REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC NO. 103 OF 2017 (O.S)

JOSHUA KAMOING.....PLAINTIFF/RESPONDENT

VERSUS

SIMON BARCHOK.....1st DEFENDANT/APPLICANT

DANIEL BARCHOK.....2nd DEFENDANT/APPLICANT

PHILIP KIPSANG MARITIM.....3rd DEFENDANT/APPLICANT

FLORENCE CHEPKWONY (sued in her capacity as the administrator of the estate of

PAUL KIPYEGON CHEPKWONY (DECEASED).....4th DEFENDANT/APPLICANT

RULING

1. Judgment was delivered by the Court on the 20th May 2020, the Applicant/Appellants have now filed their Application, pursuant to the dismissal of their original application dated 10th June 2020, by way of a Notice of Motion dated 3rd February 2021 brought pursuant to the provisions of Section 1A, 1B, 3, 3A, 63(b) & (e), 66 of the Civil Procedure Act, Rule 5 of the Court of Appeal Rules 2010 and Order 42 Rule 6, Order 51 of the Civil Procedure Rules and all enabling provisions of the Law, where they seek for orders of stay of execution of the judgement and all consequential orders arising therefrom, pending the hearing and determination of an intended Appeal.

2. The Applicants also seek for orders that the Land Registrars Kericho and Bomet be ordered to register a restriction over title parcel LR No. Kericho/Boito/140 (and/or the resultant titles therefrom) barring any transfer, mutation and/or any dealings whatsoever pending the hearing and determination of the intended Appeal and for costs of the application be in cause, as well as any other orders that the Court may deem fit to grant in the circumstance.

3. The said Application is supported by the grounds set on its face as well as on the supporting affidavit of Philip Kipsang Maritim the 3rd Applicant herein, on his behalf and on behalf of the 1st and 2nd Applicants, dated the 3rd February 2021.

4. The application was opposed by the Respondent through his replying affidavit dated 22nd February 2021 to the effect that the same was not made in good faith. That the court's judgment was to the effect that he and his family be entitled to 1/3 total acreage of the properties known as **L.R No. Kericho/Boito/95** and **L.R No. Kericho/Boito/140 and therefore it was not proper for the Applicants to allege that third parties, to whom they had sold part of the suit properties, stood to lose their developments noting that the Applicants never disclosed their transactions with these third parties when the matter was heard at the first instance.**

5. Further opposition from the Respondent was that the Applicants had not demonstrated that they would suffer substantial loss or irreparable harm since they were entitled to use and occupy 2/3 total acreage comprised in the suit properties. That the Applicants had further disposed other portions of the suit property and therefore the orders sought was only aimed at defeating the course of justice.

6. The Application was disposed of by way of written submissions.

Applicants' submissions.

7. In prosecuting their application, the Applicants framed their issues for determination as follows;

i. What are the grounds for granting stay of execution pending Appeal?

ii. Whether the 1st, 2nd, and 3rd Defendant/Applicants' application was filed without unreasonable delay?

iii. Whether substantial loss may result to the Applicants unless the 1st, 2nd and 3rd Defendant/Applicants' application is allowed?

iv. Whether such security as the court orders for the due performance of such Decree or order as may ultimately be binding on them had been given by the Applicants?

8. On the first issue for determination, the Applicants relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules as well as on the decided case of **Magnate Ventures vs Simon Mutua Muatha & Another [2018] eKLR** to submit that since this was a non-monetary Decree/judgment, the issue of security for costs and did not arise and therefore what was expected of them was to prove that substantial loss would result unless the order sought was granted and secondly whether the application had been made without unreasonable delay.

9. That on the 28th January 2021, upon dismissal of their original application dated 10th June 2020, the Applicants had sought leave of the court to file the present application which was filed on the 4th February 2021 within the time frame given by the court. There was therefore no unreasonable delay in filing the present application. Reliance was placed on the case of **Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR.**

10. The Applicants further submitted that over the years, they and other beneficiaries of the estate of Sawe arap Boldo (deceased) and Mariko Kotit Bolto (deceased) had not only made significant developments on the suit land, but had sold portions thereof to third parties including the 4th Defendant. That with the execution of the judgment, there was a likelihood of an eviction from the suit properties, demolitions, displacement of the Applicants and their families, litigation by the third party purchasers against them which process would be irreversible thereby occasioning the Applicants substantial loss. The Applicants relied on the decided case in **Abraham Kipsang Kiptanui vs Hillary Kipkorir Mwaita & Another [2008] eKLR** to buttress their submissions.

