



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CIVIL APPEAL NO. 5 OF 2020

JUDITH EKESA ILUNGA

BONFACE OJUMA ODWALI.....APPELLANTS/APPLICANTS

VERSUS

BONFACE WAFULA OWIRE.....RESPONDENT

RULING

1. The Plaintiff filed an application under certificate on the 6th of November, 2020 seeking for orders THAT:
 - a. *Spent.*
 - b. *Spent.*
 - c. *Spent.*
 - d. *There be a stay of execution and execution proceedings as contained in the Respondent's Lower Court application dated 20/7/2020 pending the hearing and final determination of the Environment and Land Court at Busia ELC Civil Appeal No. 5 of 2020;*
 - e. *The costs of this application be provided for.*
2. The application was supported by the affidavit of BONIFACE OJUMA ODWALI dated 6th November, 2020 and the following grounds inter alia;
 - a. That the applicants have filed an appeal in the Environment and Land Court at Busia being ELC Civil Appeal No 5 of 2020 which is arguable and has a high chance of success;
 - b. That the applicants appeal shall be rendered nugatory if execution of the application is not stayed and may lead to the transfer and further alienation of the applicant's parcel of land and subject them to a difficult recovery process in the event that their appeal finally succeeds;
 - c. That the applicants shall suffer irreparable loss if their parcels of land are transferred to Respondent who shall be at liberty to deal and even alienate them to third parties while the appeal shall be pending hearing and final determination;
 - d. That the applicant's similar application of in the Lower Court was declined to the filing of the same for reconsideration by the appellate court;
3. The Respondent filed his replying affidavit on the 24th of November, 2020 urging this Court to dismiss the Application based on the following reasons:
 - a. That a similar application was canvassed before the lower court on the 12th day of the November, 2020 and the same was dismissed with costs;

- b. The applicants should have filed an application for review and not the present application for stay;
 - c. The appeal does not have a probability of success and that it does not operate as a stay of execution or any proceedings under a decree;
 - d. The judgement in the lower court matter was entered 13 years after the case was filed and that the Respondent has the right to enjoy the fruits of the judgement; and
 - e. The appellants have not provided any security in consideration for the application.
4. The Appellants filed a supplementary affidavit on the 3rd of December, 2020 affirming that their appeal has a high chance of success and that the restriction placed on the suit land should suffice as security.
5. Parties agreed to canvass the Application by way of written submissions with the Appellants filing their submissions on the 3rd of December, 2020 and the Respondent on the 12th of January, 2021. The Appellants submitted that the Respondent has cultivated and harvested crops for 13 years and he continues to draw benefits from the land and he has not lost anything from the current state of affairs. They submitted further that the Suit Land titles have been restricted by the Respondent. That the restriction in place amount to more than adequate security for the due performance of the Lower Court's decree in the event that the appeal fails.
6. The Respondent submitted that the pending appeal does not operate as a stay of execution. That the Appellants have also failed to prove that substantial loss may result if the application is not allowed. Further that the Appellants have not provided this Court with security and that the restriction registered on the titles are not sufficient security as such this Court should dismiss the application.
7. Order 42 Rule 6 (2) of the Civil Procedure Rules provide that 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 applicant unless the order is made and that the application has been made without unreasonable delay;
 - b. Such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the Applicant.
8. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** determined how a court should exercise discretion when granting stay of execution and when it held that:
- a. 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.**
 - b. 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.**
 - c. 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 the proceedings.**
 - d. 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.**
9. This Court is called upon to determine whether or not the Appellants' application has met any criteria for granting an order for stay. The Applicants pleaded that if the orders sought are not granted, their appeal shall be rendered nugatory. That the Respondent's counterclaim was for specific performance of the sale agreement dated 3rd January, 2005 and the transfer of the parcels of land namely **SOUTH TESO/APOKOR/1644** and **SOUTH TESO/APOKOR/1859** to the Respondent's name.
10. If the decree is executed and later on the appeal succeeds, parties will incur unnecessary costs of reversing antries that may have been effected pursuant to the decree. Secondly, there will be a risk of the land changing hands during the pendency of the appeal. These two reasons in my opinion satisfies the requirement of the likelihood of substantial loss. See also paragraphs (b) & (c) of Butt's (supra)decision.
11. With regard to the issue of security, the Appellants submit that the restrictions placed on the suit parcels are sufficient security an allegation that is rebutted by the Respondent. This was not a monetary decree so it is not possible to make an order for monetary security. Secondly, the Respondent has not made any proposal on his expectations of the security to be provided. In the circumstances, this court finds no need for provision of the security. The restrictions on the title to remain in place until the appeal is determined.
12. In conclusion, the application is allowed on the terms that:
- a. Stay of execution of the decree in Busia Civil Suit No. 453 of 2007 is granted pending hearing and determination of the appeal;**
 - b. The costs of this application to abide the winner in the appeal.**

Dated, signed & delivered at BUSIA this 9th day of June, 2021.

A. OMOLLO

JUDGE