Respondents. That if the said ruling is executed, it will render the appeal nugatory and the Applicant will also suffer substantial loss. Further, that the trial Court did not even have jurisdiction to determine the dispute before it and that if the orders issued on 7th June 2021 are executed, a large chunk of the Applicant's land will be cut off and this will result in substantial loss to him. That the application has been made timeously and the Applicant is ready and willing to abide by any condition which this Court may impose. That the Respondents will not suffer any prejudice and disallowing the application will render the appeal nugatory.

Annexed to the Notice of Motion are the following documents: -

- 1. A copy of the Notice of Motion filed in BUNGOMA CHIEF MAGISTRATE MISCELLANEOUS APPLICATION No 196 of 2021 seeking orders that the OCS BUNGOMA POLICE STATION or any nearest Police Station offer security to the County Surveyors and Land Registrar Bungoma while re – opening the road of access between land parcels NO EAST BUKUSU/NORTH SANG'ALO/5028, 5031, 5032 and 5033.**
- 2. Copy of title deed in respect of the land parcel NO EAST BUKUSU/ NORTH SANG'ALO/5033.**
- 3. Copy of the title deed in respect of parcel NO EAST BUKUSU/NORTH SANG'ALO/5032.**
- 4. Mutation form for title NO EAST BUKUSU/NORTH SANG'ALO/891.**

5. Replying affidavit by the Applicant dated 22nd March 2021 and filed in BUNGOMA CHIEF MAGISTRATE'S COURT MISCELLANEOUS APPLICATION No 196 of 2021.

6. Copy of Title deed in respect of parcel NO EAST BUKUSU/NORTH SANG'ALO/5031.

7. Report of AMOS MASINDE of GEOMASTER SURVEYS on land parcel NO EAST BUKUSU/NORTH SANG'ALO/5031 together with annexures.

8. Ruling by HON. A. ODAWO SENIOR RESIDENT MAGISTRATE dated 16th August 2021 in BUNGOMA CHIEF MAGISTRATE CIVIL CASE No 196 of 2021.

In opposition to the application the Respondents filed replying affidavits.

In his replying affidavit dated 8th September 2021, **ANAZETUS WAFULA WEKESA** the 1st Respondent described the application as a total abuse of the Court process. He confirmed that he is an immediate neighbour to the Applicant and shares a common boundary. That according to the mutation form and amended map, there is a clear road of access between the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/5028** and **5033** as per the annexed map and mutation form. That the Local Administration and the County Surveyors have tried to intervene to have the said road of access opened but in vain as per the annexed letters from the **CHIEF** and **COUNTY SURVEYOR**. That when the Applicant declined to open the road of access, he was advised by the Local Administration and County Surveyor Bungoma to file an application to seek security due to the Applicant's hostility. That the Applicant keeps filing applications and the ruling delivered by the Magistrate on 7th June 2021 favoured both parties.

The 1st Respondent annexed the following documents to his replying affidavit: -

1: Mutation form for land parcel NO EAST BUKUSU/NORTH SANG'ALO/891 and map showing access road between land parcels NO EAST BUKUSU/NORTH SANG'ALO/5028 and 5033.

2: Copy of letters from the CHIEF and COUNTY SURVEYOR.

The 2nd Respondent **HUDSON WANJALA BITONYAKE** also confirmed that he shares a common boundary with the Applicant and that according to the mutation form and amended map, there is a clear road of access between the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/5028** and **5033**. That the Local Administration and the County Surveyors have tried to intervene to have the said road of access opened but in vain and so he was advised to seek orders of security due to the Applicant's hostility. That if the orders sought by Applicant are granted, he will suffer irreparable loss as he cannot cut and carry his over – grown sugar cane to the factory because the Applicant has blocked the access road. That the ruling delivered on 7th June 2021 favoured both parties and this application should be dismissed.

The 2nd Respondent annexed to his replying affidavit the following documents: -

1. Mutation form and map showing access road.

2. Letters from the CHIEF and COUNTY SURVEYOR.

3. Orders issued in BUNGOMA CHIEF MAGISTRATE'S COURT MISCELLANEOUS APPLICATION No 196 of 2021.

4. Photograph of sugar cane crop.

The Applicant filed a further affidavit dated 27th September 2021 denying that he has encroached on the access road or blocked the Land Registrar or Surveyor from executing their mandates. That these are mere allegations as no report has been made to the Police. That if indeed he was un – co – operative, it would have been the Land Registrar or Surveyor making this application. That the Respondents have not refuted the fact that the import of the order issued by the trial Magistrate will result in a chunk of his land being hived off and also result in a road being created where non existed.

That the orders issued are to his prejudice and will render his appeal academic and the Respondents know that the land which he is occupying is less than what is registered.