11. That the Plaintiff /Respondent was not in occupation of the suit properties and would not suffer any prejudice if the orders sought was granted, rather his interest in the suit property would have been protected as the same would not be open to disposition in the intervening period pending the hearing of the Appeal.

12. It was the Applicants' further submission that should the orders sought not be granted, the Respondent would proceed to execute the judgment thereby rendering their intended Appeal nugatory.

13. On the issue as to whether there was need for the Applicants to deposit such security as the court orders for the due performance of such Decree, the Applicants submitted that there was no need as the subject matter of the Decree was non-monetary and parties were the members of the same family. That although the Respondent had sought for a deposit of Ksh 10,000,000/= as security to cater for the cost of the suit, delay and inconvenience due to the fact that he could not develop the suit property, yet he had not provided any evidence to justify how he had arrived at that figure. That the delay in filing of the suit had been occasioned by the Respondent himself and secondly no costs had been awarded to him due to the blood relationship of the parties.

14. The Applicants submitted that they had offered to surrender the original title deeds of the suit properties as security for costs pending the hearing and determination of their intended Appeal and sought that security for costs should not be granted. They prayed for their application to be allowed.

Respondent's submissions.

15. In response and in opposition to the Applicants' application, the Respondent herein framed his issues for determination as follows;

i. Whether substantial loss may result to the Applicants unless the order is made.

ii. Whether an order of restriction barring registration of any disposition in the suit properties can issue in the circumstances.

iii. Whether the Applicants have given security for due performance.

16. On the first issue for determination, the Respondent submitted that the Applicants had failed to demonstrate that they would suffer substantial loss unless an order for stay of execution was made. That what constituted substantial loss had been discussed in the case of **James Wangalwa & another vs Agnes Naliaka Cheseto [2012] eKLR.** That although the Applicants had submitted that they and third party purchasers were in occupation of the suit properties wherein they had done extensive developments which may be demolished upon execution, there had been no evidence adduced in support of the said allegations and therefore the court should hold that the Applicants had failed to demonstrate the kind of substantial loss they would suffer if stay of execution was not granted.

17. That the whole acreage of the suit properties was 71.6 acres to which the Respondent was entitled to a $^1/_3$ making it 23.8 acres. The Applicants could not therefore be heard to say that they would suffer substantial loss noting that they were entitled to at least 47.7 acres. That further, the fact that the Applicants would be sued by 3rd parties whom they did not disclose, was not reasonable justification for the application. That it was not sufficient for the Applicants to claim that they resided on the suit property as a reason for the grant of an order of stay of execution. Reliance was placed on the decided case in **Robert Nyaruiya Chutha vs Joseph Chege Ndungu [2014] eKLR.**

18. The Respondent further submitted that contrary to the Applicants' submission, he was the one who stood to suffer prejudice should the order of stay of execution be granted considering his advanced age of 85 years old and the fact that for the better part of his adult life, he had been denied the use and occupation of his rightful entitlement of the suit property. He also sought for the court to treat the Applicants' assertion that he stood to suffer no prejudice as he was not currently on the suit property, with the contempt it deserved, keeping in mind that the Applicants had been the ones who had evicted him from the suit land in the year 1989 and illegally taken exclusive use and occupation thereof.

19. The Respondent submitted that from the date of judgment, the Applicants had continued to sell portions of the suit properties to several persons including but not limited to Joshua Arap Tonui and Charles Arap Torgoti, a contention that had not been controverted by the Applicants.

20. On the issue as to whether an order for restriction barring registration of any disposition in the suit properties could issue in the circumstances, the Respondent submitted that this was an extraneous relief that was not founded on the pleadings and/or orders sought by the parties before the court. That the court therefore lacked jurisdiction to grant the said relief which was akin to an order of an injunction pending Appeal. Reliance was placed on the decided case in **Bartholomew Mwanyungu & 3 Others vs Florence Dean Karimi [2019] eKLR.**

21. The Respondent's submission as to whether the Applicants had given security for due performance of the Decree herein, was that they had not expressed willingness to furnish proper security for due performance of such Decree or order as may ultimately be binding on them which was a key prerequisite to grant an order for stay of execution pending Appeal. That the Applicants' insistence that security was not required in the present case was utterly mistaken keeping in mind that the provisions of Order 42 Rule 6 of the Civil Procedure Rules was couched in peremptory terms. Reliance was placed on the decided case in **Peter Ngugi Kainamia & Another vs Tabitha Wambui Munyao & 7 Others [2020] eKLR**.

