



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERICHO
ELC CASE NO. 94 OF 2009 (O.S)
IN THE MATTER OF L.R KERICHO CHESINENDE/446, 447,448,449 /450
(ORIGINALLY KERICHO/ CHESINENDE/133
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA
KIGEN KANDIE.....PLAINTIFF/APPLICANT
VERSUS
RUTH CHEMUREN.....DEFENDANT/RESPONDENT

RULING

1. By an application dated the 20th February, 2020 made under the provisions of Section 1A, 3, 3A of the Civil Procedure Act and Order 42 Rule 6(1), (sic) 51 Rule 1 and 8 of the Civil Procedure Rules, Article 159(2)(d) of the Constitution and all other enabling provisions of the law, the Applicant herein seeks a myriad of orders to wit;

i. Spent

ii. spent

iii. That there be stay of execution and enforcement of Judgment and Decree arising from the orders made by the honorable Justice J M Onyango on the 24th May 2019 pending the hearing and determination of the intended Appeal in the interest of justice.

iv. That the honorable court be pleased to order the Defendant/Respondent to sign transfer forms the land control board application forms and surrender original title deeds for the title number Kericho/Kipkelion/Chesinende/446, 447, 448, 449 and 450 (the suit properties within seven (7) days of service of this application.

v. That the honorable court be pleased to compel the Defendant/Respondent to grant the Applicant Land Control Board Consent to transfer of (sic) the suit properties as per orders of Lady Justice J M Onyango on 24th May 2019.

vi. That in the alternative to prayer 4 and 5 this honorable court directs the Executive officer to sign the necessary documents and as per prayer ii herein above.

vii. That the County Land Registrar Kericho County be ordered to effect the registration of transfer of title number Kericho/Kipkelion/Chesinende/446, 447, 448, 449 and 450 in favour of the Applicants forthwith.

viii. That in default to prayer 2 and 3, the Defendant/Respondent be cited and punished for contempt of court orders issued by the honorable Lady Justice J M Onyango on 24th May 2019.

ix. That the costs of this application be provided by the Respondent or to abide the outcome of intended appeal.

x. That any other order that this honorable court deems necessary to grant for the ends of justice to be met.

2. The Application is supported by the grounds set on its face as well as on the supporting affidavit of Kigen Kandie the Applicant herein.

3. The said application was opposed by the Respondent via her replying Affidavit dated the 5th March 2020 to the effect that it was incompetent in law, mischievous, misleading, an abuse to the court process and it deserved a dismissal.

4. Vide the orders of the Court of 9th March 2020 parties took directions to have the Application disposed of by way of written submissions to which I shall summarize as follows;

Applicant's the written submissions.

5. The Applicant submitted that judgment had been delivered on 24th May 2019 affirming his entitlement to 5 plots of the suit land to which the Respondent has failed to sign the transfer forms, the Land Control Board application forms and to surrender the original title deeds for title numbers Kericho/Kipkelion/Chesinende/446, 447, 448, 449 and 450, but has instead commenced execution process for the costs awarded.

6. That by so doing she has obtained warrants of sale of property in execution of Decree for money and has instructed Indomitable Auctioneers who have continuously intimidated and threatened the Applicant with committal to civil jail in spite of the Respondent's non-compliance with the orders of the court and the fact that the Applicant has since filed a notice of Appeal challenging the costs and the physical location of the parcels of land awarded to him.

7. That from the judgment delivered on the 24th May 2019, Respondent had been given strict time line of 90 days from the date of judgment to surrender the plots to the Applicant. That the succession proceedings, upon which the Respondent relied upon as the reason for the delay in effecting the court's order to transfer of the suit properties, has since been concluded and a certificate of confirmation of grant dated 26th October 2020 issued, but the Respondent is yet to transfer and the suit properties to the Applicant.

8. That unless the Respondent is compelled, cited and/or punished by the court, she will continue unabated to disregard, ignore and/or fail to comply with the court's order thus causing the Applicant untold inconvenience and suffering after more than 10 years of pursuit.

9. That indeed it was not contested that the Applicant had paid part of the costs awarded yet the warrants had not been set aside and/or discharged and as such, the Applicant continues to suffer prejudice at the expense of the Respondent's assertion for costs at the expense of the Applicant's rights to the certificate of title within the time frame set by the court.

10. The Applicant therefore sought for stay of execution of the warrants in order to allow him secure the certificate of title pending the transfer of the titles and in default, the Respondent be compelled to comply with the court's orders before subjecting the Applicant to untold suffering, inconvenience and/or financial embarrassment. That unless there was stay of execution of warrants, the Appeal would be rendered nugatory and the Applicant condemned unheard on his Appeal which had a high probability of success.