The application was first placed before **OMOLLO J** on 25th August 2021 who granted a temporary stay of execution of the ruling delivered on 7th June 2021 in **BUNGOMA MISCELLANEOUS CHIEF MAGISTRATE'S COURT CIVIL APPLICATION No 196 of 2021** and directed the parties to exchange written submissions.

Submissions were thereafter filed both by **MR ANWAR** instructed by the firm of **ANWAR & COMPANY ADVOCATES** for the Applicant while the firm of **ADONGO & COMPANY ADVOCATES** filed submissions on behalf of the 1st Respondent. The 2nd Respondent filed his submissions in person.

I have considered the Notice of Motion, the rival affidavits and annexures thereto and the submissions filed.

The Applicant seeks a stay of execution of the ruling delivered by the **HON A. ODAWO (SRM)** in **BUNGOMA CHIEF**

MAGISTRATE'S CIVIL CASE No 169 of 2021 on 7th June 2021 pending the hearing and determination of the appeal herein. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides that: -

6(1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 an appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it 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 sub rule (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." Emphasis added.

It is clear from the above that a party seeking the grant of an order of stay of execution pending appeal must satisfy the following conditions:

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order of stay is granted.
3. Offer security.
4. Approach the Court without unreasonable delay.

Substantial loss is the cornerstone for the jurisdiction to grant stay – **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410**. It is clear from the documents filed herein that the Applicant is the proprietor of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/5031** while the 1st and 2nd Respondents are the proprietors of the parcels **NO EAST BUKUSU/NORTH SANG'ALO/5032, 5033 and 5028**. All these parcels of land are the resultant sub – divisions of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/891**.

The order that has aggrieved the Applicant and which is the subject of this application and the pending appeal reads as follows: -

"ORDER

Before HON. A. ODAWO S. R. M on the 7th June 2021.

The matter coming up for ruling of an application dated 11th February 2021 in the absence of all parties.

IT IS HEREBY ORDERED: -

1. That the OCS Bungoma Police Station or any nearest Police Station to provide security to the County Surveyors and Land Registrar Bungoma while re – opening the road of access between land parcel NO E. BUKUSU/N. SANG'ALO/5028, 5031, 5032 and 5033.
2. That the OCS Bungoma Police Station or any nearest Police Officers to ensure compliance of the orders.
3. That if the said re – opening would result to any demolition whatsoever of the structures of either party, then the re – opening exercise be stopped at that point and a comprehensive report on the same be submitted to Court by the Lands Registrar.
4. If that were to happen any aggrieved party to move the Court appropriately regarding the same.
5. Costs in the cause.

GIVEN UNDER my HAND AND SEAL OF THE HONOURABLE COURT ON THE 7TH DAY OF JUNE 2021.

HON. A. ODAWO

SENIOR RESIDENT MAGISTRATE

BUNGOMA." Emphasis added.

The Court of Appeal in **BUTT .V. RENT RESTRICTION TRIBUNAL 1982 KLR 417** gave the following guidelines on how a Court should exercise its discretion in an application of this nature. These are: -

- 1. The power of the Court to grant or refuse an application for stay of execution is discretionary.**
- 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 any appeal may not be rendered nugatory should the 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 the 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.**
- 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.**

An order of stay of execution pending appeal is geared towards preserving the subject property so that the appeal is not rendered nugatory. The Court must therefore weigh the competing interests of the parties so that none of them is prejudiced.

I have no doubt in my mind that the Applicant has approached this Court without unreasonable delay. He has also averred that he is ready and willing to abide by any conditions as to security which this Court may impose in granting a stay of execution. However, to satisfy the threshold set out in **Order 42 Rule 6** of the **Civil Procedure Rules**, the Applicant is required to meet **all** the conditions set out therein and **not only one or some of them**.

As already stated above, substantial loss is the cornerstone of an application for stay pending appeal. Has the Applicant surmounted this test? On this issue, the Applicant has averred in paragraph 12 of his supporting affidavit as follows: -

12: "That I also know for a fact that disallowing the application will gravely prejudice me as my appeal will be rendered academic and nugatory and further, I will suffer substantial loss should the appeal be successful as part of my land would have been converted to an access road and used for passage by members of the public including the Respondents herein usage that would not be easy to stop."

In response to that averment, the Respondents in their separate replying affidavits averred in paragraph 5 as follows: -

5: "That according to the mutation and amended map, there is a clear road of access between land parcels numbers E. BUKUSU/N. SANG'ALO/5028 – 5033. Annexed and marked HWB – 1(a) and (b) (AWW – 1(a) and (b) is a copy of amended map and mutation showing road of access between the parcel numbers."

