



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC CASE NO. 6 OF 2019**

**SAMWEL NYABICHERE MUCHEMERSON.....PLAINTIFF**

**VERSUS**

**DANIEL SERERIA MAKARA.....1<sup>ST</sup> DEFENDANT**

**JACOB GESASE MARWA.....2<sup>ND</sup> DEFENDANT**

**MUSA MARWA.....3<sup>RD</sup> DEFENDANT**

**RIOBA MARWA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The instant ruling is in respect of twin applications namely;-

a) A Notice of motion dated 6<sup>th</sup> November 2020 filed in court on 9<sup>th</sup> November 2020 by the four (4) defendants/applicants in person (Hereinafter referred to as the first application) and

b) A Notice of motion (ex-parte) dated 18<sup>th</sup> November 2020 and duly filed herein on 19<sup>th</sup> November 2020 by the plaintiff/applicant, Samwel Nyabichere Muchemerson through M/s Kerario Marwa and Company Advocates (The second application herein).

2. In the first application, the applicants are seeking the orders infra;-

a) Spent

b) That this Honourable Court be pleased to issue an Order setting aside her Orders dated the 27<sup>th</sup> October 2020 and issued on the 30<sup>th</sup> October 2020 against the Applicants/Defendants herein.

c) That upon granting Orders (a) and (b) above, this Honourable Court be pleased to issue an order of stay of execution of the Decree of this Honourable Court dated and issued on the 8<sup>th</sup> day of October 2020, pending filing of intended appeal in the Court of Appeal.

d) That the costs of this Application be provided by the Respondent/Plaintiff herein.

3. The first application is premised on an 11-paragraphed supporting affidavit sworn one even date by the 1<sup>st</sup> defendant, Daniel Sereria Makara for and on behalf of the other three (3) defendants and himself and upon grounds (a) to (e) stated on the face of the application. Briefly, the applicant's lamentation is that the instant matter was finalized and judgment delivered on 28<sup>th</sup> July 2020 and subsequently the decree was issued on 8<sup>th</sup> October 2020 for its intended execution. That they were not aware of the judgment and since an order dated 27<sup>th</sup> October 2020 and issued on 30<sup>th</sup> October 2020 have been served on them, they may suffer irreparable loss unless the application is allowed.

4. In an eight (8) paragraphed replying affidavit sworn on 11<sup>th</sup> December 2020 and filed herein on even date, the plaintiff (respondent), opposed the first application. He deposed, inter alia, that the application is bad in law and does not meet the threshold of a stay of execution and the same does not disclose any cause of action.

5. As regards the second application, the plaintiff/applicant has sought three (3) orders as follows;

a) Spent

b) That this Honourable Court be pleased to amend the Decree dated 8<sup>th</sup> October, 2020 to read **L.R BUKIRA/BWISABOKA/852** as the suit property.

c) That consequent to prayer (a) & (b) above being granted, this Honourable Court be pleased to issue an Order of Security from Kehancha Police Station to the District Land Surveyor Kuria East/West to accompany his office in the execution of the Order/Decree in this matter.

d) That cost of this Application be provided for.

6. The second application is beacons on the applicant's fourteen (14) paragraphed supporting affidavit sworn on even date and copies of documents marked as "SNM1 (a) (b), 2 (a) and 2 (b)" annexed thereto. The documents include copies of the decree (SNM 1(a)) and certificate of official search in regard to the suit land, LR NO. Bukira /Bwisaboka/852 (SNM 2 (b)). The second application is also anchored on grounds (a) to (h) set out on the face of it. In brief, the applicant states that he mounted a claim over a portion measuring five (5) acres of LR No. Bukira/Bwisaboka/136 which has already been subdivided and does not exist. That the orders sought therein are necessary and that the court has the discretionary jurisdiction to grant the same.

7. By a sixteen (16) paragraphed replying affidavit jointly sworn by the applicants on 5<sup>th</sup> January 2021 and duly filed in court on even date, the defendant/respondent opposed the second application and sought its dismissal with costs. They deposed in part that the application is incurably defective, incompetent, vexatious frivolous and an abuse of the court's process. That this court was misled by the applicant and proceeded to deliver a default judgment against them in respect of LR NO. Bukira/Bwisaboka/823 which belongs to one Mosi Wankuru Kerati as shown in the official search marked as "DSM1" and attached to the replying affidavit. That the application is time barred. They also annexed to the application, copies of documents marked as "DSM2 to 5" in support of the same.

8. The twin applications were canvassed by way of written submissions pursuant to Order 51 Rule 16 of the Civil Procedure Rules, 2010 and this court's orders and directions of 10<sup>th</sup> December 2020 which read, inter alia;-

***".....the Notice of Notice of dated 16<sup>th</sup> November 2020 and 18<sup>th</sup> November 2020 both be argued by way of written submissions to be exchanged between the parties herein....."***

9. Accordingly, the defendants (applicants) filed their four (4) paged and submissions dated 24<sup>th</sup> June 2021 on 25<sup>th</sup> June 2021 making reference to the 1<sup>st</sup> and 2<sup>nd</sup> applications and identified three (3) issues for determination which include; whether the parties are entitled to the orders sought in their respective applications. In analyzing the issues in favour of the first application against the 2<sup>nd</sup> application, the defendants cited the Oxygen (Overriding Objective) Rule, Article 159 of the Constitution of Kenya, 2010 sections 99 and 100 of the Civil Procedure Act Chapter 21 Laws of Kenya and the Court of Appeal decision in **Domnic Alois George Omenye t/a Omenye and Associates =vs= Prime Bank Ltd (2017) e KLR**, to buttress the submissions.

