



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL CASE NO. 22 OF 2020

(Formerly Homa-Bay ELC case No. 33 of 2018)

LAWRENCE OJWANG.....1ST APPELLANT/APPLICANT

JOHN VINCENT OTEYO OLWAL.....2ND APPELLANT/APPLICANT

Versus

DUNCANE OTIENO ANYACH (Suing as a personal representative of

the Estate of GEORGE ANYACH OWUOR..... RESPONDENT

(Being an appeal from the Judgment Hon R.B.N Maloba (PM) delivered and dated 7th August 2019 in the original Homa –Bay CM’s Court ELC No. 33 of 2018)

RULING

1. The present ruling is in regard to an application by a way of Notice of motion dated 18th August 2020 and filed in this court on even date pursuant to sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 (the Rules herein), among other provisions of the law. The 1st and 3rd defendants (the applicants) through M/s Odhiambo Kanyangi and Company Advocates, are seeking orders infra:-

a) There be stay of execution of the ex-parte judgment/decreed dated 7/8/2019 until the hearing and determination of the Migori High Court ELC Civil Appeal No. 22 of 2020.

b) Costs be provided.

2. The applicants based their application on an eighteen (18) paragraphed supporting affidavit of the 1st applicant together with copies of documents annexed thereto and marked as “LO1” to “LO10” alongside grounds 1 to 15 set out on its face. In a nutshell, the applicants complain, inter alia, that they were never made aware of the hearing of the suit which proceeded ex-parte at the trial court on 26th June 2019. That the trial court rendered a ruling on 9th July 2020 which provoked the instant appeal which may be rendered nugatory unless the orders sought in the application are granted.

3. By a thirteen (13) paragraphed replying affidavit sworn on 8th September 2020 and duly filed herein on 16th November 2020, the respondent through G.M. Nyambati Advocate, termed the application incompetent, an abuse of the due process and ought to be dismissed with costs. The respondent deposed that he executed the judgment and an application to review and or set aside the same was dismissed by the trial court as per annexure thereto (DOA-01).

4. The respondent further deposed that the application is based on a negative order, brought too late in the day and has been overtaken by events. That the applicants have not demonstrated the threshold for the stay sought as required under Order 42 Rule 6 of the Rules and that their counsel on record is a stranger in view of Order 9 of the same Rules.

5. In a supplementary affidavit sworn on 27th October 2020 and duly filed in this court on 27th October 2020, the respondent’s response to the replying affidavit is to the effect that he executed the judgment and he annexed a copy of title deed (DA-O1) to the affidavit. That the suit land parcel No. Kanyada/Kanyango/Klanya/861 was therefore, registered in his name as per the title deed which facts are within the knowledge of the applicants.

6. On 16th November 2020, this court ordered and directed that the application be canvassed by way of written submissions; see **Order 50 Rule 16 of the Civil Procedure Rules and Practice Direction Number 33 of the Environment and Land Court Practice Directions, 2014**.

However, none of the parties complied thus, precipitating this ruling; See Order 51 Rule 16 of the Civil Procedure Rules, 2010.

7. Consequently, learned counsel for the applicants filed submissions dated 17th February 2021 on 22nd February 2021 making reference to the application and that the present appeal is centered on the applicant's right to be heard under Article 50 (1) of the Constitution of Kenya, 2010 and as per the decision in **Philip Chemwolo and another vs Augustine Kubende (1986) eKLR**. That the applicants were never notified of the hearing of the suit before the trial court.

8. Counsel also submitted that suit land in the appeal ought to be preserved pending the outcome of the appeal. That this will enable the applicants to exercise the right to be heard.

9. On 31st May 2021, Mr. Singei learned counsel for the 2nd appellant informed the court that they were in support of the present application.

10. On the other hand, learned counsel for the respondent filed submission dated 16th February 2021 on 17th February 2021. Counsel gave an introduction and background of the matter including introductory proceedings and Judgment delivered in the suit. Issues for determination framed and analysed therein in favour of the respondent include whether the applicants have met the threshold for orders sought in the application.

11. To reinforce the submissions, counsel cited Orders 42 Rule 6 (1), 45 Rule 1 (i) (a) and (b), section 80 of the Civil Procedure Act (supra). The cases of **Kiplagat Kotut vs Rose Jebor Kipugok (2015) eKLR** and **Kenya Commercial Bank Ltd vs Sun City Properties Ltd and 5 others (2012) eKLR**, were also relied upon by counsel in the submissions.

12. I have carefully examined the application and the affidavits in their entirety together with the parties' respective submissions including the authorities cited therein. The application is generated pursuant to, inter alia, Order 42 Rule 6 (1) (supra) pertaining to a decree or order appealed from and that this court is at liberty to consider the same and make just orders. That borne in mind, the issues that emerge therefrom for determination are;

- a) is the appeal arguable?
- b) Is the appeal bound to be rendered nugatory?
- c) Is there need to preserve the subject of this appeal?

13. An arguable appeal does not mean that the appeal is for success. The principal focus is on triable issues, if any, in the appeal.

14. Plainly, the party has a vested right to Judgment which ought to be effectual to realize the fruits of the same; see **Shamad vs Shamji Bros and another (1957) EA 438**.

15. The memorandum of appeal annexed to the supporting affidavit and marked as "LO10" discern grounds including fair hearing of suit and determination of the same on merits. Therefore, the instant appeal is arguable as noted in the case of **David Morton Silverstein vs Atsango Chesoni (2002) eKLR** and **John Odhiambo Roche vs Cyprian Laura Roche and another (2021) eKLR**.

16. Indeed, an ex parte judgment was rendered and a decree issued as shown in documents marked as "LO5" and "LO7" annexed to the supplementary affidavit in this application. In the case of **Butt vs Rent Restriction Tribunal (1979) eKLR**, it was held that grant of stay of execution of judgment, order and or decree is, at best, within the discretion of the court. The same depends on special circumstances of the case and should not prevent any appeal arising therefrom.

17. **Articles 48 and 50(1) as read with Article 25(c) of the Constitution of Kenya, 2010** provide for the right to access to justice and unlimited right to fair hearing respectively. The said provisions do not preclude the instant appeal.

18. Moreover, it is trite law that a party should have his or her party determined on its merits; see **Philip Chemwolo case (supra)**.

19. It is also established law that the court has authority to issue orders to the preserve, in the interim, of a subject matter of appeal; see the Supreme Court of the Republic of Kenya decision in **Board of Governors, Moi High School Kabarak and another vs Malcom Bell (2013) eKLR**.

20. Pursuant to Section 13(7)(a) of the Environment and Land Court Act, 2015 (2011), this court has both original and appellate jurisdictions to grant interim preservation orders. The orders sought herein are included thereunder and the substratum of the subject of appeal requires preservation until the appeal is heard and determined on merits.

21. A fortiori, it is the finding of this court that the present application originated by way of Notice of Motion dated 18th August 2020 and filed on even date is meritorious. I proceed to allow the same in terms of the stay of execution order sought under prayer number 3 therein. Costs of the application to abide the outcome of the instant appeal.

It is so ordered.

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

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Odhiambo Kanyangi learned counsel for the 1st appellant

Mr. Kaba holding brief for Nyambati learned counsel for the respondent

Ms. Okota learned counsel for 2nd appellant

Tom Maurice – Court Assistant