22. Lastly, the Respondent pleaded with the court to consider the finding in the case of **Macharia t/a Macharia & Co Advocates vs East Africa Standard [2002] eKLR** and thereafter dismiss the instant application.

Determination.

23. I have considered the Applicants' Application for stay of execution of the decree and judgement delivered by the court on the 20th May 2020 pending the hearing and determination of their intended Appeal. I have also considered the authorities, as well as the reasons given for and against the said application.

24. 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.*

25. 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.

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

> i. Whether the Applicants have satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.
>
> ii. What orders this Court should make

27. On the first condition of proving that substantial loss may result unless stay order is made, I find that it was incumbent upon the

Applicants to demonstrate the kind of substantial loss they would suffer if the stay order was not made in their favour. It was not sufficient for them to merely state that if the execution of the judgment was carried out, there was a likelihood of demolitions, displacement of the Applicants and their families and litigation by the third party purchasers against them. There is uncontroverted evidence by the Respondent that the whole acreage of the suit properties was 71.6 acres to which he was entitled to a $^1/_3$ of the acreage making it 23.8 acres whilst the Applicants were entitled to at least 47.7 acres. That further after judgment, the Applicants had continued to sell portions the suit properties to several persons including but not limited to one Joshua Arap Tonui and Charles Arap Torgoti.

28. 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."*

29. Upon considering the circumstance of the case herein, the status quo has not been preserved and it was not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss if their application is not allowed. Indeed in the case of **Charles Wahome Gethi vs. Angela Wairimu Gethi [2008] eKLR**, the Court of Appeal held -

> "*... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them."*

30. In the case of **Jumilla Attarwalla & another v Hussein Abdulaziz & Another [2015] eKLR** the court held that

> '*The mischief that Rule 6 of Order 42 sought to meet is to ensure that the Applicants loss would be shown to be greater than the prejudice or loss that would be suffered by a successful party. The Defendants did not state that if they are evicted they will be rendered homeless. Indeed they did not state that the subject property was the only accommodation available to them. Why then should the court deny the Plaintiffs the fruits of their Judgment?'*

31. Further the fact that the Applicants had sold portions of the suited properties and stood to be sued if stay was not granted, in my humble view did not constitute substantial loss that could not be compensated with damages.

32. The Court has to balance the interest of the Applicants who are seeking to preserve the status quo pending the hearing of the Appeal so that their Appeal is not rendered nugatory, and the interest of the Respondent who is seeking to enjoy the fruits of his judgment. In other words the Court should not only consider the interest of the Applicants but to consider also, in all fairness, the interest of the Respondent who could be been denied the fruits of his Judgment. See **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410.**

33. In an application of this nature, the Applicants were bound to show the damages they 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 and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see **Kenya Shell Ltd** (Supra).

34. I find in the present circumstance, that the Applicants have not established sufficient cause to warrant the court to exercise its discretion in their favour and therefore this ground must fail.

35. On the second condition, I find that the Application herein was brought without undue delay and the issue rests at that.

36. On the last condition as to provision of security, 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."*

37. I find that although the Applicants submitted that this being a non-monetary Decree/judgment the issue of security for costs did not arise, their proposal to provide the title deeds to the suit land as security, was a sign of good faith. My view is that although it is sufficient for the Applicants to state that they are ready to provide security or to propose the kind of security, yet it is the discretion of the Court to determine the said security.

38. Section 3A of the Civil Procedure Act provides as follows:

> *Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

39. The application for stay is not meant to deny the Respondent the fruits of judgment and having found that the Applicants have not discharged the 1st condition necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules, to wit that they have not satisfied the court that they stood to suffer substantial loss unless the order is made, this court is not inclined

to grant the order of stay of execution so sought.

40. In the circumstance, the Applicants' Notice of Motion dated 3rd February 2021 is hereby denied and dismissed with no costs.

41. *It is further ordered that the Applicants shall prepare, file and serve their record of Appeal within 45 days upon the delivery of this ruling.*

Dated and delivered via Microsoft Teams this 21st day of May 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE