



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 22 OF 2015

JACKSON EKIM OMAIDO.....PLAINTIFF

VERSUS

LUCIA NGAIRA OMUNGA.....1ST DEFENDANT

ROSELYNE OMUNGA.....2ND DEFENDANT

CLARA ANDABWA.....3RD DEFENDANT

NELSON MAKOKHA.....4TH DEFENDANT

JOHN OKWAROI.....5TH DEFENDANT

STANLEY EKOINE JUMA.....6TH DEFENDANT

GEORGE WAFULA.....7TH DEFENDANT

KENNEDY MUMBWANI.....8TH DEFENDANT

BONIFACE NYONGESA.....9TH DEFENDANT

ALFRED CHAMAKETI.....10TH DEFENDANT

NAMBUCHA KIRIKACHA.....11TH DEFENDANT

ALEXANDER IMONI.....12TH DEFENDANT

RULING

The Application

1. By a Notice of Motion dated 12/5/2021 and filed on the same date and brought under **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Order 22 Rule 22** of the **Civil Procedure Rules**, the 1st, 4th, 5th and 6th defendants/applicants sought for the following orders:

(1) ...spent

(2) ...spent

(3) That there be stay of execution of the order and the decree herein pending the hearing and determination of the appeal against the order dated 3/5/2021.

(4) That costs of this application be provided for.

2. The application is supported by the affidavit sworn on **12/5/2021** by the 1st defendant on his own behalf and on behalf of his co-applicants. The grounds on the face of the application are that the judgment in this matter was delivered on **18/1/2021**; that the applicants filed an application under certificate of urgency dated **1/2/2021** for orders of stay of execution and setting aside the judgment which application was dismissed with costs and interim orders of stay vacated; that the applicants being aggrieved have filed the Notice of Appeal and intend to appeal against the ruling and order dated **3/5/2021**; that the applicants have an arguable appeal which has high chances of success; that it is in the interest of justice and equity to preserve the *status quo* pending hearing and determination of the intended appeal and that the respondent shall not be prejudiced if the orders being sought are granted.

The Response

3. The plaintiff filed Grounds of Opposition and opposed the application dated **12/5/2021** on the following, amongst other grounds:

(1) That the application dated 12/5/2021 is fatally defective, incompetent as filed and an abuse of the court process hence the same should be dismissed with costs.

(2) The application dated 12/5/2021 offends Order 42 rule 6(2) of the Civil Procedure Rules, hence the same should be dismissed with costs.

(3) The application dated 12/5/2021 lacks merit and offends the provisions of Section 1A and 1B of the Civil Procedure Act and Article 159(2) of the Constitution, hence the same should be dismissed with costs.

(4) The application dated 12/5/2021 has been brought in bad faith with the intention of frustrating the judgment of this honourable court and embarrassing the process of court, hence the same should be dismissed with costs.

(5) The application dated 12/5/2021 offends the doctrines of equity for having been brought by applicants guilty of dirty hands. The applicants have come to court with unclean hands hence they cannot benefit from the discretion of the court. Therefore, the application dated 12/5/2021 should be dismissed with costs.

(6) That it is in the interest of justice that the application dated 12/5/2021 be dismissed with costs.

SUBMISSIONS

4. The applicants filed their written submissions on **23/6/2021** and supplementary submissions on **21/7/2021**. I have perused the court file and found no submissions filed on behalf of the respondent.

DETERMINATION

Issues for determination.

5. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed by the parties.

6. The main issue for determination in the instant application is whether the applicants should be granted a stay of execution pending appeal against the ruling and order of this court delivered on **3/5/2021**.

7. A notice of appeal has been attached to the application and the original thereof is in the file record. I find that for the purposes of an application for stay of execution the applicants have satisfied this court that there is an appeal in place.

8. As to whether the application was brought without unreasonable and inordinate delay this court observes that the same was filed on **12/5/2021**, just **9** days after the delivery and issuance of the said ruling and order and therefore it is convinced that there was no such inordinate delay.

9. The applicants claim to have been in occupation of the suit land for a lengthy period of time and that the respondent's father found them living on the suit land in **1956** when he came onto the land.

10. I have come to the conclusion that the applicants have demonstrated that they would suffer loss that may not be capable of compensation by way of damages and the appeal may be rendered nugatory if the orders sought do not issue.

11. I find that the application dated **12/5/2021** has merit and the same is granted in terms of **prayer no (3)** thereof. The costs of the application shall abide the costs of the appeal.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 22nd day of September, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.