11. That the Respondent had not offered any plausible or sufficient reason over the failure to execute the transfer documents, application for Land Control Board consent within the time frame given by the court but had made a belated attempt to take out summons for confirmation of grant dated 6th March 2020 which was the same date as their replying affidavit.

12. That the inordinate delay and reluctance by the Respondent to comply with court orders amounted to contempt of a valid court order and was punishable by the court. That the Respondent should be compelled and surrender the completion documents and/or the executive officer be directed to sign the same.

13. That the power to grant or refuse stay of execution pending appeal under Order 42 Rule 6(1) of the Civil Procedure Rules was discretionary and the court could only grant the same where there was shown; sufficient cause, the Applicant may suffer substantial loss, the application is made without unreasonable delay and on provision of some security as the court may impose. That the court has to balance the interest, Applicant/Appellant with those of the Respondent.

14. That the Applicant had demonstrated beyond the balance of probabilities that he had suffered loss and continued to suffer irreparable loss that cannot be compensated by damages. Reliance was placed on the decided case in **RWW vs EKW [2019] eKLR** cited in **HE vs SM [2020] eKLR** wherein the Applicant sought for his application to be allowed.

Respondent's written submissions.

15. Upon summarizing the brief facts of the matter as well as the orders made by the court on 24 May 2019, the Respondent/Defendant framed her issues for determination as follows;

- i. Whether the Applicant is entitled to stay of execution and whether the same has been overtaken by events.
- ii. Whether the Respondent should be ordered to sign transfer forms, Land Control Board application forms, surrender original titles and grant Land Control Board consent.
- iii. Whether the Respondent should be cited and punished for contempt of court orders.
- iv. Who should be condemned to costs and for this application?

16. On the first issue for determination, the Respondent submitted that the Applicant's prayer for stay of execution was confusing given that

on hand he sought for stay of execution and enforcement of judgment and Decree pending Appeal, while on the other hand he sought for the enforcement of the same judgment where he sought for the Respondent to be cited for contempt.

17. That be as it may, the said prayer had been overtaken by events given that the Applicant had voluntarily paid the costs awarded in the judgment directly to the Respondent's Advocate M/S Joshua K Mutai after being contacted by the auctioneers and therefore it was not true that he had been harassed or intimidated by the auctioneers.

18. On the issue as to whether the Respondent should be ordered to sign transfer forms, Land Control Board application forms, surrender original titles and grant Land Control Board consent, the Respondent submitted that given the fact that she had substituted the original proprietor of the suit land, her husband Cheruiyot Arap Chemuren, she had been in no capacity to sign any transfer documents or give any consent for the said transfer of the suit property. That further although it had been true enough, she had been issued with a Grant on the 6th July 2020, the same had erroneously indicated she as the sole beneficiary of the estate of Cheruiyot Arap Chemuren the deceased thus leaving out 4 (four) other beneficiaries wherein she had sought for rectification of the said Grant. A rectified certificate of confirmation of grant had been issued on 24th February 2021 wherein the Applicant had now been allocated his five plots being Kericho/Kipkelion/Chesinende/446, 447, 448, 449 and 450 each measuring 0.046 hectares.

19. That the Respondent could therefore not be cited and punished for contempt of court orders as she had not been registered proprietor of the suit properties at the time and further that she had no control of the court diary but had to await the confirmation of the grant at the court's convenient date before the properties could be allocated to the Applicant. That the succession cause had been slated for the 13th May 2020 for confirmation of the grant but did not proceed on the slated date due to the closure of the courts due to the ensuing Covid-19 pandemic.

20. The Respondent further submitted that quite clearly, the Applicant had moved the court prematurely and without any justifiable cause, that he was undecided on whether to seek for stay of execution or Appeal the judgment. That the impugned properties had already been registered in his name and the costs awarded fully paid. That the entire application was a mere academic exercise and should be dismissed with costs to the Respondent.

Determination.

21. I have considered the Applicant's Application where he seeks for stay of execution of the decree and judgement delivered by honorable Justice J M Onyango on the 24th May 2019 pending the hearing and determination of his intended Appeal. The Applicant further seeks that the Respondent be compelled to sign transfer forms, the land control board application forms and to surrender the original title deeds for the title number Kericho/Kipkelion/Chesinende/446, 447, 448, 449 and 450 in default that the executive officer signs the necessary documents so as to have the county land registrar Kericho county to effect the registration and transfer of the said properties to him in compliance with the orders of the 24th May 2019.

22. I have also considered the authorities, as well as the reasons given for and against the said application. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

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 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 1st 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 1st Applicant.

