



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO. 23 OF 2020

EMMANUEL LEKAKENY KAYO.....PLAINTIFF

-VERSUS-

ORAMAT OLE SENTU.....DEFENDANT

RULING

Before me is a Notice of Motion dated 19/8/2020 in which the Applicant is seeking the following Orders:-

1. Spent.
2. Spent.
3. That there be a stay of execution of the Ruling and Order issued on 13/8/2020 in Kilgoris Principal Magistrate's ELC No. 23 of 2018 pending the hearing and determination of this Appeal.
4. That there be an Order reviewing, varying and or setting aside the Order of the trial court directing the eviction of the Appellant from Land Reference Transmara/Olomismis/769 or at all.
5. That the costs of this application be provided for.

The Application is premised on the grounds that the Appellants are aggrieved by the ruling of the trial court particularly failure to order a survey and establishment of the boundaries of Land Reference Transmara/Olomismis/766 and Transmara/Olomismis/769 and further, that the Appellant has an arguable case with high probability of success. That if the Order eviction is not reviewed varied or set aside, the Appeal will be rendered nugatory.

The Application is supported by the Affidavit of Emmanuel Lekakeny Kayo on 19/8/2020, the Appellant herein in which he avers that an order for eviction was granted on 13/8/2020 and as a result, he is now faced with execution of the decree from the decree arising out of Kilgoris ELC No. 23 of 2018. That enforcement of the decree will affect Land Reference Transmara/Olomismis/769 instead of Transmara/Olomismis/766. Finally, that this court should do justice pursuant to Article 159 (2)(d) of the Constitution. More importantly to note is that the Appellant has deposited the sum of Kshs. 100,000/= as ordered by the trial court albeit late. The Appellant has annexed a copy of the Memorandum of Appeal dated 19/8/2020 marked as ELK1, a copy of the ruling dated 13/8/2020 marked as ELK2, another copy of the Memorandum of Appeal dated 25/5/2019, copy of the map marked as ELK4, copy of the Judgment dated 16/5/2019 marked as ELK5 and a copy of this Court's Order dated 8/7/2020 and marked as ELK6.

The Application is opposed by the Replying Affidavit of Oramat Ole Sentu sworn on 26/8/2020 in which he contends that the application is subjudice for the reason that there is a pending application for stay of the judgment and decree of the trial court in Kilgoris PMC ELC Case No. 23 of 2018 which was lodged vide Narok ELC Appeal No. 5B of 2019. That the Appeal is incapable of enforcement since there is a similar Appeal pending at the trial court in Kilgoris and that this instant application is made in bad faith. The Respondent further contends that this court lacks jurisdiction to review the ruling and Order of the trial court since there is a pending appeal for stay of execution in Kilgoris PMC Case No. 23 of 2018. The Appellant was directed to deposit a sum of Kshs. 100,000/= within 30 days with effect from 5/12/2019 but the same was done in piece meal in total disregard of the directions of the court. That despite failure to make prompt deposit, the Appellant did not seek leave of the court for extension of time to make late payments. That due to the failure on the part of the Appellant to make payment on time, the Respondent had no option but to institute application for eviction of the Appellant from the suit land. Further, an order for review or setting aside is not available to a party seeking Appeal as is in this instant case. That this honourable court has been misled into issuing Orders dated 20/8/2020 whereas an appeal exists against the decree of the trial court. The land in which the Appellant claims to be referred to which is L.R. No. TRANSMARA/OLOMISMIS/769 belongs to Nenkoko Nonkipa Ketere, a third party who was not a party to the suit in the trial court. The Respondent has annexed a copy of the Decree issued 17/7/2019 and marked as OOS1, a copy of the Memorandum of Appeal dated 28th May, 2019, a copy of the Order issued on 10/2/2020 and marked as OOS3, a copy of the Notice of Motion Application dated 6/7/2020 filed as ELC Appeal No. 5 of 2019 and marked as OOS4, a copy of this court's Order issued on

30/7/2020 marked as OOS5, and a copy of the search dated 29/4/2014 marked as OOS6.

