



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU

ELC APPLICATION NO.44 OF 2018 (O.S)

MANASON OGENDO AFWANDA.....PLAINTIFF/RESPONDENT

VERSUS

ALICE AWITI ORENDE.....1ST DEFENDANT/APPLICANT

MARK AYAGA AGUTU.....2ND DEFENDANT/APPLICANT

RULING

Alice Awiti Orende and Mark Ayaga Agutu hereinafter referred to as applicants have come to this court seeking orders that this court be pleased to issue an order of stay of execution of judgment of Hon M.A Odeny dated 18th December 2020 and all consequential orders pending the hearing and determination of the appeal and that this honorable court be pleased to set aside and expunge the decree from the record of court issued on the 26th December 2021 as drawn. This Honorable court be pleased to draft a decree in accordance with the judgment delivered on 18th December 2020.

They grounded their Application on the facts that the decree issued herein as drafted did not reflect the judgment. That the Defendant had filed his notice of appeal which Appeal has very high chances of success, and that they stand to suffer substantial loss if the Application is not allowed.

The application was also supported by a supporting affidavit sworn by the 2nd Defendant/Applicant in which he averred that, despite judgment having been delivered on 18th December 2020 he only got to know of the same on the 20th of January 2021. That when he perused the decree he found that the same was fundamentally different from what was in the Judgment. For which reason he prayed that it be expunged from the record. He further contended that they are appealing the court's decision and if stay is not granted they stand to suffer irreparable damage as their appeal will be rendered nugatory.

RESPONDENT'S GROUNDS OF OPPOSITION

The Respondent on his part filed grounds of opposition dated 10th March 2021 in which he averred that the application was fatally defective. He further averred that the firm of Peres Odoyo & Co was improperly on record for the Defendants/Applicants and thus the application has been drawn by a stranger. It was his contention that the application has not satisfied the conditions for grant of stay, and that the affidavit in support of the application violates the mandatory provisions of the Civil Procedure Rules.

DEFENDANT'S WRITTEN SUBMISSIONS

In their submissions dated 30th April 2021 the Defendants' laid down the following issues for determination.

- a. Whether the Applicant's/Defendants' counsel is properly on record.
- b. Whether the Decree herein should be rectified.
- c. Whether stay of execution should issue.

On the first issue counsel for the Applicants' submitted that they were properly on record having obtained consent from the firm of Maxwell .O. Ogonda, who were previously on record for the Defendants.

On the second issue counsel for the Defendants submitted that the judgment only granted the order for adverse possession to the exclusion of all orders sought in the Originating Summons and as such the decree herein should be rectified to reflect that prayer only. Counsel relied on Order 21 Rule 7(1) which provides that; -

The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

It was counsel's contention that in the absence of an application for review then the decree ought to be crafted to reflect the judge's decision.

On the third issue counsel submitted that being dissatisfied with this court's decision they filed a notice of appeal and if stay is not granted they run the risk of losing the suit property.

It was their further submission that a notice of appeal or a memorandum of appeal does not act as an order of stay of execution pending appeal therefore they are seeking this court's intervention to preserve the suit property pending the hearing of the appeal.

ISSUES FOR DETERMINATION

1. Whether the Applicants have met the threshold for grant of stay of execution pending appeal.
2. Whether the decree herein aligns with the court's judgment.

Whether the Applicants have met the threshold for grant of stay of execution pending appeal.

The statutory basis for stay of execution is **Order 42 rule 6(2) Civil Procedure Rules which** lays down the conditions which a party must establish in order for a court to order stay of execution. The rule provides: -

“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.”

The applicant is supposed to prove that substantial loss may result unless the order is made. That the application has been brought without unreasonable delay and they can abide by such security as maybe ordered by the court.

The 2nd Defendant/Applicant is particularly apprehensive that if stay of execution is not granted then he may suffer substantial loss given that the Plaintiff may move to register himself as the owner of the suit property. It is also trite law that courts should always exercise their discretion in granting stay of execution in a manner that doesn't render the appeal nugatory, as was held in the case of **Bhutt -v- Rent Restriction Tribunal (1982) KLR 417.**

In the present case if execution is not stayed then the Plaintiff might move to register the suit property in his name. After such registration the Plaintiff may sell the plot further complicating this matter. If this is allowed to occur then the appeal will be rendered nugatory. The 2nd Defendant has thus proved that he will suffer substantial loss.

With regard to the issue of unreasonable delay the judgment herein was delivered on 18th of December 2020. The notice of appeal was filed on 16th January 2021 and the Application was filed on 1st February 2021. The Applicant was vigilant and moved the court with speed, the delay was not inordinate in this case.

On the issue of security, the same is not necessary because the subject matter is secure. It is my considered view that the status quo should be maintained, and I order so, pending hearing and determination of the appeal. The Applicant has met the threshold for grant of stay pending appeal.

Whether the decree herein aligns with the court's judgment.

It was the Applicants' contention that the decree as drawn did not conform to what was held in the judgment. They averred that the court only granted the prayer for adverse possession but the plaintiff went ahead to lump in all the prayers as sought in the Originating summons. For this reason, they called for rectification of the decree and for the current decree to be expunged from the court record.

Order 21 Rule 7(1) provides that; - a decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

Further section 90 of the Civil Procedure Act grants this court the power to amend a decree either on its own motion or on application by any of the parties. The amendment is however limited to arithmetical or clerical mistakes together with any accidental slip or omission.

The question that arises from the foregoing therefore is whether there is an arithmetical/clerical mistake or an accidental slip or omission herein as contemplated by Section 90 of the Civil Procedure Act.

A look at the judgment under the head “analysis and determination” shows that the court settled on two issues for determination in this suit. The first being whether there was a valid agreement between the Plaintiff and the 1st Defendant and the second being whether the plaintiff has met the threshold for adverse possession.

On the first issue the court found that indeed there was a valid agreement between the Plaintiff and the 1st Defendant. On the second issue the court was of the considered opinion that the Plaintiff had proved adverse possession. Having come to this conclusion the court then stated as follows: -

“I have considered the pleadings, the affidavits in support and in opposition of the Originating Summons, the submissions by counsel together with the relevant authorities and come to the conclusion that the plaintiff has proved adverse possession against the 1st defendant with costs and therefore entitled to the orders.”

From the foregoing it is evident that the court after taking a look at the prayers sought in the Originating Summons in totality concluded that only two matters arise for consideration in this suit. The court then went ahead to find that the plaintiff had proved his case after due consideration of the issues for determination.

It is therefore not true to say that the decree has been wrongfully drafted. The same clearly captures the court’s determination.

The applicants have clearly not met the threshold for rectification of the decree as stipulated by Section 90 of the Civil Procedure Act as there is no arithmetical, clerical mistake or accidental slip or omission.

It is trite law that slip orders are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled.

Further the court in **Patrick Kilonzo v Teachers Service Commission [2015] eKLR** stated that,

A court will only correct a defect where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given. The court found the Respondent evidence to be satisfactory and awarded the prayers sought in the plaint.

This is similarly what has happened in this suit, the court considered all evidence and allowed the plaintiff’s suit, there’s therefore no need to amend the Decree. The upshot of the above is that the application is partially allowed to the effect that stay of execution be and is hereby granted pending hearing and determination of the appeal while the prayer for setting aside, expunging and drafting of a new decree is denied.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE