



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT VIHIGA

ELC APPEAL NO. 11 OF 2021

(FORMERLY KAKAMEGA ELCA E022 OF 2021)

JEREMIAH OTEMO OKONYO.....APPELLANT/APPLICANT

VERSUS

REGISTERED TRUSTEES AFRICAN

DIVINE CHURCH.....1ST RESPONDENT

JAMES MULONGO SILEKA.....2ND RESPONDENT

RULING

A. Introduction

1. This ruling is in respect of the Applicant's Notice of Motion Application dated 16th June 2021 brought under certificate of urgency pursuant to the provisions of Order 42 Rule 6(3) and (6) Civil Procedure Rules & Section 3A of the civil Procedure Act Cap 21 Laws of Kenya (herein called the Application).
2. The Application primarily seeks for orders as contained in prayer (3) thereof. Prayers (1) and (2) are already spent and prayer (4) is a prayer for costs. Prayer (3) reads:

“That pending the hearing and determination of this Application interpartes or further orders of the court, this court does grant to the Applicant an order of interim stay of execution and full implementation of the judgement delivered on the 31/05/2021 and the decree thereon pending the hearing and determination of the subject Appeal and that in the event the execution has been commenced, the court does order a stop to any further action on the register the suit property being LR No. E BUNYORE/E BUSAMIA/1027 pending the hearing and final determination of the Appeal.

3. The Application is opposed.
4. By consent the parties chose to canvass the application by way of written submissions pursuant to which the Appellant/Applicant filed written submissions dated 4th October 2021 and the Respondents dated 30th September 2021.

B. The Applicant's case

5. The Applicant's case, as contained in the Application, Supporting Affidavit sworn by the Applicant on 16th June 2021 and annexures thereto, is that he was the registered owner of the suit land and the Plaintiff in VIHIGA ELC CASE NO 56 OF 2018(formerly KSM ELC Case No. 236 of 2016) in which Judgement was delivered on 31st May 2021.
6. That he was aggrieved by the judgement and preferred the appeal herein to this court. He contends that if the execution or other proceedings to enforce the judgement and decree is carried out the Appeal will be rendered nugatory.
7. The Applicant contends that he has an arguable appeal raising triable issues and that his application has been filed without unreasonable delay.
8. The Applicant submitted that he had met the threshold for grant of an order of stay of execution. He relied on the decision in the case of **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR** to support his case and prays that the Application be allowed.

C. The Respondents' case

9. The Respondents' case is contained in the Statement of grounds of opposition dated 26th July 2021 and the Replying Affidavit sworn by one **ELIJAH UKIRU OLEMBO** and the annexures thereto. They contend that the Application is incurably defective, bad in law and against the rules of natural justice; the same is unfounded and does not meet the mandatory requirements. It is their case that the Appeal is a non-starter with no chances of success and a scheme by the Applicant to continue interrupting the Respondents' utilization of their property.

10. The Respondents contend further that the Applicant and his Counsel are in gross violation of Sections 1A and B of the Civil Procedure Act and the rules of equity and have thus rendered themselves ineligible to benefit from the orders sought and that the application amounts to gross abuse of the process of the honourable court.

11. The Respondents aver in the Replying Affidavit that the Application has been overtaken by events as the decree is almost fully implemented. That registration of the suit land in the name of the Applicant has already been cancelled, title has reverted to the 2nd Respondent James Mulongo Sileka and Consent of the Land Control Board for subdivision of the suit land into two pieces as per the judgement has been obtained.

12. The Respondents further aver that the orders sought are prejudicial to them as they will be denied enjoyment of the fruits of the judgement if the same are granted

13. The Respondents submit that the Applicant has not met the threshold for the grant of the orders sought. They rely on the case of **Kariuki Njuri –vs- Francis Kimaru Rwara(suing as Administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru(Deceased)2020 eKLR** and pray that the Application be dismissed.

D. Issues for determination

14. From the pleadings and submissions filed by the parties, the court identifies the following as the issues for determination:

- a. Whether or not the Application meets the threshold for grant of an order of stay of execution of judgement and decree pending Appeal*
- b. Whether the Application has been overtaken by events*
- c. Who pays the costs of the Application?*

E. Analysis and determination

15. I have considered the pleadings and submissions of both parties as well as the orders in the judgement whose execution is sought to be stayed which are as follows:

“I proceed to dismiss the entire suit of the Plaintiff and order that the title deed be cancelled by the land Registrar Vihiga County. I further order that the title deed revert back to JAMES MULONGO SILEKA who shall then sign transfer the respective portion to the 1st Defendant and the plaintiff herein.”

16. The grounds for grant of orders of stay of execution of decree/judgement are provided for in Order 42 of the Civil Procedure Rules 2010 and Order 42 Rule 6 (2) provides as follows:

“No order for stay of execution may be made under sub rule (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.”*

17. Firstly, the court must be satisfied that the Applicant will suffer **substantial loss** if the order of stay of execution is not granted. Substantial loss has been described in **Dr. Daniel Chebutuk Rotich –vs- Morgan Kimaset Chebutuk** thus:

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”

18. The burden of proof lies with the Applicant to prove that substantial loss will result to him if the order sought is not granted. In the case of **Charles Wahome Gethi vs Angela Wairimu Gethi [2008]eKLR** the Court of Appeal held-

“..it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the applicants stand to suffer if the Respondent execute the decree in this suit against them”

In the case of Shell Kenya Ltd vs Benjamin Karuga Kibiru & Another [1986] eKLR 410 the court stated that

“if it is shown that execution would render a proposed appeal nugatory then a stay can properly be granted.”

19. It is the Applicant’s case that the judgement effectively cancelled his title to the suit land and ordered its subdivision and if the transactions are not stopped there is imminent danger that the subject property may be sold to other persons thereby complicating the substance of the Appeal. That the imminent danger is that he may be locked out in a bid to access justice and a right to fair hearing in his Appeal.

20. He further states that it is not possible to ascertain the Respondents’ ability to reimburse the Appellant of any loss in case he succeeds in the appeal.

21. Though the Applicant has not disclosed the basis of his assertion that the suit land may be sold to other persons, from the orders in the judgement there is no doubt that full execution of the decree will vest part of the suit land in the 1st Respondent and the Applicant may not have control of what the 1st Respondent may do with it thereafter.

22. Taking into account the circumstances of the present case and all the pleadings filed and the submissions, this court finds that substantial loss will indeed be occasioned to the Applicant in the event that an order of stay of execution will not be granted.

23. In the case of James Wangalwa & Anor Vs Agnes Naliaka [2012] relied upon by the Applicant, the court stated that

“ No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion by itself does not amount to substantial loss...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 a successful party in the Appeal.”

24. The second condition for grant of an order of stay of execution is that the Application should be filed without unreasonable delay. I agree with what the court said in the case of Jaber Mohsen Ali & Anor vs Priscillah Boit & Another [2014]eKLR that what amounts to unreasonable delay is dependent on the surrounding circumstances of each case. The judgement whose execution is sought to be stayed was delivered on 31/5/2021 and the Application filed on 28/6/2021 within the period of the right of Appeal. In the circumstances of this case the court finds that there was no unreasonable delay in filing the Application.

25. The third condition is provision of security. The purpose of this requirement as stated in the case of Aron C. Sharma vs Ashana Raikundalia t/a Raikundaria & Co Advocates under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. The Applicant has not said anything at all about security in the application, Affidavit and submissions. It is a mark of good faith and commitment when an Applicant undertakes to provide security as the court will order or even proposes the kind of security he offers (see Focin Motorcycle Co. Ltd –vs- Ann Wambui Wangui & Another [2018] eKLR).

26. None the less in the special circumstances of this case namely that execution had actually begun and incase the appeal fails, the remaining process of execution can be completed with minimal or no input at all from the Applicant, it is the view of the court that an order of stay ought to be granted but on conditions. This secures the interest of the Respondents.

27. The court is guided by the decision of the court of Appeal in Butt vs Rent Restriction Tribunal [1982]KLR 417 inter alia that:

“a.) The power of the court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal

b.) The general principle in granting or refusing a stay is: if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory...”

28. The court is also in agreement with the holding in HGE vs SM [2020] eKLR that the issue of security is discretionary and it is upon the court to determine the same.

29. As to whether the Application has been overtaken by events, the Respondents contend that the decree has been almost fully executed and that there may not be anything to stay hence the Application has been overtaken by events. The annexures to the Replying Affidavit show that execution of the decree had indeed taken place in part to wit: That as at the time of hearing the Application, the Applicant’s title to the suit land had been cancelled, title had reverted to the 2nd Defendant and Consent of the Land Control Board for subdivision of the suit land obtained.

30. The court finds that indeed execution of the decree has taken place partly but there is something to stay namely; the actual subdivision of the suit land and transfer of the resultant parcels.

31. The duty of the court in considering an application for stay of execution pending Appeal is to prevent an appeal that has been filed from being rendered nugatory while at the same time guarding the right of a successful litigant, the decree holder, to enjoy the fruits of the judgement. No doubt, it is a delicate balancing act of these competing interests which requires the court to exercise its discretion very judiciously.

32. In trying to balance the interests of the parties herein, the court allows the Application and makes the following orders;

- i. Further execution of the decree/ judgement dated 31/5/2021 be and is hereby stayed pending hearing and determination of the Appeal herein.
- ii. Record of Appeal be filed within 30 days hereof failing which the stay order lapses.
- iii. Deputy Registrar to call for the lower court file to enable directions on the appeal
- iv. Costs of the Application are awarded to the 1st Respondent in any event.

Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT VIHIGA THIS 18TH DAY OF OCTOBER 2021.

E ASATI

JUDGE.

In the presence of:

For the Applicant

For the Respondents

Ajevi Court Assistant.

E ASATI

JUDGE.