I have analysed the Application, Replying Affidavit and the Submissions filed by both parties. The issues for determination are whether the Appellant is entitled to the stay of execution of the ruling and Order issued on 13.8.2020, whether the instant suit is sub judice and whether this court has jurisdiction to review, set aside or vary the decision of the trial court.

The principles guiding the grant for a stay of execution pending appeal are well settled. **Order 42 rule 6 of the Civil Procedure Rules** provides as follows:-

(2) No order for stay of execution shall be made under subrule (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.

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** provides guidance on how a court should exercise discretion and held that:-

‘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, a 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 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 or 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’.

In the instant case, it is the Respondent’s contention that the Appellant was granted 30 days within which to make a deposit of Kshs. 100,000/- with effect from 5/12/2019 as a condition for stay of execution of Judgement. Sadly, he made the payments in piecemeal in that by the 27/1/2020 he had deposited Kshs. 37,000/= and failed to seek extension of time at the time when he experienced delays in making the deposits. Be that as it may, the decision to grant stay of execution pending appeal is a discretionary power to be exercised by this court. In the Application the Appellant has also faulted the trial court for failure to order a survey and establishment of the boundaries of Land Reference Number TRANSMARA/OLOMISMIS/769 and Land Reference Number TRANSMARA/OLOMISMIS/769. In my view failure on the part of the trial court to make such orders do not warrant any substantial loss since the Appellant has not demonstrated so. In fact, the Appellant has not proved to this court the substantial loss that he would suffer in the event that this instant application is not allowed. It is incumbent upon the applicant to demonstrate what substantial loss he stands to suffer unless the stay orders are granted. On whether the Appeal has been filed without unreasonable delay, from the document relied on by the Appellant, the Ruling was delivered on 13/8/2020 and the Memorandum of Appeal was filed on 19/8/2020 therefore the Appellant has satisfied this requirement. The general principle in granting or refusing a stay also is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion. In deciding an application of this nature, I am guided by decisions by the High Court and Superior Courts. In the case of ***Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC No. 795 of 1997, Warsame J.*** (as he then was) was faced with a similar conundrum and held as follows:-

***“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the Court. The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. For the applicant to obtain a stay of execution, it must satisfy the Court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the Court will not consider assertions of substantial loss on the face value but the Court in exercising its discretion would be guided by adequate and proper evidence of substantial loss Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the Court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation At the stage of the application for stay of execution pending appeal, the Court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides*”**

For the reasons stated above I find that the orders sought for grant of stay of execution pending appeal unmerited and therefore dismissed.

The second issue for determination is whether the instant matter is sub-judice. First and foremost, the existence of two suits is not disputed. In this regard, **section 6 of the Civil Procedure Act** expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding **between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

*The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties **or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.** A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; **there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.***

In the instant case the Respondent contends that the Appellant has made the Application in bad faith by filing a similar suit NAROK ELC APPEAL NO. 5 ‘B’ OF 2019 and filed a similar application in ELC APPEAL 23 OF 2020. I have analysed both applications and I confirm that ELC 23 OF 2020 was filed on 19/8/2020 whereas ELC APPEAL 5 (2019) was filed on 6/7/2020. I have also further analysed the pleadings and I have come to the conclusion that parties are similar, the grounds relied upon are similar, and the prayers sought are also similar. To that effect I totally agree with Counsel for the Respondent that indeed the instant application is indeed sub-judice.

Based on the foregoing, I do find that the Notice of Motion Application dated 19/8/2020 lacks merit and the same is dismissed. The Kshs. 100,000/= deposited in ELC 23 OF 2020 be transferred to ELC 5(B) of 2020 to be apportioned as security for costs pending hearing and determination of ELC Appeal Number 5(B) of 2020.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 29TH DAY OF JUNE, 2021

MOHAMED N. KULLOW

JUDGE

In the presence of:

CA:Chuma