



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 80 OF 2008**

**IN THE MATTER OF: PARCEL NO. 1847/SECTION 111/MN**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE  
APPLICANT HAS OBTAINED OWNERSHIP OF TWO DECIMAL ONE ZERO**

**EIGHT [2.108] HECTARES OF THE ABOVE SAID LAND**

**BY WAY OF ADVERSE POSSESSION.**

**BETWEEN**

**PETER BIRYA KALU.....PLAINTIFF**

**VERSUS**

**SEA VIEW PROPERTIES LIMITED.....DEFENDANT**

**RULING**

1. By the Notice of Motion dated 10<sup>th</sup> January 2020, Peter Biryala Kalu [ the plaintiff] prays for orders:

***1) That a stay of execution of the whole of the Judgement dated 18<sup>th</sup> September 2017 by the Honourable Justice O. A Angote and delivered on 5<sup>th</sup> October 2017 by the Honourable Justice J. O Olola do issue pending the hearing and determination of the intended appeal; and***

***2) That costs be in the cause.***

2. The Notice which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:

***a) Judgement was entered against the Plaintiff on 18<sup>th</sup> September 2017;***

***b) The Plaintiff/judgment debtor was not in sound bodily health including his faculties hence could not pursue his appeal as statutorily required;***

***c) The Plaintiff was aggrieved by the said decision and still intends to appeal against the same;***

***d) The Plaintiff is apprehensive execution shall be conducted at any given moment and if stay shall not issue forthwith before he is able to lodge his appeal, he shall suffer substantial loss and harm;***

***e) The intended appeal is meritorious with high chances of success and if stay is not granted, same will be rendered nugatory and a mere academic exercise; and***

f) *This court is bestowed with unfettered discretion to grant the orders sought to avert an injustice being occasioned.*

3. The application is opposed. By their Grounds of Opposition dated 23<sup>rd</sup> January 2020, Messrs. Sea View Properties Ltd [the Defendant] opposes the application on the grounds;

1) *That the application is misconceived, frivolous, vexatious and an abuse of the process of the court;*

2) *That the Plaintiff/Applicant failed to file a Notice of Appeal within 14 days from the date of judgment as required under Rule 75 [2] of the Court of Appeal Rules.*

3) *That the Plaintiff/Applicant has failed to show or prove sufficient reasons as to the delay in filing of the Notice of Appeal and seeking stay of the judgement dated 18<sup>th</sup> September 2017;*

4) *That the Plaintiff's suit vide the Judgment dated 18<sup>th</sup> September 2017 was dismissed with no orders as to costs.*

4. In addition to the Grounds of Opposition, the Defendant has through its Managing Director Nabhan Swaleh sworn a Replying Affidavit filed herein on 22<sup>nd</sup> October 2020 in which it avers that the judgement was delivered way back on 5<sup>th</sup> October 2017 and that the delay in bringing the present application is inordinate and that no plausible reason has been given therefor

5. The Defendant further avers that contrary to the Plaintiff's averments, the Notice of Appeal was filed out of time and the same is not properly on record. Accordingly, the alleged intended appeal does not lie and there is no basis for the grant of the orders of stay.

6. I have perused and considered the Plaintiff's Motion and the response thereto by the Defendant. I have equally considered the submissions placed before me by the Learned Advocates for the parties.

7. The Plaintiff herein craves an order of stay of execution of the judgment herein dated 18<sup>th</sup> September 2017 pending the hearing and determination of an intended Appeal. In respect of an application for stay of execution, Order 42 Rule 6 of the Civil Procedure Rules provides that before the application is granted, the Applicant ought to prove:

i. *That substantial loss is likely to occur unless the order is granted;*

ii. *That the application has been brought without unreasonable delay; and*

iii. *That the Applicant is able to provide such security for costs as the court may deem appropriate.*

8. Considering what would constitute substantial loss in *James Wanjalwa & another –vs- Agnes Naliaka Cheseto [2012] eKLR*, the court observed as follows:

