



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC APPEAL NO. 03 OF 2021

JEFFER SHARIFF OMAR.....1ST APPELLANT

NIMO SHARIFF OMAR.....2ND APPELLANT

VERSUS

OMAR ADAN SAMBUL.....RESPONDENT

RULING

What is before court for determination is the Appellants' Notice of Motion application dated the 6th January, 2021 brought pursuant to Section 1A, 1B, 3A of the Civil Procedure Act and Order 22 Rule 22, Order 42 Rule 6 as well as Order 51 Rules 1, 3 & 4 of the Civil Procedure Rules. The Appellants seek for the following orders:

1. Spent
2. That in the interim there be a stay of execution of the Judgement in Kajiado CMCC 206 of 2017 dated 9th December, 2020 pending the hearing and determination of this Application.
3. That there be a stay of execution of the Judgement in Kajiado CMCC 206 of 2017 dated 9th December, 2020 pending the hearing and determination of the instant Appeal.
4. That costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of JAFFER OMAR SHARIFF where he deposes that on 9th December, 2020, the Honourable Chief Magistrate delivered a judgement in Kajiado CMCC 206 of 2017 in the Plaintiff's favour. Further, that the Court issued a permanent injunction and eviction orders against them from all the property referred to as Plot 211 Kajiado Town, hereinafter referred to as the 'suit land', which they were aggrieved with. He claims they have made substantial developments on the suit land and have been in possession thereon from 2003. He contends that the Respondent has already intimated and communicated his plan to destroy and/ or demolish all the developments on the suit land and evict them. Further, that they have a semi permanent house, deposit of sand and constructed a pit latrine on the suit land. He avers that they wish to lodge an appeal against the impugned judgement and should the execution proceed, it will cause them substantial loss. He reiterates that the Appeal has high chances of success and it shall be rendered nugatory unless the stay of execution is granted. Further, that the Application has been made without unreasonable delay and the Respondent shall suffer no prejudice if the orders sought are granted.

The Respondent opposed the application and filed a replying affidavit sworn by OMAR ADAN SAMBUL where he deposes that the Applicants had filed another application in the Lower Court which was dismissed. He confirms being the owner of plot No. 211 B906 Kajiado Town. He insists the Applicants did not produce a Search or Valid Allotment during trial. Further, that the County Government of Kajiado supported his case in the Lower Court. He contends that the Appellants do not have an arguable Appeal and this application should be dismissed.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Appellants' Notice of Motion application dated the 6th January, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether there should be a stay of execution of the Judgement in Kajiado CMCC 206 of 2017 dated 9th December, 2020 pending the hearing and determination of the instant Appeal.

The Appellants in their submissions contend that they will suffer substantial loss if the orders sought are not granted. Further, that they have brought the application without unreasonable delay and the subject matter of the Appeal should be preserved. They further reiterated the averments as per their supporting affidavit. To buttress their averments, they relied on the following decisions: **Sarah Nandacha Mayeku V Aden Noor Aden (2020) eKLR; David Oyiare Ntungani Vs Matuiya Ole Naisuaki Orket (2017) eKLR; David Kimani Chege V Iddi Shaban Oniale (2020) eKLR; Butt Vs Rent Restriction Tribunal (1979) eKLR; Beatrice Ndunguri Mwai & Another Vs Sicily Wawira Titus & Another (2020) eKLR; Josephine Koki Raymond V Philemon Kanini Maingi (personal representative of Maingi Musila Mutava – deceased) & Another (2018) eKLR and Joseph Gitahi Gachau & Another Vs Pioneer Holdings (A) Ltd & 2 Others , Civil Application No. 124 of 2008.** The Respondent submitted that the Appellants had not demonstrated that there is an arguable appeal. Further, that his plot is recognized by the County Government of Kajiado and annexed evidence to that effect. He insists the Appellants did not produce a new Letter of Allotment and a search to confirm current status of their plot. I will proceed to highlight hereunder certain legal provisions governing stay of execution of judgment including Decree pending appeal.

Order 22 rule 22 of the Civil Procedure Rules provides that:’ **(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto. (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application. (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.’**

While Order 42 Rule 6(2) of the Civil Procedure Rules stipulates that:’ **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.’**

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution pending appeal and stated thus:’ **“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;**

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 the 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 of rent in dispute and the appellant had an undoubted right of appeal.'

In this instance, the Appellants claim to have been on the suit land and there is threat of an imminent eviction after the Kajiado Chief Magistrate in CMCC 206 of 2017 entered judgement dated 9th December, 2020 in favour of the Respondent. The Appellants contend that they will suffer irreparable harm as they have been on the suit land since 2003 and put up certain structures thereon. Further, that if the stay is not granted, the Appeal would be rendered nugatory. The Respondent on the other hand avers that the Appellants have not demonstrated an arguable appeal. Further, he has the new generation Letter of Allotment in respect of his land. At this juncture, after considering the submissions and authorities from the parties, which I deem relevant, the issue for the court to consider is whether there is an arguable appeal and if the same would be rendered nugatory should the court decline to grant the orders sought. From a perusal of the judgement and the respective affidavits, it is not in dispute that Appellants had been in occupation of the suit land prior to the Respondent filing the lower court suit. Further, that the Court granted eviction orders against them from the said suit land. I note the Appellants in the Lower Court also produced a Letter of Allotment dated the 17th December, 2003 to support their claim in respect to the Suit land. Further, the Respondent also produced his Letter of Allotment. It further emerged in the dispute before the Lower Court that Appellants were claiming plot No. 212 while the Respondent was claiming Plot No. 211. I note the instant application was filed on 6th January, 2021 while the impugned Judgement was delivered on 9th December, 2020. To my mind, I find that the instant application has been brought without unreasonable delay. From a reading of Order 22 Rule 22 together with Order 42 Rule 6 of the Civil Procedure Rules an intending Appellant is expected to seek a stay pending appeal as filing an Appeal alone does not operate as a stay of execution. The Appellants have intimated that the Respondent intends to evict them from the suit land which fact he does not deny. Based on the facts before me including my analysis above, it is my considered view from perusing the Memorandum of Appeal that there is an arguable Appeal before this court. Insofar as the Lower Court declined to grant a stay of execution pending Appeal, I opine that a right of Appeal is a Constitutional right of an aggrieved party. Further, a right to fair hearing can only be guaranteed if stay pending appeal is granted to the Appellant. Since it is the Appellants who have been in occupation of the suit land, I opine that they are indeed the disadvantaged party herein. Based on the standards set in the above cited case and in applying them to the circumstances at hand, I find that the Appellants have met the threshold for stay of execution pending appeal and will grant them the same.

It is against the foregoing that I find the Appellants Notice of Motion dated the 6th January, 2021 merited and will allow it. I will proceed to make the following final Orders:

1. A stay of execution of the Judgement in Kajiado CMCC 206 of 2017 dated 9th December, 2020 be and is hereby granted pending the hearing and determination of the Appeal.
2. That costs of this application will be in the cause.

Dated Signed and delivered Virtually at Kajiado this 27th Day of July 2021

CHRISTINE OCHIENG

JUDGE