



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC APPEAL NO. 32 OF 2020

PAMELA AWUOR OCHIENG.....APPELLANT/APPLICANT

ROMANUS ODHIAMBO OTIENO.....APPELLANT/APPLICANT

VERSUS

ELISHA ODARI OGONY.....RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 28th September, 2020, the Applicant sought for the following orders: -

a) Spent.

b) Pending the hearing and determination of this Application, the Honourable Court be pleased to grant an Interim **Order of Stay of Execution** and/or Implementation of the Judgment and Decree of the Honourable Court rendered on the 25th day of August 2020, together with all consequential and/or incidental Orders.

c) In the alternative and without prejudice to the foregoing, pending the hearing and determination of the instant Application, the Honourable court be pleased to **Order and/or direct the Maintenance of Status Quo** in terms of occupation, possession and use, over and in respect of L.R. No. SUNA WEST/ WASIMBETE/ 1257 (hereinafter referred to as the suit property)

d) The Honourable Court be pleased to grant Orders of Stay of Execution of the Judgment and/or Decree issued by this Honourable Court on the 25th day of August, 2020, together with any consequential Orders arising therefrom and/or attendant thereto, pending the hearing and determination of MIGORI ELC APPEAL NO. 32 OF 2020.

e) The Honourable Court be pleased to Order and/or direct Maintenance of Status Quo, in terms of occupation, possession and use, over and in respect of the suit property, pending the hearing and determination of MIGORI ELC APPEAL NO. 32 OF 2020.

f) The Honourable Court be pleased to grant any such further and/or other orders as may be deemed just, appropriate and/or expedient be granted.

g) Cost of this Application do abide the Appeal.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn by PAMELA AWUOR OCHIENG on 28.09.2020. The applicants herein aver that they entered into a sale of land agreement with the Respondent herein on the 02.11.2010 for the sale of a portion of L.R. No. SUNA WEST/ WASIMBETE/ 1257 measuring approx. 3.40Ha for a consideration price of Kshs. 340,000/=. The Respondent did not transfer the same upon the Applicants as agreed, which necessitated the filing of the suit in the lower court. Upon hearing and determination of the suit, judgement was delivered on the 25/08/2020, dismissing their claim with costs to the Respondent.

3. Owing to their dissatisfaction with the said judgment, they have since filed an Appeal to this court; which in their view raises pertinent and salient issues and has an overwhelming chance of success.

4. It is their fear that the Respondent is at the verge of implementing and enforcing the terms of the judgment and the decree and further has even started acts of aggression on the suit property geared towards dispossessing them of the suit property. They are apprehensive that should

the execution of the judgment and decree take place, the Respondent will be at liberty to deal with, dispose of and transact over the suit property despite the pending Appeal and they shall be permanently deprived and dispossessed of the suit property and as a result will suffer substantial loss.

5. They have further stated that they are ready to furnish any reasonable and justifiable security as the Honourable Court may deem fit and justifiable in the circumstances for the due performance of any such orders as shall be granted by the Honourable Court in a joint interest earning account of both counsels or in the honourable court accounts.

6. The application was opposed. The Respondent filed a Replying Affidavit dated 21.10.2020 and a Preliminary Objection dated 08.03.2021 in response to the Application dated 05.03.2021. It is the Respondent's assertion that the land parcel L.R. No. SUNA WEST/ WASIMBETE/ 1257 is registered in the name of OBONYO ODARI, who is since deceased, thus he is neither the owner of the said land nor the administrator of the estate of the deceased.

7. It is further his position that there cannot be a stay of execution in respect to the impugned order/ decree since the same was a dismissal. He maintained that since he is currently in possession and occupation of the suit property, the order for maintenance of status quo as sought should be defined to recognize that he is in occupation and tills the same for his livelihood.

8. It was his contention that he had not acquired a decree nor drawn a bill of costs hence the claim by the Applicants that he is at the verge of executing the said judgment are aimed at misleading the court.

9. The Application was disposed of by way of written submissions. I have read and considered the Application, various responses thereto and the rival submissions by both parties and the various authorities cited in support of their respective cases and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

10. The solitary issue in the present Application is Whether an Order for Stay of Execution can issue against the decree and the judgment dated 25/08/2020.

11. 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 decree and judgment dated 29th July, 2019

12. 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”.

13. 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.

14. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is 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.”

15. The onus is on the Applicants to show the damages they would suffer if the order for stay of execution sought is not granted for the reason that; by granting such stay, it would mean that the status quo should remain as it were before the judgment and that would be denying

a successful litigant the fruits of his judgment, which should not be done unless the Applicants have given sufficient cause to the court to enable it to 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**).

16. It is the Applicant's assertion that should the application be disallowed; the Respondent will be at liberty to deal with the property as he deems. They have also stated that they have been in occupation and possession of the suit property since 2010 when they bought the suit parcel from the Respondent and paid the purchase price in full; wherein they have been carrying out farming activities and thus stand to be evicted from the said suit property and rendered destitute should the stay orders not be granted.

17. The Respondent on the other hand maintains that the Applicants seeks to Appeal against the dismissal of the suit; which amounts to a negative order. It is my considered view, that for an Order to be considered a negative order; its effect ought not to order any of the parties to the suit to do anything, or to refrain from doing anything, or to pay any sum. This is not the case in the present case; the effect of the trial court judgment delivered on 25/08/2020, is to evict the Applicants from the suit land and to give the Respondent the authority to deal with the same as he deems fit including dispossessing, alienating and selling it to 3rd parties and any other. This is not a negative order See; **David Thiong'o T/A Welcome General Stores vs Market Fancy Emporium [2007] eKLR**.

18. In view of the foregoing, I find and hold that the Applicants have satisfactorily proved that they are likely to suffer substantial loss unless orders for stay of execution are granted. Further, the Respondent has not demonstrated his capacity to compensate the Applicants in the event that the suit property is alienated and disposed of and the Appeal succeeds.

19. The lower court judgment was delivered on the 25th August, 2020 the Memorandum of Appeal was lodged on 2nd November, 2020 while the present Application was filed on the 28th September, 2020. I therefore find that the Application was filed without undue delay and hold that the Applicants have satisfied the 2nd limb of the conditions set out in Order 42 Rule 6(2).

20. The last limb to be proved is on the deposit of security for costs for the due performance as the court may direct. At Paragraph q of the Notice of Motion and paragraph 24 of the Supporting Affidavit; the Applicants have shown their willingness to furnish any reasonable and justifiable security as the court may deem just and fit in the circumstance for the due performance of any such orders as the court may grant.

21. 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.”

22. 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.

23. 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*

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.”*

24. I have looked at the Applicants' Notice of Motion, the grounds thereon and the Supporting Affidavit in totality and I find that the Applicants have satisfied the 3 limb test provided under the Civil Procedure Rules as explained above; the Application was brought without delay, they have demonstrated the likelihood to suffer substantial loss and lastly, they are ready and willing to deposit security for costs for the due performance.

25. In the upshot, I accordingly find that the Application dated 28th September, 2020 is merited and I proceed to allow the same on the following terms: -

a) Orders of Stay of Execution of the decree issued on 25th August, 2020 pending the hearing and determination of the Appeal.

b) The Applicants shall deposit a sum of Kshs. 100,000/= the 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 IN OPEN COURT AT MIGORI ON 3RD DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:-

Mr. Adawo for the Appellant/Applicants

Respondent present in person

Tom Maurice - Court Assistant