23. There are three conditions for granting of stay order pending Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- i. The Court is satisfied that substantial loss may result to the 1st 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 Applicants.

24. I find the issues for determination arising therein being:

- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What orders this Court should make

25. On the first condition of proving that substantial loss may result unless stay order is made, the Court of Appeal in the case of **Mukuma v Abuoga (1988) KLR 645** held that *Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory*. It was therefore incumbent upon the Applicant to demonstrate the kind of substantial loss he would suffer if the stay order was not made in his favour and not merely stating that he would suffer loss if the order of stay of execution was not issued.

26. I have considered the submission of both the Applicant and the Respondent and find that indeed there is no contestation that the judgment was entered for the Applicant on the 24th May 2019 in which it had been declared that he was entitled to 5 plots out of Title No. Kericho/Kipkelion/Chesinende/133 that is to say title numbers Kericho/Chesinende/446, 447, 448 449 and 450 by virtue of adverse possession. The court further held that the time within which consent of the Land Control Board should be granted in respect of the subdivision and/or transfer of the 5 plots was extended by 90 days from the date of the judgment wherein the Respondent was ordered to sign the necessary documents to effect a valid transfer of the land in favour of the Applicant and in default the Executive Officer of this Honorable court to do so.

27. I have also considered the fact that at the time the Judgment was passed, the impugned parcels of land were still registered to the Respondent's deceased husband Cheruiyot Arap Chemuren and for which there was Succession Cause No 46 of 2010 pending determination wherein the Applicant had been listed as a beneficiary to the said parcels of land.

28. I have further considered the Respondent's written submissions to which she had stated that although it had been true that she had been issued with a Grant on the 6th July 2020, the same had erroneously indicated that she was the sole beneficiary of the estate of Cheruiyot Arap Chemuren the deceased leaving out 4 (four) other beneficiaries. That she had then sought for rectification of the said Grant which was issued on 24th February 2021 wherein the Applicant has now been allocated his five plots being Kericho/Kipkelion/Chesinende/446, 447, 448, 449 and 450 each measuring 0.046 hectares. It is therefore clear that this application has been overtaken by events.

29. The Applicant further confirmed that he was only challenging the costs awarded and the physical location of the parcels of land, however the Respondent has confirmed that the said prayer had also been overtaken by events given that the Applicant had voluntarily fully paid the costs awarded in the judgment directly to the Respondent's advocate M/S Joshua K Mutai after being contacted by the auctioneers.

30. In an application of this nature, the Applicant should show the damages he would suffer if the order for stay is not granted since by granting stay it would mean that the status quo should remain as it were before the judgment. I find that the Applicant has not given the Court sufficient cause to enable it to exercise its discretion in granting the order of stay. In short I find that the Applicant has failed to avail evidence to support its alleged claim of irreparable loss, should the application for stay of execution be denied.

31. In the case of **Machira T/A Machira & Co. Advocates –vs- East African Standard (No. 2) [2002] 2 KLR 63**, the Court held as follows:-

“In this kind of applications for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay...”

32. On the second Condition there is no contestation that the application herein was brought eight months after the judgment had been delivered which was undue delay for which there has been no explanation given.

33. On the 3rd Condition as is provided for under Order 42 Rule 6(2) (b) of the Civil Procedure Rules the Applicant ought to have offered such security for the due performance of the orders as may ultimately be binding on him. In the instant matter, no security or proposal for due performance had been offered and no commitment had been exhibited by the Applicants.

34. In the case of **Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR**, the Court held as follows;-

“.....of even greater impact is the fact that an Applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this Court can grant an order of stay...”

35. This principle was also emphasized in **Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others. Civil Appeal No. 291 of 1997**.

36. The Applicant has failed to meet the three mandatory tenets under which this application is brought and therefore has failed to sufficiently satisfy the required pre-conditions to allow the Court to exercise its discretion. Further, the Respondent having confirmed that the Applicant had voluntarily paid in full the costs awarded in the judgment directly to the Respondent's Advocate M/S Joshua K Mutai, this application is not merited.

37. The Applicant has urged that he has an arguable Appeal. I note that no draft Memorandum of Appeal has been attached to his Application. Whether an Appeal is arguable or not can only be deciphered not from the supporting affidavit or submissions but on the face of a Memorandum of Appeal.

38. In the case of **Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR** the Court had upheld the decision in **M/S Portreitz Maternity -vs- James Karanga Kabia Civil Appeal No. 63 of 1997** that had held that:-

“That right of Appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right....”

39. The end result is that I find that the intended Appeal would not be rendered nugatory by declining stay of execution. The Applicant’s application dated 20th February, 2020 is without merits and is dismissed with costs to the Respondent.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF MAY 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE