



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC APPEAL CASE NO. E 8 OF 2020

FELIX NYALOO.....1ST APPELLANT

BENAR NYOLOO.....2ND APPELLANT

PETER NGOTHO KILONZO.....3RD APPELLANT

TERESIA ADHIAMBO NYOLO.....4TH APPELLANT

ALICE ACHIENG RIARO.....5TH APPELLANT

GEORGE OMONDI PAUL.....6TH APPELLANT

Versus

RAPHAEL SUMBA OCHIENG.....RESPONDENT

(Being an appeal from the Judgment Hon. Nicodemus N. Moseti (SRM) delivered and dated 2nd day of

December 2020 in the original ELC No. 6 of 2019 at Mbita

RULING

1. By a Notice of motion dated 23rd December 2020 and duly filed in court on 24th December 2020 pursuant to Order 42 Rule 6 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law (the application herein), the six (6) appellants (The applicants herein) through Robert Ochieng Advocates, are seeking the following orders; -

a) That this honorable court be pleased to grant a stay of execution of the judgment/decree in Mbita Principal Magistrate's Court ELC Suit No. 6 of 2019 pending the hearing and determination of the appeal filed in before this Honorable court in the same matter.

b) That a date for inter-partes hearing of this application be given.

c) That the costs of this application abide by the appeal in this matter.

2. The application is premised on a twelve (12) paragraphed supporting affidavit of Ochieng Robert Ochieng, learned counsel for the applicants alongside a copy of a portion of the judgment delivered in Mbita PM'S Court Environment and Land case No. 6 of 2019 marked as "ORO1" and a copy of memorandum of appeal herein marked as "ORO2" annexed to the affidavit. The same is also anchored on grounds (a) to (f) set out on it's face.

3. In brief, the applicants scream that after the delivery of Judgment (ORO1) by the trial court, they have filed an appeal as shown in the memorandum of an appeal as shown in the memorandum of appeal (ORO2) against the decision. That the applicants have built and reside on the suit land parcel No. Kasgunga/Kamreri/3003. That execution of the judgment in the suit concluded before the trial court shall cause them substantial loss unless the orders sought in the application are granted.

4. In a thirty (13) paragraphed replying affidavit sworn on 3rd March 2021 through M/s Moerwa Omwoyo and Company Advocates, the respondent namely Raphael Sumba Ochieng, opposed the application. He deposed, inter alia, that this appeal is frivolous, vexatious and an abuse of the court process as the same raises no triable issues. That the order sought before the trial court was eviction and not a boundary dispute.

5. The respondent further disposed that he has occupied the suit land since early 1970s and obtained its title on first registration after adjudication. That this appeal is only meant to prevent him from enjoyment of the fruit of the Judgment thus, the application should be dismissed with costs.

6. The application was canvassed by way of written submission further to this court's order and directions given on 15th March 2021. Accordingly, learned counsel for the applicants filed three (3) paged submissions dated 25th May 2021 while learned counsel for the respondent filed a three (3) paged submissions dated 19th May 2021.

7. The applicants' counsel submitted that the application has met the three (3) conditions for granting the orders sought in the application as stated in **Order 42 Rule 6 (2) (supra)**. That the orders be granted as prayed.

8. On his part, the respondent's counsel submitted that the application is unmerited, frivolous, misplaced, vexatious and an abuse of the court's process hence, the same be dismissed with costs to him. To buttress his submissions, he relied on the persuasive decision in the case of **Samuel Njagi M'nyamba =vs= Gilbert Ndwiga Mwangie (2019) eKLR**.

9. I have duly considered the application, the replying affidavit in their entirety as well the rival submissions. On that account, I am of the considered opinion that the issues for determination at this stage are whether:-

a) This appeal is arguable

b) If the application for stay is refused, the appeal if successful, would be rendered nugatory.

10. In respect of arguable appeal, this court is guided by the Court of Appeal decision in **Mrao Ltd=vs=First American Bank of Kenya Ltd and 2 others (2003) KLR 125** that the term "prima facie" in civil cases is clearly a standard, which is higher than an arguable case. In the **Concise Oxford English Dictionary 12th Edition at page 69** where "arguable" means:-

"able to argued or asserted"

11. Indeed, a party has a vested right to the judgment which ought to be effectual; see **Shamad =vs= Shamji Bros and another (1957) EA 438**.

12. Be that as it may, I have studied the entire memorandum of appeal (ORO-2) herein. There are triable issues discerned therein, among them, acquisition of title to the suit land and jurisdiction of the trial court in regard to the suit. Therefore, the appeal is quite arguable in the circumstances.

13. As regards the second issue, by the same memorandum of appeal, the applicants have the right to access justice before this court. The same is enshrined under **Article 48 of the Constitution of Kenya, 2010**.

14. Moreover, the applicants have an un-curtailed right to fair hearing of this appeal as stipulated under **Article 50(1) of the Constitution (supra)**. The appeal has to be heard and determined on merits as observed in the case of **Philip Chemwolo and another v Augustine Kubende (1982-88)KAR 103**.

15. In the case of **Butt vss Rent Restriction Tribunal (1979) eKLR**, it was held, inter alia;

a) Grant of stay of execution is, at best, within the discretion of the court.

b) Particular or special circumstances of the case dictate grant of such a stay.

c) The bottom line is not to prevent the appeal or render it nugatory.

16. This court has inherent powers and special jurisdiction under Sections 3 and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya. In the case of **Board of Governors, Moi High School Kabarak and another v Malcolm Bell (2013) eKLR**, the Supreme Court of the Republic of Kenya, remarked:

"...A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject matter of the appeal, pending the resolution of the contested issues."

17. Section 13(7)(a) of the Environment and Land Court Act, 2015(2011) empowers this court to grant interim preservation orders. I am of the view that stay of execution of judgment and or decree, is envisioned thereunder.

18. It is noteworthy that grant of stay of existing orders can be quite desirable in the obtaining circumstances. Nonetheless, the same cannot be a matter of course. It rests upon genuine conditions, grounds, merit and dispatch; **see the Court of Appeal decision in Malindi Law Society of Kenya v Law Society of Kenya Nairobi Branch and 5 others Civil Application No. 20 of 2017 (2017) eKLR**.

19. In result, it is the finding of this court that the application dated 23rd December 2020 and filed herein on 24th December 2020, is meritorious. I proceed to allow the same with costs to abide the outcome of the instant appeal.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 28TH DAY OF JULY 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. B. Mulisa holding brief for Moerwa Omwoyo learned counsel for respondent

Tom Maurice – Court Assistant