



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 638 OF 2016**

**NYAKUNDI ONCHIRI.....PLAINTIFF**

**VERSUS**

**NYAMWANGE NYANG'AU.....1<sup>ST</sup> DEFENDANT**

**OBIERO NYANG'AU.....2<sup>ND</sup> DEFENDANT**

**OSEKO NYANG'AU.....3<sup>RD</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. By his application dated 9<sup>th</sup> March 2020, the Defendant/Applicant seeks to have a second bite at the cherry. In a similar application dated 5<sup>th</sup> April, 2019 the Applicant sought that the judgment entered against him on 9<sup>th</sup> October 2018 together with all consequential orders be set aside and that the Defendant be allowed to file their defence out of time. The said application was dismissed on 23<sup>rd</sup> October, 2018 when my brother Justice Mutungi declined to set aside the judgment.

2. In the instant application the Applicant prays that execution of the judgment issued on 9<sup>th</sup> October, 2018 be set aside until the hearing and determination of the Appeal and that there be a stay of execution of the decree issued on 31<sup>st</sup> October, 2018.

3. In his Supporting Affidavit the Applicant depones that he has lodged a Notice of Appeal dated 17<sup>th</sup> February, 2020. He further depones that he has filed an application for leave to appeal out of time in the Court of Appeal at Kisumu and if this application is not granted, his Appeal shall be rendered nugatory.

4. The application is opposed by the Respondents through the Grounds of Opposition dated 30<sup>th</sup> November, 2020.

5. Before delving into the merits of the application, it is important to briefly state the facts of this case. The Plaintiff sued the Defendants claiming that they had encroached on his land parcel No. Central Kitutu/Mwogeto/1230. He sought an order of eviction and a permanent injunction restraining the Defendants from interfering with the suit property. The Defendants did not file any defence. After satisfying itself that the Defendants had been served with Summons to enter Appearance, and after confirming that the main issue herein involved a boundary dispute, the court referred the matter to the Land Registrar and County Surveyor, Nyamira County to establish and fix the boundaries and file their report in court.

6. The Land Registrar and County Surveyor visited the suit property in the presence of both parties and established that the Defendants who are the owners of land parcel No. Central Kitutu/ Mwogeto/1239 had encroached onto the Plaintiff's land parcel No. Central Kitutu/Mwogeto/1230 to the extent of approximately 0.1Ha. This finding was captured in their report dated 23<sup>rd</sup> May, 2018. On 9<sup>th</sup> October, 2018 the court adopted the said report as a judgment of the court and ordered the Defendants to vacate the suit property within 30 days failing which the Plaintiff would be at liberty to apply for an eviction order. The decree was served upon the Defendants on 10<sup>th</sup> October 2018.

7. On 25.2.2019 the Defendants, through the firm of Maosa & Co Advocates, filed an application seeking to set aside the ex-parte orders as well a stay of execution of the decree herein on the grounds that they had not been served with summons to enter Appearance. On 5<sup>th</sup> April 2019, they filed another application seeking inter alia, that the firm of Gitonga Kinyanjui & Co. Advocates be granted leave to come on record for the Defendants in place of the firm of Maosa & Co Advocates. They also sought an order that the judgment and decree entered on 9<sup>th</sup> October, 2018 be set aside and that the application be heard concurrently with the one dated 25.2.2019. Before the application could be heard, the firm of Gitonga, Kinyanjui & Co Advocates filed a Notice of Motion dated 5<sup>th</sup> April, 2019 seeking that the judgment be set aside

as well as an order of stay. This is the application that was dismissed on 23<sup>rd</sup> October, 2019.

The court directed that this application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

## ISSUES FOR DETERMINATION

8. Against the foregoing background, the main issues for determination are:-

1. Whether the Applicant is entitled to an order of stay of execution of the decree issued on 31<sup>st</sup> October, 2018 pending Appeal.
2. Whether the judgment entered on 23<sup>rd</sup> May, 2018 should be set aside.

## ANALYSIS AND DETERMINATION

9. Even though the Applicant has filed this application under Section 1, 3 and 3A of the Civil Procedure Act, it is essentially an application for stay pending Appeal which ought to have been filed under the provisions of Order 42 Rule 6 which provides as follows:

*6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) 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; 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.*

*(3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

10. The principles that guide the courts in granting an order of stay pending appeal are now well settled. In the case of **M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others [2017] eKLR** the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

*“13. In the cases of **Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (Supra)**, the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.*

11. Furthermore, in the case of **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR** Mutungi J stated as follows:

*“It is not enough to satisfy 1 or 2 of the requirements under 42 Rule 6. All of the requirements must be met for the court to grant orders of stay pending appeal”.*

12. In the instant case the Applicant has stated that if the stay of execution is not granted, the Appeal will be rendered nugatory as the Respondents have moved the court to order the Land Registrar and County Surveyor Nyamira to fix the boundaries between land parcels No. Central Kitutu/ Mwogeto/1230 and 1239. It is not lost to me that the Applicants filed a Notice of Appeal on 17<sup>th</sup> February, 2020 whereas the ruling dismissing the application to set aside the judgment entered against them on 9<sup>th</sup> October, 2018 was delivered on the 23<sup>rd</sup> day of October, 2019, four months earlier. At the time of filing this application, the Applicants had not yet obtained an extension of time to file the said appeal. This means that there is technically no appeal pending. On that ground alone the application is incompetent and it must fail.

13. Be that as it may, assuming that the Applicants had been granted leave to appeal out of time, they would need to satisfy the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.

The first one is that the Applicant must demonstrate that he shall suffer substantial loss unless the stay is granted.

14. The second condition is that the application must be made without unreasonable delay. In the instant case there is a delay of 4 months

which has not been explained to my satisfaction. I have read the Supporting Affidavit and even though the 1<sup>st</sup> Respondent alludes to the fact that land is an emotive issue, there is nothing to suggest that the Applicants will suffer substantial loss unless the stay is granted.

15. The third condition is that the Applicant must be ready to furnish security for the performance of the decree. The Applicants have not demonstrated their willingness to furnish security.

16. In addition to failing to satisfy the conditions laid out in Order 42 Rule 6, the Applicants' application to set aside the judgment was rejected by this Honourable Court through the ruling of my brother Justice Mutungi dated 23<sup>rd</sup> October, 2019 and this court cannot sit on appeal on a ruling by a judge of concurrent jurisdiction.

17. For the foregoing reasons, I find that the application has no merit and I dismiss it with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF JULY, 2021.**

**J.M ONYANGO**

**JUDGE**