*“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.*

*.....substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”*

9. In the matter before me, the Plaintiff had commenced the suit herein by way of an Originating Summons dated 13<sup>th</sup> October 2008 seeking a determination of the following questions as against the Defendant:

a. *Whether the Plaintiff is entitled to be declared as the proprietor of 2.108 Ha of land on Plot No. 1847/III/MN which he has acquired by adverse possession after staying and/or residing on the plot for over [12] years;*

b. *Whether the Plaintiff is entitled to be registered as the owner of Plot No. 1847/III/MN and be issued with a certificate of title; and*

c. *Whether the Plaintiff is entitled to the costs of this suit.*

10. Having heard the Plaintiff who is the only party who testified herein and in his judgement dated 18<sup>th</sup> September 2017 but delivered herein on 5<sup>th</sup> October 2017, the Honourable Justice A. O Angote answered the said questions in the negative after observing as follows at paragraphs 21 to 26 thereof:

*“21. When the Plaintiff testified, he informed the court that he no longer lives on the Suitland after his house was demolished in the year 2008;*

22. PW1 did not inform the court the person who demolished his house in the year 2008;

23. PW1 did not also produce a copy of the occurrence Book to show that indeed he reported the issue of the demolition of his house to the police;

24. The fact that the Plaintiff does not live on the suit [land] as admitted by himself shows that the Plaintiff's assertion that he has always lived on the land are false;

25. Indeed the Plaintiff annexed Photographs of a home which was under construction; and

26. Having admitted that he does not live on the suit land, and in the absence of evidence to show that his house was demolished in the year 2008 and by whom, I find that the Plaintiff is seeking to acquire the suit property through the backdoor”.

11. Arising from the foregoing, it was evident to me that the Plaintiff had not been on the suit land for at least some 9 years as at the time of filing the present application. It was also evident that the orders issued by the court were negative in nature and that the same did not instruct any action to be taken against the Plaintiff.

12. It is trite law that negative orders cannot be stayed. Considering the issue of stay of execution in *Kenya Commercial Bank Ltd –vs- Tamarind Meadows Ltd & 70 others [2016] eKLR*, the Court of Appeal stated as follows:

“ 16. In *Kanwal Sarjit Singh Dhihman –vs- Kesharji Juvraj Shah [2008] eKLR*, the Court of Appeal , while dealing with a similar application for stay of a negative order held as follows:

“The 2<sup>nd</sup> prayer in the application is for stay [of execution] of the order of the superior court made on 18<sup>th</sup> November 2006. The order of 18<sup>th</sup> December 2006, merely dismissed the application for setting aside the judgement with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of the costs only [see *Western College of Arts & Applied Sciences – vs – Oranga & others [1976] KLR 63 at page 66 paragraph C*”

17. The same reasoning was applied in the case of *Raymond M. Omboga –vs- Austine Ryan Maranga* [supra], that a negative order is one that is incapable of being stayed. This is what the court had to say on the matter:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

13. In light of the above authorities, there is nothing to stay in the present application as the Plaintiff remains in the same situation he was in before he came to court and before the judgement was delivered.

14. Moreover, the application before me has been brought some 3 years after the judgment was delivered. The explanation given for the delay was that the plaintiff had health problems which made it impossible for the plaintiff to attend court and to pursue the matter. I have looked at the attached documentation from Vipingo Health Centre. Many do not even bear the Plaintiff's name and I was not persuaded that the same depict a situation of illness that would have stopped the Plaintiff from prosecuting an appeal for that whole period.

15. Besides, the Notice of Appeal to which the Plaintiff refers is dated and was filed herein on 25<sup>th</sup> September 2019, some 2 years after the judgment was delivered. There was no evidence that the Plaintiff had sought for extension of time to file the same and/or that he same had been admitted by the court out of time. That being the case, I was not persuaded that the Plaintiff had an or any proper intended Appeal on the basis of which any order of stay of execution could be granted herein.

16. In the premises, it follows that there is no merit in the Plaintiff's motion dated 10<sup>th</sup> January 2020. It cannot succeed. I dismiss it with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>ST</sup> DAY OF AUGUST, 2021.**

**J.O. OLOLA**

**JUDGE**