



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

HB ELC APPEAL 7 OF 2021

(FORMERLY MIGORI ELCA NO. E09 OF 2021)

WALTER ODOYO KANDIAWO.....APPELLANT/APPLICANT

VERSUS

VICTOR OTIENO CHIANDA.....1ST RESPONDENT

JOASH ODHIAMBO JONYO.....2ND RESPONDENT

RULING

1. On 12th July 2021, the appellant/applicant namely Walter Odoyo Kandiawo through M/S Oguttu Mboya, Ochwal and Partners Advocates mounted an application by way of a Notice of Motion dated 9th July 2021 pursuant to, inter alia, Order 42 Rule 6 of the Civil Procedure Rules, 2010 and sections 13 and 19 of the Environment and Land Court Act, 2015 (2011). He is seeking the orders infra;

a. Spent

b. Spent

c. The Honourable Court be pleased to grant an order of stay of execution of the judgment and decree rendered and/or delivered by the subordinate court on 8th day of July 2021 *vide* **OYUGIS PMC ELC NO. 6 OF 2019**, together with all consequential orders arising therefrom and/or attendant thereto and in particular, the limbs thereof directing the Appellant/Applicant herein and/or the Land Registrar to remove the restriction lodged on the title over and in respect of **LR. NO. CENTRAL KASIPUL/ KAMUMA/2840** (*hereinafter referred to as the suit property*) and eviction of the Appellant/Applicant from the suit property, pending the hearing and determination of the instant appeal.

d. The Honourable Court be pleased to grant such further and/or other Orders as may be deemed just, appropriate and/or expedient to be granted.

e. Costs of this Application do abide the appeal.

2. The anchorage of the application is the applicant's 30-paragraphed supporting affidavit sworn on even date and annexed documents including a plaint, a statement of defence and counter claim in Oyugis PM's Court Environment and Land Case number 6 of 2019 (WKO-1 and 2) and a memorandum of appeal herein. It is also based on grounds (a) to (cc) as stated on the face of the same.

3. In summary, the applicant's complaint is that the 1st respondent lodged the suit as pointed out in paragraph 2 hereinabove seeking, inter alia, eviction against the applicant from the suit property, LR No. Central Kasipul/Kamuma/2840. The applicant mounted a statement of defence and counter claim thereto. That on 8th July 2021, judgment was rendered in favour of the 1st respondent who is at liberty to evict the applicant from the suit property. That the applicant was dissatisfied with the judgment and decree and filed the instant appeal which is arguable. That the application has been brought without unreasonable delay and that the applicant is likely to suffer loss if the application is not allowed.

4. In a replying affidavit sworn 20th July 2021 and filed on 2nd August 2021, the 1st respondent through the firm of Ngala Awino and company Advocates, opposed the application and sought that it be dismissed with costs. He deposed, inter alia, that the intended appeal has no chances of success. That there is the need to strike a balance so that it is not only the applicant who benefits from the order of stay of execution.

5. The 1st respondent further deposed that the applicant has not demonstrated that this appeal will be rendered nugatory if the orders sought

in the application are not granted. That there is no reasonable explanation given by the applicant thereof and that the application is a ploy to delay the 1st respondent from enjoying the fruits of the judgment.

6. On 13th July 2021, the court (Kullow J) ordered and directed that the application be argued by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010**.

7. So, learned counsel for the applicant filed a 5-paged submission dated 16th August 2021 on 19th August 2021 giving the background of the matter and framed three (3) issues for determination which include; whether the applicant has satisfied the conditions for the grant of stay sought in the application. Counsel analysed the issues in the negative and relied on the Court of Appeal decision in **Butt-vs-Rent Restriction Tribunal (1979) eKLR**, among other authoritative pronouncements, to fortify the submissions.

8. Learned counsel for the respondent filed submissions of three (3) pages on 2nd day of August 2021 and identified an issue for determination namely whether an order of stay of execution pending appeal should issue. In discussing the same, counsel urged this court to dismiss the application and relied on **Order 42 Rule 6 (supra), Re Estate of Michael Kiarri Njoroge (deceased) (2019) eKLR and Machira T/A Machira and company Advocates-vs-East African Standard (No. 2) (2002) 2 KLR 63**.

9. The 2nd respondent filed neither a replying affidavit nor submissions in this application.

10. I have examined the application, the replying affidavit and the rival submissions. On that score, the twin issues for determination are whether on the basis of the application;

- a) The appellant/applicant has undoubted right of appeal and
- b) The instant appeal, if successful, will not be nugatory.

11. This court is pretty aware of the conditions as regards an order for stay of execution under **Order 42 Rule 6 (supra)** alongside the Constitutional and statutory provisions under which the application is mounted. **The Black's Law Dictionary 10th Edition at page 1639** defines the term "Stay" and further states;

"...Also termed stay of execution, suspension of judgment"

12. At paragraph 25 of the affidavit in support of the application, it is deposed in part;

"...that where a litigant is pursuing an undoubted right of appeal, the honourable court is enjoined and/or obliged to afford the litigant the opportunity to be so heard without any restrictions and/or limitation."

13. Section 75 of the **Civil Procedure Act Chapter 21 Laws of Kenya provides for orders from which appeal lies. Section 79 G of the same Act** governs the time for lodging an appeal from the subordinate courts.

14. **Article 48 of the Constitution of Kenya, 2010** anchors the right of access to justice. Furthermore, the applicant is entitled to fair hearing of this appeal as stipulated in **Article 50 (1) of the same Constitution**.

15. It is established law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system: see **James Kanyiita Nderitu and another-vs- Marios Philotas Ghikas and another (2016) eKLR and Onyango Oloo-vs-Attorney General (1986-89) EA 456**.

16. I subscribe to the Court of Appeal decision in **Butt case (supra)**, where it was observed that;

"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson -vs- Church* (No. 2) 12 Ch D (1879) 454 at p 459.....and the appellant has an undoubted right of appeal." (Emphasis added)

17. Paragraphs 13 to 15 and 19-23 of the applicant's affidavit in support of the application and grounds r, s, t and u of the application, refer to the nugatory aspect of the appeal. Moreover, the appeal duly filed herein calls for determination on merits.

18. In the instant case, there is an impending eviction of the applicant from the suit property as disclosed in relief number 2 at page 6 of the trial court's judgment (WOK-4) as well as grounds (h) to (j) and paragraphs 9, 10, 11, 16, 17 and 18 of the applicant's supporting affidavit. So, those are special circumstances in this application and the applicant has an undoubted right of this appeal.

19. In the foregone, I find that the application has met the requirements for the grant of stay of execution sought therein. The application is merited.

20. A fortiori, the stay order sought in the application dated 9th July 2021 and filed in court on 12th July 2021, be and is hereby granted pending the hearing and determination of the instant appeal but upon terms that the applicant will deposit in court within thirty (30) days from this date, the sum of Kshs.25,000 (Twenty five thousand only) as security for the due performance of such decree or order as may be

ultimately binding upon him, failing which the stay shall lapse without further order of this court.

21. Costs of this application be the costs in the appeal.

DELIVERED, SIGNED AND DATED 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 Appellant/Applicant.