



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC MISC CASE NO 1 OF 2021

(FORMERLY MIGORI ELC MISC CASE NO. 18 OF 2021)

LUCY AKEYO OGINGA.....APPELLANT/APPLICANT

VERSUS

CALEB OCHIENG NYARERA

(Suing as the legal representative of the estate of Selina Aoko Mbeche-Deceased).....RESPONDENT

RULING

1. On 1st July 2021, one Lucy Akeyo Oginga (The applicant herein) through the firm of S. O Madialo and Company Advocates duly granted leave to come on record for the applicant with effect from 2nd July 2021, lodged a Notice of Motion dated 24th June 2021 under the sections cited on its face (The application). She has sought the orders infra;

a) Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue an order of stay of execution of the judgment delivered on the 16th June 2021, subsequent decree and all further proceedings pursuant to the judgment.

b) Costs of the application be provided for.

2. The mainstay of the application are grounds 1 to 15 as stated thereon alongside a 23-paragraphed supporting affidavit sworn on even date by the applicant. Copies of the documents marked as "LAO-1 to LAO-6", inter alia, a copy of the judgment (LAO-4), a copy of memorandum of appeal (LAO-5) and photographs (LAO-6), accompany the affidavit.

3. Precisely and concisely, the applicant laments that on 16th June 2021, the learned trial magistrate, R B N Maloba (PM) delivered judgment (LAO-4) in Homa Bay CM's Court Environment and Land case No. 35 of 2018 where she dismissed the applicant's suit which had been originated by way of a plaint dated 16th September 2013 and allowed the respondent's counter claim dated 4th February 2014. That by the said judgment, the respondent was declared the owner of the suit land, LR No. Kanyada/Kotieno Katuma/686, eviction orders against the applicant granted and the respondent awarded Kshs.500, 000/= damages for trespass. That the applicant was aggrieved by the judgment and intends to appeal against the same and has filed a draft memorandum of appeal dated 24th June 2021 (LAO-5).

4. The applicant further laments that he is in possession of the suit land as shown in the photographs (LAO-6) hence he stands to suffer substantial loss if the orders sought in the application are not granted. That the application has been brought without any unreasonable delay, the suit land be preserved as it will not cause any prejudice to the respondent and that he is willing to comply with any directions of this court.

5. By a 29-paragraphed replying affidavit sworn on 26th July 2021 duly filed in court on 28th July 2021 through M/S Oguttu Mboya, Ochwal and Partners Advocates, the respondent opposed the application. He termed the same devoid of merits and sought its dismissal. That the application has not met the threshold for the grant of orders sought therein. That the application is meant to obstruct the terms of the judgment.

6. Annexed to the replying affidavit are copies of documents marked as "CON 1" to "CON 2(a) to (d)" which include: a decree issued on 8th July 2021 in Homa Bay CMCC NO. 35 of 2018 (CON 1) and a letter of consent dated 6th June 1995 in respect of transfer of the suit land from the applicant to Selina Aoko Mbeche-Deceased (CON 2b).

7. Simultaneous with the replying affidavit, the respondent filed a statement of grounds of opposition of even date. The grounds include;

a. Besides, the Appellant/Applicant has neither established nor satisfied the requisite conditions and/or ingredients, *inter alia* proof of substantial loss to warrant grant of the orders of stay of execution of the decree pending the hearing and determination of the appeal herein.

b. In any event, the Appellant/Applicant herein, is not disposed to suffer any substantial loss and/or such other loss, whatsoever.

c. In the premises, the Notice of Motion application herein is devoid of merits, whatsoever and/or howsoever.

8. On 2nd July 2021, the court (Kullow J) ordered and directed that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010** and **Practice Direction number 33 of the Environment and Land Court (ELC) Practice Directions, 2014**.

9. Interestingly, the applicant filed no submissions despite the directions as per paragraph 8 hereinabove.

10. On the other hand, learned counsel for the respondent filed a 6-paged submission dated 24th September 2021 on 30th September 2021 giving the introduction and background of the matter. Counsel identified four (4) issues for determination including whether the applicant has met the conditions set out for stay of execution of the decree. The discussion thereof was in the negative and counsel urged the court to disallow the application with costs to the respondent. To buttress the submissions, counsel referred to the Court of Appeal decisions in **Kenya Shell Limited-vs-Benjamin Karuga Kibiru and another (1986) eKLR** and **Butt-vs-Rent Restriction Tribunal (1979) eKLR**.

11. I have carefully considered the application, the replying affidavit, the grounds of opposition and the rival submissions in their entirety. Therefore, are there special circumstances for the grant of the stay order sought in the present application?

12. The conditions for the grant of stay of execution as set out in **Order 42 Rule 6** (supra) are borne in mind herein. Clearly, judgment was rendered on 16th June 2021, this application was commenced on 1st July 2021 while the applicant filed the memorandum of appeal on 24th June 2021.

13. **Order 50 Rules 6 and 8 of the Civil Procedure Rules 2010** provide for the court's power to enlarge time and computation of days respectively. **Article 10 (2) (b) of the Constitution of Kenya, 2010** anchors the principles of equity, *inter alia*, equity aids the vigilant and not the indolent and delay defeats equity. In the present scenario, the application was filed within a reasonable period of time.

14. It is crystal clear that the decree (CON 1) was issued further to the trial court's judgment (LAO 4). That the suit land was registered in the name of the deceased as per documents marked as "CON 2 (a) to (d)" and annexed to respondent's replying affidavit. The respondent has therefore, a vested right to the said judgment and the decree which ought to be effectual as held in **Shahmad-vs-Shamji Bros and another (1957) EA 438**.

15. Besides, by the draft memorandum of appeal marked as "LAO 5" and annexed to the applicant's supporting affidavit, there are trial issues in the intended appeal; see also **Butt case** (supra).

16. No doubt, this court has the mandate to grant interim preservation orders under **section 13 (7) (a) of the ELC Act, 2015 (2011)**. The same do not exclude the stay order sought in the application.

17. Moreover, it is trite law that the court has inherent jurisdiction to safeguard the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues; see the Supreme Court of the Republic of Kenya decision in the case of **Board of Governors, Moi High School, Kabarak and another -vs- Malcolm Bell (2013) eKLR**.

18. In **Butt case** (supra), the Court of Appeal observed thus;

"...and the appellant has an undoubted right of appeal...."

19. The right to access to justice is enshrined under **Article 48 of the Constitution of Kenya, 2010**. In that spirit, the applicant in this matter has an undoubted right of the intended appeal.

20. In sum, this court has the mandate to preserve the character and integrity of the suit land pending the hearing and determination of contested issues in the intended appeal. The special circumstances in this matter are that the ownership of the suit land is hotly contested as there is alleged threatened eviction of the applicant from the suit land and the applicant has an undoubted right of appeal which may be rendered nugatory unless the orders sought in the application are granted.

21. Wherefore, I find the application dated 24th June 2021 meritorious. I proceed to allow the stay order as per prayer 4 therein upon terms that the applicant will deposit in court within thirty (30) days from this date, the sum of Kshs.50,000 (Fifty thousand only) as security for the due performance of such decree or order as may ultimately be binding upon him, failing which the stay so granted shall automatically lapse without further order(s) herein.

22. Costs of the application to abide the intended appeal to be filed and served within the next thirty (30) days from this date.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 26TH DAY OF OCTOBER 2021

G M A ONGONDO

JUDGE

In the presence of:

Mr. Ogari holding brief for MS W. Ochwal, Learned Counsel for the applicant