



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC APPEAL NO. 1 OF 2020

OSUMO KAREMI JOHN.....APPELLANT

VERSUS

GEORGE MORARA OCHARO.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR NYAMIRA...2ND RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 27th October 2020, the Appellant filed an application pursuant to sections 1A and 3A and Order 42 Rule 6 of the Civil Procedure Act seeking the following orders:

1. Spent
2. This Honourable Court be pleased to stay the proceedings in Nyamira CM ELC Case No. 35 of 2018 pending the hearing and determination of this application.
3. This Honourable Court be pleased to stay the proceedings in Nyamira CM ELC Case No. 35 of 2018 pending the hearing and determination of this Appeal.
4. This Honourable Court be pleased to set aside the orders given by Honourable Maurine Nyigei (Ms) Senior Resident Magistrate on 3rd June 2020, more particularly the order for the exhumation of the remains of Osumo Owano (deceased) from land parcel number West Mugirango/Bomabacho/330.
5. That the costs of this application be provided for.

2. The application is anchored on the grounds set out in the Notice of Motion and the Supporting Affidavit of John Osumo Karemi sworn on the 27th October 2020. In the said affidavit, the Applicant depones that he filed Nyamira CMELC Case No. 35 of 2018. The 1st Respondent filed and Defence and Counterclaim to the suit. The said suit was subsequently consolidated with Nyamira CMELC Case No. 15 of 2018 and case no. 35 remained the lead file. The case was heard and a judgment delivered on 4th December 2019. The court dismissed the Plaintiff's suit with no order as to costs. The court did not allow the Counterclaim and instead ordered that the 1st Defendant to file a separate suit for determination. The court indicated that it could not order the burying of the deceased on the suit property but did not restrain the burial nor cancel the title to the suit property.

3. Being dissatisfied with the said judgment, the Appellant filed an appeal in this Honourable Court. It is the Applicant's contention that the Nyamira court became *functus officio* after rendering its judgment save for contempt or execution proceedings flowing from the said judgment. However, the 1st Respondent filed an application for exhumation of the remains of the deceased without regard to section 146 of the Public Health Act, Cap 242 of the Laws of Kenya and in disregard of the Mental Health of the Applicant and his family members.

4. It is the Applicant's contention that in its ruling the lower court misinterpreted its jurisdiction with regard to the provisions of section 146 of the Public Health Act which merely mandates the court to inquire into the cause of death of any person and nothing else.

5. In his submissions, learned Counsel contends that the subordinate court in its judgment found that the suit property belonged to the Respondent and that the Appellant had no right to force the Respondent to have the remains of the deceased interred on the suit property. It is

against this judgment that the Appellant has appealed. He submits that despite being aware of the said judgment, the Appellant proceeded to bury the deceased in the suit property in defiance of the court order. This is what prompted the Respondents to move the court for orders of exhumation. The court held that the actions of the Appellant were a clear defiance of the court order and that the Appellant had acted in utmost bad faith and was therefore in contempt of the judicial process.

6. It is counsel's submission that given the history of this matter and the conduct of the Appellant which was found to be in contempt of the court order, he ought not to be accorded a hearing as he is tainted with unclean hands. Counsel further submitted that there is nothing to stay as the case in Nyamira court is concluded.

7. The application was canvassed by way of written submissions and both parties filed their submissions their submissions which I have considered.

ISSUES FOR DETERMINATION

8. Having considered the Notice of Motion, rival affidavits and submissions filed herein, the main issue for determination is whether the applicant is entitled to the orders sought.

ANALYSIS AND DETERMINATION

9. The fundamental question I must answer is whether the court can stay a negative order. It is not in dispute that the Appeal herein relates to the judgment of the court in Nyamira ELC Case No. 35 of 2018. In the said suit the Appellant sought a declaration that land parcel no. West Mugirango/Bomabacho/330 belongs to the late Osumo Omwando. He also sought an order to restrain the Respondent from preventing or barring him and his family from interring the remains of the late Osumo Omwando on the suit property. In its judgment the court held that the suit property belonged to the Respondent and that the Appellant had no right to force the Respondent to have the remains of the deceased interred in the suit property. In effect the Appellants suit was dismissed and he was advised to file a fresh suit with respect to his counterclaim. It is therefore counsel's submission that the Appellant cannot seek to stay a negative order.

10. The Court of Appeal has held time and again that a negative order is not capable of being stayed. In **Milcah Jeruto T/A Milcah Faith Enterprises v Fina Bank Limited & Another** the court relied on **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No. NAI 79 Of 2007 (unreported)** cited in the **Re Sonalux** case where the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

The court further observed as follows:

“To further emphasize the point in the **Re Sonalux** case, the Court of Appeal stated that in the matter that was before it, Kasango J in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money.

Undoubtedly, the Plaintiff strongly feels that she has an arguable appeal at the Court of Appeal. I am, however, alive to the fact that this court cannot sit on an appeal in a matter that has been handled by a court of similar and competent jurisdiction and give the same orders that such a court had refused to grant and more so when the law does not provide that the same can be granted.

A close scrutiny of the Civil Procedure Rules 2010 does not reveal any provision that would allow this superior court to grant stay orders emanating from the dismissal of an application that had sought injunctive order in the same court. Order 42 Rule 6 of the Civil Procedure Rules 2010 under which the Plaintiff's application is filed reads as follows:-

“ **No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or an order appealed from... the court appealed from may for sufficient cause order stay of execution of such decree or order...**”

I fully associate myself with the above decisions and find that the order of 4th December 2019 is a negative order that is incapable of execution.

11. In the Appeal before me, the Appellant has not appealed against the order of exhumation but against the judgment in Nyamira ELC Case No. 325 of 2018. I agree with counsel for the Respondent that if the Appellant intended to reverse the orders of exhumation, he ought to have filed an Appeal in that regard rather than file an application for setting aside.

12. The upshot is that I find no merit in the application and I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF MAY 2021

J.M ONYANGO

JUDGE