



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO 28 OF 2020

ROBERT OKERI OMBEKA.....APPELLANT

VERSUS

PETER NG'ANG'A CHEGE.....RESPONDENT

RULING

1. This is the Notice of Motion dated 23rd June 2020 brought under order 42, rule 6(1) (2) and section 19(1) (2) of the Environmental and Land Court No 19 and all other enabling provisions of law.
2. It seeks orders:-
 1. *Spent.*
 2. *Spent.*
 3. *That a stay of proceeding in respect of CMCC 1267 of 2014 pending hearing and determination of this application.*
 4. *That cost be in the cause.*
3. The grounds are on the face of the application and are:-
 - (i) *The subordinate court case has a date of 8th July 2020.*
 - (ii) *The Appeal has a very high chances of success hence the need for stay of proceedings.*
 - (iii) *The Appeal would be rendered nugatory unless stay of proceedings is granted.*
4. The application is supported by the affidavit of David Njeru Nyaga, advocate sworn on the 22nd June 2020.
5. The application is opposed. There are grounds of opposition filed by the Respondent dated 26th October 2020.
6. On the 24th February 2021, the court with the consent of the parties directed that the application be canvassed by way of written submissions. On the 28th April 2021, Mr. Ndambiri for the Respondent intimated to the court that he would not be filing any submissions but will rely on the grounds of opposition dated 26th October 2020.
7. The appellant's submissions are dated 14th April 2020. That Appeal is now ready for hearing and determination. The Appellant vide a Notice of Motion dated 2nd October 2014 sought leave from the subordinate court to extend time to enable him file a defence which was late for 5 days.
8. The application was brought under order 50 rule 6 of the Civil Procedure rules and Section 3A of the Civil Procedure Act. However, the learned Magistrate dismissed the application seeking to extend time for filing defence. The Appellant/Applicant has an arguable appeal.
9. This application has been filed timeously. The issue pending determination touches on ownership of land which is a very sensitive issue

and it is only fair that all parties are heard by the court. The applicant was late to file defence by only five days and sought the court's indulgence to file the same which request the subordinate court declined to grant.

10. He had relied on Articles 50 and 159(a), (d) of the Constitution. This appeal ought to be heard before the suit in the subordinate court is heard. He prays that this application be allowed.

11. I have considered the Notice of Motion and the affidavit in support. I have considered the grounds of opposition and the submission filed by the Appellant/Applicant. The issue for determination is whether the application is merited.

12. **Order 42 rule 6(2)** of the Civil Procedure Rules provides that:-

“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.”

13. The ruling by the learned Magistrate was delivered on 10th February 2015. The Appellant/Applicant has explained the delay in bringing this application. I find that the reasons given for the delay are plausible.

14. It is the Appellant's/Applicant's case that the dispute in the subordinate court touches on ownership of the land. I find that the applicant has demonstrated sufficient cause and that he has an arguable appeal.

15. I also find that the Appellant/Applicant has demonstrated that he will suffer substantial loss in that the matter in the subordinate court is likely to proceed without his participation unless these orders are granted.

16. I am satisfied that the application herein meets the conditions set out under Order 42 rule 6(2) of the Civil Procedure Rules. I hereby allow the application in the following terms:-

(a) That there be stay of proceedings in respect of CMCC 1267 of 2014, pending hearing and determination of this Appeal.

(b) That costs of this application do abide the outcome of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 23RD DAY OF SEPTEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Nyaga for the Appellant

Mr. Ndambiri for the Respondent

Steve - Court Assistant