10. On the part of the plaintiff, his counsel filed a two (2) paged submissions dated April, 2021 on even date where reference is made to the orders sought in the second application and that the same be granted. Counsel submitted in part that amendment of the decree as sought in the second application is in line with order one and that LR NO. Bukira/Bwisaboka/136 has now been closed by subdivision and has made it impossible for execution of the orders arising from the Judgment herein. That the surveyor's letter (SM1) speaks to the second application.

11. I have duly considered the first and second applications, the respective replying affidavits and the rival submissions in their entirety. So, are the twin applications merited?

12. The statutory provisions under which the first application was commenced, give the court the discretion and their target is to meet the ends of justice. The said provisions provide that the court's discretion is exercised always for upholding the law and preservation of the claims of the parties so that they may be heard and determined according to the law and equity as recognized by the Court of Appeal decision in **Macharia Mwangi Maina and 87 others-vs-Davidson Mwangi Kagiri (2014) eKLR** where it was held;

***".....This is a court of law and a court of equity; Equity shall suffer no wrong without a remedy...."***

13. Order number 2 sought in the first application was precipitated by orders of 27<sup>th</sup> October 2020 issued on 30<sup>th</sup> October 2020 further to an application by way of a Notice of Motion date 23<sup>rd</sup> October 2020 (ex parte) where the applicant sought order of security from Kehancha Police Station in execution of the order/decreed issued on 8<sup>th</sup> October 2020 herein. It is within the discretion of the court to grant an order made ex parte in order to avoid injustice as held in the case of **Shah-vs-Mbogo (1968) EA 693**. So, order number 2 is grantable bearing in mind order number 3 sought in the first application and the orders sought in the second application in the circumstances.

14. As pertains order number 3 sought in the first application, the same relates to the judgment and the decree rendered and issued on 28<sup>th</sup> July 2020 and 8<sup>th</sup> October 2020 respectively. The term "exception" in lieu of "execution" is used in the said order but it would appear to be a clerical slip which is curable under **Section 19 (1) of the Environment and Land Court Act, 2015 (2011)** alongside the provisions of the law under which the first application is initiated.

15. The triple conditions for stay of execution of judgment/decreed are set out under Order 42 Rule 6 (2) (a) and (b) of the Civil Procedure Rules, 2010; substantial loss, delay and security for the due performance of the decree/order. All the trio must be satisfied before a stay of execution can be granted as stated in the case of **Trust Bank Ltd-vs-Ajay Shah and 3 others (2012) eKLR**, among other authorities.

16. The applicants contend in the first application that they intend to file an appeal from the judgment of this court at the Court of Appeal. In

the event of execution of the judgment and or decree herein, the applicants who depend on the suit land are likely to suffer substantial loss as stated in the first application.

17. It is crystal clear that the first application was filed approximately one hundred (100) days after the delivery of judgment in this matter. In the case of **Raphael Musila Mutiso-vs-Joseph Ndava Nthuka and another (2019) eKLR**, the Court of Appeal held that delay for a day will result to dismissal of an application if not explained to the satisfaction of the court.

18. **Article 10 (2) (b) of the Constitution of Kenya 2010** anchors the principles of equity, inter alia, delay defeats equity and equity aids the vigilant and not the indolent. It is disclosed from the grounds of the first application and the supporting affidavit to the same that the applicants were not aware of the judgment until after the orders issued on 30<sup>th</sup> October 2020. Thus, the delay in mounting the first application is plausible and satisfactory.

19. As regards security, in the case of **Doshi Iron Mongers Ltd-vs-Kenya Revenue Authority and another (2020) eKLR**, the Court of Appeal observed that there is no exemption from providing security for the due performance of a decree or order. That even a statutory body is statute bound thereby.

20. Regarding the second application, I note the entire Order 51 (supra) under which it is brought. Further, pursuant to **Section 99 of the Civil Procedure Act (supra)**, this court has the power to correct any apparent error in the judgment, ruling and orders; see also the Supreme Court of Kenya decision in the case of **Charles Karathe Kiarie and 2 others-vs- Administrator of the estate of John Waliace Mathare-Deceased) and 2 others (2020) eKLR**.

21. Indeed, a party has a vested right to the judgment which ought to be effectual as held in **Shahmad-vs-Shamji Bros and another (1957) EA 438**. Besides, Article 48 of the Constitution of Kenya 2010 provides for the right to access justice and the parties have that right to have their respective claims ventilated including at the appellate level. Moreover, stay of existing orders rests upon genuine conditions, grounds, merit and dispatch as held by the Court of Appeal in the case of **Malindi Law Society-vs-Law Society of Kenya Nairobi Branch and 5 others (2017) eKLR**. In light of the nature of the first application which is grantable, the second application must fail.

22. In the result, I find the first application and the second application unmeritorious and merited respectively. I proceed to order as follows;

a) Orders 2 and 3 sought in the first application and as set out in paragraph 2 (b) and (c) hereinabove be and are hereby granted.

b) The applicants in the first application to;

i. mount an appeal before the Court of Appeal within the next thirty (30) days from this date.

ii. Deposit security in the form of Ksh 20,000 /=in this court within the next thirty (30) days from this date without further extension.

iii. Failure to comply with order (b) (i) and (ii) hereinabove, the stay of execution order granted herein to lapse automatically.

c) The second application is hereby disallowed.

d) The costs of the first and second applications to abide the intended appeal.

**DELIVERED, DATED AND SIGNED AT HOMA BAY VIA EMAIL AS THE PARTIES WERE NOTIFIED ACCORDINGLY, THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2021**

**G.M.A. ONGONDO**

**JUDGE**