



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CASE NO. 5 OF 2019

JOHN ALLAN ONCHIRI MASESE..... PLAINTIFF/APPLICANT

VERSUS

REUBEN KIPNGETICH MABIL.....1ST DEFENDANT/ RESPONDENT

THE LAND REGISTRAR NAROK COUNTY.....2ND DEFENDANT/RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 10th February, 2020 the Applicant sought for the following orders: -

a) Spent.

b) That pending hearing and determination of the instant application a Stay of Execution be issued against the 1st Defendant stopping him from proceeding with the execution of the Honourable Court's Ruling of 17th December, 2019.

c) That pending hearing and determination of the Appeal herein a Stay of Execution be issued against the 1st Defendant from proceeding with execution of the Honourable Court's Ruling of 17th December, 2019.

d) That the costs of this Application be provided for.

2. The application is based on the grounds thereof and the Supporting Affidavit of JOHN ALLAN ONCHIRI MASESE sworn on 10.02.2020. The applicant avers that on 17.12.2019, the trial court upheld the 1st Defendant's Preliminary Objection dated 12.06.2019 thereby dismissing the Plaintiff's suit. Being dissatisfied with the said Ruling of 17.12.2019, he has since filed a Notice of Appeal dated 19.12.2019.

3. It is his contention that he has an arguable appeal which raises serious and triable issues and ought to be given an opportunity to proceed to final determination on merit.

4. Further, he is apprehensive that should execution be allowed to proceed, he will suffer serious and irreparable loss, harm and damage and further that the appeal will be rendered nugatory since the 1st Defendant has already moved to the disputed part of the land. The Applicant also give an undertaking to provide damages so as to allow him to prosecute the appeal before court.

5. The application was opposed. The 1st Defendant/Respondent filed a Replying Affidavit sworn on 18.05.2021 in response to the said application. It is the 1st Respondent's assertion that the Application is bad in law, fatally defective and an abuse of the court process.

6. Further, it is the 1st Respondent's contention that the Applicant's Notice of Appeal is fictitious and was only filed with the intention of obtaining stay orders. He did also contend that the Applicant had no capacity to sue on behalf of the registered owner of the suit land.

7. The 2nd Defendant/ Respondent did not file any response to the Application dated 10.02.2020 nor file any submissions.

8. The Application was disposed by way of written submissions. I have read and considered the rival submissions by both the Applicant and the 1st Respondent in this case and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

9. I am of the considered opinion that the issues for determination arising therefrom are as follows: -

i. Whether an order for Stay of Execution can issue against the Ruling dated 17th December, 2019

A. Whether an Order for Stay of Execution can issue against the Ruling dated 17th December, 2019.

10. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 sets out the grounds of issuing an Order for Stay of Execution as follows: -

(2) No order for stay of execution shall 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.

11. As outlined above, it is evident, that the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. It connotes that all three (3) conditions must be met simultaneously; they must all be satisfactorily proved to the required threshold. The Applicant thus, needs to prove to this honourable that he will suffer substantial loss, that the Application was brought without unreasonable delay and that he shall provide security for costs as may be ordered by the court.

12. This position was reiterated by the courts in the case of **M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others [2017] eKLR** the court held that all the three conditions had to be met and satisfied simultaneously in order for the court to exercise its discretion and grant a stay of execution. The court stated as follows: -

“13. In the cases of Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and Kenya Shell Limited vs Kibiru (Supra), the common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.

13. I wish to give a brief background to bring the matter into perspective. The 1st Respondent vide a Notice of Preliminary Objection dated 12th June, 2019 sought the dismissal of the Applicant's suit for being res judicata contrary to section 7 of the Civil Procedure Act. The same was canvassed by way of written submissions; each party outlining their rival positions. I thereafter issued my Ruling on the said Preliminary Objection on the 17.12.2019 whose effect was to allow the Preliminary Objection raised and thereby dismiss the Plaintiff's suit for being Res Judicata. Consequently, the Applicant has filed the present Application.

14. On a perusal of the Application and the Submissions filed by the Applicant, I do note that he has failed to establish or prove that he will suffer substantial loss. As has been held in a number of cases; it is not enough to merely state that one will suffer substantial loss, the onus is on the Applicant to demonstrate to the court the substantial loss he will suffer.

15. Further, I have also noted that the Applicant has not given any explanation for the delay from the time of the delivery of the Ruling herein on 17.12.2019 to the time of filing the present Application on 10.02.2020.

16. Be that as it may, it is my considered view, that the Orders made by this honourable court on 17.12.20019, are negative orders. The said orders are incapable of execution; neither the Plaintiff nor the Defendants were ordered to do anything, refrain from doing anything or to pay any sums of money. The Preliminary Objection was allowed for the reason that the matter had already been heard and finally determined and therefore the plaintiff's suit was dismissed for being res judicata.

17. The Court of Appeal decision in **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another [2007] eKLR** relied on its earlier decision in **David Thiong'o T/A Welcome General Stores vs Market Fancy Emporium [2007] eKLR** and held as follows: -

“This Court has repeatedly stated in previous decisions, among them, David Thiong'o T/A Welcome General Stores vs Market Fancy Emporium, Civil Application No. NAI. 47 OF 2007.... that in an application under Rule 5(2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this court to enforce or to restrain by injunction... the decision of 9th February, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly, no order of stay can properly issue relating to it.”

18. Similarly, in **Milcah Jeruto T/A Milcah Faith Enterprises v Fina Bank Limited & Another** the court relied on **Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 Of 2007 (unreported)** cited in the **Re Sonalux** case where the Court of Appeal had this to say: -

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be

nothing arising out of that decision for this court to enforce or to restrain by injunction.”

19. I fully adopt the reasoning in the above mentioned cases and find that the order which the Applicant seek to be stayed are negative orders; the court did not order any of the parties to do or refrain from doing anything. Therefore, I do find that there is nothing arising out of the decision of 17.12.2019 for this court to stay.

CONCLUSION

20. In the upshot, I accordingly find that the Application dated 10.02.2020 is not merited and is therefore dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 30TH DAY OF NOVEMBER, 2021.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:-

Non appearance for the Applicant

Nonappearance for the Respondents

Tom Court Assistant