REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI

ELC CASE NO. 66 OF 2018

JOSEPH KISILU NZAU.....PLAINTIFF/RESPONDENT

VERSUS

DAVID MAITHYA MUNYASYA.....1ST DEFENDANT/APPLICANT

FRANCIS MUSYOKA MUNYASYA.....2ND DEFENDANT/APPLICANT

RULING

1. The application for determination is dated 16th July, 2020 and was filed under certificate of urgency. It is brought under Sections 1A, 1B & 3A) of the Civil Procedure Act, Order 42 Rule 6 & Order 22 Rule 22 of the Civil Procedure Rules (CPR) and all other enabling provisions of the Law. It seeks;

a. Spent.

b. Spent.

c. THAT there be a stay of execution of the judgment of this Honourable Court dated 28th May, 2020 pending the hearing and determination of the appeal to the Court of Appeal.

d. THAT costs of this application be in the cause.

2. The application is supported by the grounds on its face and the affidavit of David Maithya Munyasya sworn on the same date. He deposed that the stay granted after delivery of judgment has lapsed and his intended appeal will be rendered nugatory if execution proceeds. It's also his deposition that he has an arguable appeal with high chances of success and is ready to abide by any condition which the court may set.

3. The application is opposed through the Respondent's Replying Affidavit sworn on 19th January, 2021. The gist of the opposition is that the grounds advanced by the Applicant do not warrant the grant of stay of execution. That the Applicants have not illustrated the prejudice which they will suffer and have not informed this Court that they are willing to abide by any conditions which may be set, pending the hearing and determination of the appeal.

4. He deposed that matters take a long time in the Court of Appeal hence he will be denied the fruits of his judgment for an unknown period of time. He deposed that he has been living on the land since 1964 and relies on it for sustenance. He deposed that his Advocate has never been served with a memorandum of appeal since this application was filed. He deposed that the Applicants have been enjoying the interim stay of execution since 7th August, 2020 hence the failure/reluctance to file the substantive appeal.

5. Directions were given that the application be canvassed by way of written submissions. The parties complied and filed their respective submissions.

6. The Applicants' submissions were that they filed a notice of appeal on 6th December, 2020 and served it on the Respondent. That they are yet to file the substantive appeal because they have not been supplied with certified copies of proceedings and judgment despite requesting and paying for them.

7. The Applicants submitted that if the application is not allowed they will suffer substantial loss because they will be evicted from the suit land which they use for grazing and subsistence farming. They also submitted that the mature trees which they planted may be destroyed.

8. They submitted that they filed the application in less than two months after the judgment hence the delay was not inordinate. Further, they submitted that consideration should be given to the prevailing hardships due to the Covid 19 pandemic. They relied on the case of **Florence**

Hare Mkaha -Vs- Pwani Tawakal Mini Coach & Anor (2014) eKLR where the court held that a delay of one year was not inordinate.

9. They submitted that deposit of security for due performance is not necessary because this is a land matter. They however undertake to abide by any orders which the court may impose. They relied on the case of **David Oyiare Ntugani -Vs- Matuiya Ole Naisuaku Orket (2017) eKLR** where it was held that deposit of security was unnecessary because the subject matter was land.

10. The Respondent's submissions were that the Applicants have made mere assertions and have not proved that they will suffer substantial loss. That the Applicants misled the court by stating that they use the suit property to sustain themselves because he (Respondent) has been in possession of the suit property for over 55 years. That it is also a lie for the Applicants to claim that they will be evicted. Accordingly, the Respondent submitted that the Applicants will not suffer any substantial loss if the orders are denied. He relied *inter alia* on the case of **James Wangalwa & Anor -Vs- Agnes Naliaka Cheseto (2012) eKLR** where it was held that:

> ***"The issue of substantial loss is the cornerstone…and has to be prevented by preserving the status quo because such loss would render the appeal nugatory…the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail."***

11. He submitted that Courts are now enjoined to give effect to the overriding objective of the Civil Procedure Act and are not just limited to the provisions of Order 42 rule 6. He relied *inter alia* on the case of **Victory Construction -Vs- BM (*A Minor suing through next friend and one PMM* (2019) eKLR** where the Court held that;

> ***"The Court ought to weight the likely effect of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the Court so far as possible to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should always therefore opt for the lower rather than the higher risk of injustice."***

12. Accordingly, he contends that since he has been in possession, the effect of granting the application would be to deny him his source of livelihood pending the determination of an appeal which is yet to be filed.

13. As correctly submitted by the parties, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.

14. The application was filed within two months after delivery of judgment and I am in agreement with the Applicants that such delay is not unreasonable. The Applicant is also ready to abide by the conditions imposed with regard to security for costs.

15. As for substantial loss, this Court has already made a finding of fact that Munyasya Nzau Kilomo *(the Defendant in the plaint)* sub-divided the suit land unequally hence the Respondent is entitled to 1 Ha from the suit land. It is therefore incorrect for the Applicants to claim that they will be evicted because evidently, only a portion is being excised and not transfer of the whole suit land which is 4.8 Ha. Further, the balance of the suit land after excision will still be substantial and I am not convinced that it will cause a major difference for their subsistence farming and grazing. It is also noteworthy that the applicants did not exhibit a memorandum of appeal hence impossible to know the kind of case they will be advancing at the Court of Appeal.

16. The upshot is that the Applicants have not satisfied the conditions for grant of stay pending appeal. The application is dismissed with costs to the Plaintiff.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi