



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO. 19 OF 2020

JOSEPH MUIYA RINKA.....APPELLANT/APPLICANT

VERSUS

ISAAC MWANGI NGEETI.....RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 5th July, 2020, the Applicant sought for the following orders: -

a) Spent.

b) Pending the hearing and determination of this Application and determination of Appeal ELC No. 19 of 2020 in this court, the Honourable Court be pleased to grant an Interim **Order of Stay of Execution** of the Judgment and Decree herein dated 29th May, 2020.

c) The Honourable court be pleased to grant an order of stay of execution of the judgement and decree herein dated 29th May, 2020 at Kilgoris Law Courts.

d) That this Honourable Court do review and/or rewrite taking into account that in the judgment proceeding dated 29th May, 2020 at Kilgoris law court, nowhere in entirely shown the way the Respondent attained the title of the land T/Mara/ Ololchani/684 but the only thing is he owns the title.

e) Such other and/or further orders that this honourable court may deem just and expedient be granted.

f) Cost of this Application do abide the Appeal.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn by JOSEPH MUIYA RINKA dated 05.07.2020. The applicant herein avers that he has been staying on the suit land Trans- Mara/ Ololchani/684 with his entire family; his children and grandchildren since 1967 without any interference. That he has constructed structures on the said land and have also been planting trees, flowers, variety of fruits among others.

3. It is his claim that the Respondent herein filed a case against him at the Principal Magistrates Court in Kilgoris vide ELC No. 19 of 2018; seeking a permanent injunction and an order of eviction against him from the suit land. Judgment was entered in favor of the Plaintiff therein whose effect was to have him vacate the suit land within 120 days.

4. Owing to his dissatisfaction with the said judgment, he has since filed an Appeal to this court; which in his view raises triable issues with an overwhelming chance of success. He is apprehensive that should the execution of the judgment and decree take place, then he stands to suffer substantial loss.

5. The application was opposed. The Respondent filed a Replying Affidavit dated 27.08.2020 in response to the Application dated 05.07.2020. It is the Respondent's assertion that he is the registered proprietor of the land parcel Trans- Mara/ Ololchani/ 684 and the title deed was issued upon confirmation by the land adjudication and settlement officer on 02.02.2005 and thus the claims by the Applicant that he grabbed the registration are false.

6. He further contends that the Applicant has failed to prove any of the known grounds for stay of execution as sought and the said Application should therefore be dismissed. He maintains that the Applicant is a trespasser on his parcel of land and he has filed a number of

criminal cases in order to restrain him to no avail.

7. The Application was disposed of by way of written submissions, however, I wish to note that the Applicant's submissions are not in the court record. I have read and considered the Application, various responses thereto and the submissions filed by the Respondent together with the various authorities cited and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

8. The sole issue for determination in the present Application is Whether an Order for Stay of Execution can issue against the judgment and the decree dated 29/05/2020.

9. I have looked at the Notice of Motion dated 5th July, 2020 and I do note that the Application is anchored on the wrong enabling provisions of the law; that is, Order 10 Rule 11, Order 50 Rules 1 & 3 of the Civil Procedure Rules, 2010 and Sections 3A and 63 (e) of the Civil Procedure Act; which do not address the issue of Stay of Execution which is at the center of the present application. However, I wish to take cognizance of the fact that the Applicant is a layman and is unrepresented by counsel and I will thus invoke Article 159 of the Constitution of Kenya and look at the substance of the Application.

10. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -

(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.*

Whether an Order for stay of execution can issue against the judgment and decree dated 29th May, 2020

11. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

12. From the provisions in Order 42 Rule (2) of the Civil Procedure Rules, there are three conditions for granting an Order for Stay pending Appeal which include:

i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

ii. The application is brought without undue delay and

iii. 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.

13. The first ground to be established is whether substantial loss may result to the Applicant if stay of execution is not granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

14. The onus is on the Applicant to show the damages he will suffer if the order for stay of execution sought is not granted. This is because; by granting such stay, it would mean that the status quo as it were before the judgment should remain and that would be denying a successful litigant the fruits of his judgment; which should not be done unless the Applicant has given sufficient cause to the court to enable it exercise its discretion in granting the orders sought. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. (See **New Stanley Hotel Ltd –vs- Arcade Tobacconist (1980) KLR 757**).

15. It is the Applicant's assertion that if the orders sought for stay of execution are not granted; he stands to suffer substantial loss. He further stated that he has been in occupation and possession of the suit property since 1967 where they have been staying with his family; children and grandchildren. He has built structures on the said parcel has been cultivating and even planting trees, flowers and various fruits. They thus stand to be evicted from the said suit property and rendered destitute should the stay orders not be granted.

16. In view of the foregoing, I find and hold that the Applicant has satisfactorily proved that he is likely to suffer substantial loss unless orders for stay of execution are granted. Further, the Respondent has not demonstrated nor commented on his capacity to compensate the Applicants in the event that the suit property is alienated and/or disposed of and the Appeal succeeds.

17. The lower court judgment was delivered on the 29th May, 2020 while the present Application was filed on the 5th July, 2020. I therefore find that the Application was filed without undue delay and hold that the Applicant has satisfied the 2nd limb of the conditions set out in Order 42 Rule 6(2).

18. The third ground to be proved is on the deposit of security for costs for the due performance of such decree or Order as the court may direct. The Applicant has not demonstrated or commented on this ground; on his willingness to provide security for costs as may be ordered by the court.

19. In the case of **Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates** the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

20. Even though the requirement on the amount of security to be deposited ought to be balanced against the interests of both the Applicants and the Respondent, the said amount should be adequate and not be disadvantageous to the party depositing the security as was properly held in **ROSENGERENS LTD –VS- SAFE DEPOSIT CENTRE LTD 919840M 3ALLER** 198.

21. The grant for an Order of Stay of Execution is discretionary in nature. The Court of Appeal in **Butt vs Rent Restriction Tribunal [1982] KLR 417** gave guidance on how such discretion should be exercised as follows:

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, 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 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.”*

22. I have looked at the Applicant's Notice of Motion, the grounds thereon and the Supporting Affidavit in totality and I find that the Applicant have satisfied the 3 limb test provided under the Civil Procedure Rules on a balance of probabilities.

23. In the upshot, I accordingly find that the Application dated 5th July, 2020 is merited and I proceed to allow the same on the following terms: -

a) Orders of Stay of Execution of the judgment and decree issued on 29th May, 2020 pending the hearing and determination of the Appeal.

b) The Applicant shall deposit a sum of Kshs. 50,000/= in the court's account being Security for Costs for the due performance of the decree within 30 days from the date of this Ruling.

c) The Applicants to file the Record of Appeal within 30 days from the date of this Ruling.

d) Failure to comply with orders (b) and (c) hereinabove, Order (a) hereinabove shall automatically lapse.

e) Costs of the Application to abide the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

RULING DELIVERED IN THE PRESENCE OF: -

MR. SAGWE FOR THE RESPONDENT

NO APPEARANCE FOR THE APPLICANT

TOM COURT ASSISTANT