



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 889 OF 2017

(Formerly Kisii ELC case No. 82 of 2012)

FLORENCE MUMBI NJINE.....PLAINTIFF/APPLICANT

VERSUS

KEFA OKETCHI MUINDE.....DEFENDANT/RESPONDENT

RULING

1. On 4th February 2019, the plaintiff, Florence Mumbi Njine (the applicant) approached this court by way of a Notice of motion dated 4th February 2019 and filed on even date under Order 42 Rule 6 of the Civil Procedure Rules, 2010 sections 1A, B, 3A and 63 (e) Civil Procedure Act, Section 150 of the Land Act, No. 6 of 2012 Articles 27 (1) 48, 50(1), 159 and 165 of the Constitution, 2010 (hereinafter referred to as the application). She is seeking the following orders:-

a) Spent

b) Spent

c) The Honourable court be pleased to grant an order of stay of execution of the judgment and decree herein dated 18th day of December 2018, together with all consequential proceedings and/or orders, pending the hearing and determination of the intended Appeal Honourable Court of Appeal in terms of the Notice of Appeal dated 24th December 2018, albeit lodged in court on the 27th day of December 2018.

d) Costs of this application do abide the Appeal

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

2. The application is anchored on the applicant's 27- paragraphed supporting affidavit sworn on 4th February 2019 wherein she averred, inter alia, that this Honourable court rendered a Judgment on 18th December 2018 whereby the suit was dismissed. That the court decreed that the defendant (respondent) be registered as the owner of the suit land, LR No. Bukira/Buhirimonono/2022 on account of lawful purchase.

3. The applicant also averred that she felt dissatisfied by the said decision and she has filed a Notice of Appeal dated 24th December 2018. That the intended appeal in terms of the Notice is arguable and has overwhelming chances of success. That she is bound to suffer substantial loss, if ever the respondent is allowed to execute the judgment or decree and may render the intended appeal nugatory. That she is ready and willing to offer such security as this Honourable court may deem just, reasonable and expedite in the obtaining circumstances.

4. The application is further anchored on grounds (a) to (c) on its face. Essentially, the grounds capture most averments of the applicant in her supporting affidavit. That she be afforded reasonable opportunity to pursue the intended appeal and that the respondent would not suffer any prejudice if the orders sought in the application are granted.

5. In his replying affidavit sworn on 20th March 2019, the respondent opposed the application and sought its dismissal with costs in the interest of justice. He averred, inter alia, that the application does not meet the threshold for grant of orders of stay of execution pending the hearing of the appeal and that a notice of appeal is not an automatic stay. That since the applicant has not demonstrated the delay in mounting the present application, then she lost her right of stay of execution.

6. On 25th March 2019 this court permitted counsel for the respective parties to canvass the application by way of oral submissions and limited time for the same; see **Order 51 Rule 16 of the Civil Procedure Rules 2010 and Practice direction number 33 (a) of the Environment and Land Court Practices Directions, 2014.**

7. Mr. Oguttu Mboya learned counsel for the applicant submitted that the application be allowed as the same fits the three (3) corners of **Order 42 rule 6 of the Civil Procedure Rules, 2010**. Counsel cited **Order 9 Rule 9 (b), Order 21 Rule 4 of the Civil Procedure Rules,2010 and section 107 of the Land Act,2016**, in support of his submissions.

8. Mr. G. Nyambati, Learned counsel for the respondent submitted that **Order 9 Rule 9 of Civil Procedure Rules, 2010** requires a formal application with regard to filing of a consent. That a decree has been drawn and the applicant was granted stay of execution on 18th December,2018. That the judgment does not show or direct that the suit land will be disposed of. He urged this court to disallow the application.

9. I have duly considered the application, the replying affidavit and oral submissions by counsel for the respective parties. Has the application met the threshold under **Order 42 Rule 6 of the Civil Procedure Rules,2010** for the grant of orders sought therein?

10. The three (3) conditions for stay of execution as provided under the **Order 42** (ibid) relate to:-

*a) **Likely substantial loss on the part of the applicant.***

*b) **The application is mounted without unreasonable delay.***

*c) **The applicant has given security for the due performance of the decree or order as may ultimately be binding on the applicant***

11. The applicant asserted that she shall suffer substantial loss if the orders sought in the application are not granted. That prior to the hearing and determination of the intended appeal to the Court of Appeal, the respondent is likely to execute the decree of this court.

12. On the other hand, the respondent stated that the applicant has not demonstrated what prejudice or loss and damages she will suffer thereof. That the judgment of this court did not direct that the suit property be disposed of.

13. The applicant also asserted that she made the application without a reasonable delay. However, the respondent contended otherwise.

14. Quite plainly, judgment in the present suit was rendered on 14th December 2018. The instant application was mounted on 4th February 2019. Thus, it can not be termed to be suffering from unreasonable delay in the circumstances.

15. The applicant contended that she is ready and willing to abide by any conditions that this court may deem fit to decree. That she is ready and willing to offer suitable security in such manner as the court may deem just, reasonable and expedient.

16. In the case of **Malindi Law Society of Kenya-vs- Law Society of Kenya Nairobi Branch and 5 others Civil Application No. 20 of 2017 (2017) eKLR**, it was held that grant of stay of existing orders can not be a matter of course. That it rests upon genuine conditions, grounds, merit and dispatch. The application meets the aforestated requirements.

17. It is trite law that the court has authority to issue orders for the preservation in the interim, of a subject matter of appeal; see the case of **Board of Governors Moi High School Kabarak and another –vs- Malcolm Bell Supreme Court of Kenya application Nos. 12 and 13 of 2012 (2012) eKLR**.

18. Moreover, this court is mandated to grant interim preservation orders under **Section 13 (7) (a) of the Environment and Land Act, 2015 (2012)**. The said interim orders include the orders sought in the application.

19. In the premises, I find the application merited. It succeeds.

20. The upshot is that Orders (3) and (4) sought in the application dated 4th February 2019 be and are hereby allowed accordingly. The applicant shall deposit **Kshs. 200,000/=** for security with this court within 30 days from this date.

21. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 10th day of JULY 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Ms. W. Ochwal learned counsel for the plaintiff.

Mr. Ondieki Kerosi holding brief for Mr. G. Nyambati learned counsel for the defendant.

Tom Maurice – Court Assistant.