



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC APPEAL NO. 7 OF 2019**

**JACOB OSURU.....APPELLANT**

**= VERSUS =**

**BEATRICE ASINO ODWAKO.....RESPONDENT**

**RULING**

1. The Appellant/Applicant filed this application under Order 42 Rule 6(2) of the Civil Procedure Rules on the 16<sup>th</sup> of August, 2021 for orders THAT:

- a) This application be certified urgent and heard ex-parte in the first instance during this vacation;**
- b) There be a stay of execution of the decree issued on the 31/10/2019 in Busia CM ELC No. 376 of 2011 pending inter-partes hearing of this Application;**
- c) There be a stay of execution of the decree issued on 31/10/2019 in Busia CM ELC No. 376 of 2011 pending hearing and determination this appeal;**
- d) Costs.**

2. The Application was supported by the affidavit of JACOB OSURU ABIERO dated 16<sup>th</sup> August, 2021 and the on following grounds;

- a. That, the Respondent has commenced execution of the decree passed on the 31/10/2019;*
- b. That, the Appellant preferred an appeal to this Hon. Court which has extremely overwhelming chances of success;*
- c. That if execution is not stayed at this time the Appellant's appeal will be rendered academic;*
- d. That the Appellant has been in occupation of suit land for over 50 years;*
- e. That the Appellant and his family of over 20 members live and depend on the suit land which is ancestral land;*
- f. That the Respondent though not having pleaded and obtained an eviction order has commenced eviction progress contrary to the decree hence need to grant stay at this moment;*
- g. That the Respondent's suit before the Magistrate's Court was statute barred having allegedly obtained title deed in 1988 but commenced the suit that gave rise to the decree the subject of this appeal on the 23/11/2011 a period of over 23 years hence contravening the provisions of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya;*
- h. That the Respondent has never been in occupation of the suit land;*
- i. That the suit land is the only asset/possession known to the Appellant hence if the order of stay is not granted at this stage, the Appellant stands to suffer irreparable loss and harm that cannot be compensated in monetary terms;*
- j. That the Appellant applied for certified copies of the proceedings on the 26/11/2019 and to date the same is yet to be supplied*

hence delay in preparation and service on the record of appeal;

k. That this application is filed without any delay the Hon. Magistrate having declined to grant stay on the 6/5/2021 hence this application;

l. That the Appellant is ready to comply with any conditions that may be set by the Hon. Court for stay of execution.

3. The Respondent filed her replying affidavit on the 24<sup>th</sup> of August, 2021 wherein she deposed that:

a) She filed a suit against the Appellant and his brother ROBERT ONDIGO vide BUSIA CMCC No. 376 of 2011 in which she sought a permanent injunction against them in respect of the ownership occupation and use of L.R No. MARACHI/ELUKHARI/1816 which together with 1815 are resultant subdivisions of MARACHI/ELUKHARI/131.

b) That she purchased the land from ANDREA OKOTH ABIERO (deceased) the father of the Appellant and upon subdivision, the suit title was transferred to her while the deceased and his family remained on the MARACHI/ELUKHARI/1815;

c) She took possession of the land and used it peacefully until October, 2011 when the Appellant's brother ROBERT ONDIGO filed a claim against her at the Butula Land Disputes Tribunal which case was heard and determined in her favour;

d) That the Appellant has not satisfied the prerequisites for granting the orders sought and he has come to court after undue delay and misrepresentation of facts before the court.

4. The Applicant did not file any submissions within the agreed timelines. The Respondent filed hers on 20<sup>th</sup> Sept 2021 and I have taken time to read the same. The Respondent's submissions inter alia narrated the background of the dispute between the parties and why judgement was entered in her favour. The issues raised of whether or not the Applicant has any rights over land parcel Marachi/Kingadole/1816 is one of the questions to be determined during the hearing of the pending appeal. The Respondent submitted further that the executable part of the decree although sought but it has not been made. Unless the order of stay is made, there is nothing that would stop the Respondent from executing the decree so this application cannot be said to be premature.

5. Courts are under a duty when moved to issue orders for stay pending appeal guided by the principles set under Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010. The Court of Appeal in **Butt vs Rent Restriction Tribunal [1982] KLR 417** considered the exercise discretion when granting stay of execution and held that:

a. *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;*

b. *The general principle in granting or refusing a stay is; if 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;*

c. *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;*

d. *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.*

6. According to a copy of the decree annexed to the supporting affidavit, the impugned judgment was delivered on October 31, 2019. This application was filed nearly two years after the judgment was rendered. The Applicant has explained the delay by stating that he first applied to the trial court for a stay, which was denied on May 6, 2021, thus the current application, which I find satisfactory.

7. The trial Court issued a decree on the 2nd of August, 2019 for a permanent injunction prohibiting the Appellants from interfering with the Respondent's use of the suit land and ordering the Appellants to pay the suit's costs. The Appellant deposed in paragraph 12 & 13 of the affidavit in support of the motion that the suit land is their ancestral land and he has lived on it with his family and extensively developed it. That if the execution of the decree is allowed to proceed, they will be forced to relocate, a loss that cannot be compensated in monetary terms. He deposed further that his appeal has high chances of succeeding.

8. The issue of substantial loss was discussed by Justice Munyao Sila in **James Kamau & 42 others vs. Leonid Limited (2021) eKLR** where he stated that:

***“It is incumbent upon an applicant to demonstrate, within the application for stay pending appeal, that he stands to suffer substantial loss if stay is not granted). In other words, the applicant needs to inform the court exactly what loss he stands to suffer if stay is not granted so that the court may assess whether this loss meets the standard of substantial loss. Thus evidence of such loss must be provided by the applicant, ordinarily within the affidavit in support of the application, and it is not for the respondent, or the court, to speculate on the loss the applicant stands to suffer if stay is not granted. I have described what is deposed in the supporting affidavit and I am afraid that nothing in that affidavit provides any evidence, of any loss, that may be occasioned to the applicants if stay is not granted, and I cannot speculate on the loss that they may suffer...”***

9. Although the Respondent denied that the Applicant had lived on the land for 50 years as claimed, the applicant is admitted to be on the land, which is why the Respondent wants him evicted. Because an appeal has been preferred against the decree, it would be in the best

interests of justice to have the appeal decided before evicting the Applicant. It cannot be denied that the eviction process causes economic and emotional losses, both of which, in my opinion, amount to substantial loss. In the case of **Peter Kiptarus & 3 others v Kimaiyo Arap Rono; Director of Surveys Land Registrar & 2 others (Interested Parties) [2021] eKLR** the Court stated in regard to substantial loss that:

***“This in essence means that in applications for stay of execution, the applicant must go a step further to establish the substantial loss that he would suffer. This is not ordinary loss which can just be claimed without substantiation. The applicant ought to establish that the execution of the decree/judgment will create a chain of events or state of affairs that will irreparably affect or negate the core of applicant as a successful party in the appeal.”***

10. With regards to the issue of security, the orders sought to be executed and it is pleaded that the land is registered in the name of the Respondent. It would serve no purpose to order for the deposit of security in the circumstances of this case. In light of the foregoing, this Court finds that the Applicant has demonstrated meeting the conditions set for granting stay of execution. Consequently, the Court does issue an order for stay of execution of the impugned decree pending hearing and determination of the appeal filed. The costs of the application be and is hereby awarded to the Respondent.

**DATED, SIGNED & DELIVERED AT BUSIA THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021.**

**A. OMOLLO**

**JUDGE**