In a further affidavit dated 27th September 2021 however, the Applicant's response as per paragraph 5 is: -

5: "That I further know for a fact that there has been no substantive suit and or report adduced to the Court by the Respondents to show that I have blocked the access road and thus such allegations are but mere allegation not founded on any evidence and does not meet the threshold of Section 107 of the Evidence Act."

I caution myself that at this stage, I am dealing with an interlocutory appeal. The main appeal is still pending and so too is the substantive suit in the trial Court where it will be determined on its merits. I must therefore refrain from expressing any conclusive views on issues that are yet to be canvassed. What is before me is an application of stay of the ruling delivered on 7th June 2021 by the trial Court.

Earlier in this ruling, I have reproduced in extenso the orders that were issued by the trial Court and which the Applicant seeks to stay. It is clear that the trial magistrate referred to a **"re – opening of the road of access between land parcel NO E. BUKUSU/N. SANG'ALO/5028, 5031, 5032 and 5033."** That can only mean that the trial Magistrate was persuaded that an access road previously existed because you can only **"re – open"** what was previously open but has now been closed. But that was not all. For abundance of caution, the trial Magistrate went on to add that should there be **"demolition whatsoever of the structures of either party, then the re – opening exercise be stopped at that point and a comprehensive report on the same be submitted to the Court by the Land Registrar."** The trial Magistrate went on to grant leave to any aggrieved party to approach the Court in that event. I have not heard the Applicant complain that the re – opening of the road will result in any destruction of permanent structures on his land. On the other hand, the 2nd Respondent has averred in paragraph 11 of his replying affidavit that following the closure of the road of access, he has been un - able to access the main road and is therefore handicapped in harvesting and ferrying his sugarcane to the factory. Given the orders which the trial Magistrate has granted, I am not persuaded that the Applicant has demonstrated that he will suffer substantial loss or that his appeal will be rendered nugatory. At the end of the trial, the Court will determine whether indeed there exists a road of access.

In paragraph 9 of his further affidavit dated 27th September 2021, the Applicant questions the jurisdiction of the trial Court to grant the orders sought. He does not however state why the trial Court has no jurisdiction in the matter. His Counsel **MR ANWAR** has however submitted on this issue and said at page one (1) of his submissions that: -

" the orders made by the learned Magistrate were erroneously made as the Court was not clothed with jurisdiction to

deal with Boundary disputes”

The Plaintiff and Defence in the Subordinate Court were not available for my perusal. I therefore do not have any material upon which I can determine whether the matter revolves around a Boundary dispute. All I can say is that there is a very thin line between determining a Boundary dispute and re – opening up a road of access which is in dispute. There is no doubt however that under **Section 140** of the **Land Act**, an owner of landlocked land has a right of access and may approach the Court for redress.

In paragraph 8 of his further affidavit, the Applicant has questioned the involvement of the Police in this matter. His Counsel has submitted on the same stating that the Police do not need a Court order to perform their functions which are set out under **Section 24** of the **National Police Service Act**. Nothing turns on that.

It is true that under the **Section 24** of the **National Police Service Act**, among of the duties of the National Police Service are to maintain law and order and preserve peace. In **KAMAU MUCHINA .V. THE RIPPLES C.A CIVIL APPEAL No 186 of 1992**, the Courts were advised to be slow in involving the Police in purely civil processes. However, the Respondents have averred that the Applicant has been hostile when the Local Administration and Surveyor attempted to re – open the road. In cases where a party is being hostile, nothing stops the Police, upon request, from providing security.

After all, among the duties of the Police under **Section 24(a)** is: -

“Provision of assistance to the Public when in need.”

In **PETRONILLA NEKOYE KONG’ANI .V. JOHN BARASA & OTHERS 2021 eKLR**, the Court said: -

“But that is not to say that the Police cannot be directed to maintain law and order where that may be necessary as in cases where there is evidence of resistance. The first point of call therefore would be for those persons involved in the execution process to seek the necessary Police assistance and only resort to Court orders where there is a likelihood of a breach of the peace and requests for security have been rebuffed.”

Ultimately therefore and having considered the Applicant’s Notice of Motion dated 23rd August 2021, I am not persuaded that it has satisfied the threshold of **Order 42 Rule 6(1)** and **(2)** particularly on the issue of substantial loss which is the cornerstone of such applications.

The up – shot of the above is that this Court makes the following disposal orders: -

- 1. The Notice of Motion dated 23rd August 2021 is hereby dismissed.**
- 2. Costs shall be in the appeal.**

Boaz N. Olao.

J U D G E

4th November 2021.

Ruling dated, signed and delivered at **BUNGOMA** on this 4th day of November 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

4th November 2021.

Explanatory notes: -

This ruling was due for delivery on 28th October 2021. However, I was unwell and had travelled to Nairobi for treatment. The delay is regretted but was inevitable under the circumstances.

Boaz N. Olao.

J U D G E

4th November 2021.