



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 36 OF 2018

PATRICK MUTENYO WANJALA.....PLAINTIFF

VERSUS

FATUMA NALIAKA KUTA 1ST DEFENDANT

SALIM MUCHELULE OMULANGULA2ND DEFENDANT

ASMINI WABWIRE WANYAMA 3RD DEFENDANT

RAMADHAN JOM KARIO 4TH DEFENDANT

RAMADHAN MAHDLY WEKHUYI 5TH DEFENDANT

GODFREY ONGUME CHICHOLA 6TH DEFENDANT

RULING

1. Judgment was delivered in this matter on 14th May 2019 in favour of the plaintiff as follows:

1. That the plaintiff has acquired title to the said parcels of land namely N. WANGA/KHALABA/1800, 1801, 1802, 1803, 1804 and 1805 previously comprised in title NO. N. WANGA/KHALABA/172 measuring in total 5.93 hectares or thereabouts by adverse possession.

2. That the defendants as administrators of the estate of the late Ilario Wanzala Wanjala alias Wanyama Wanzala or as beneficiaries thereof hold title to the respective parcels of land in trust for the applicant.

3. That the title of the late Ilario Wanyama Wanzala alias Wanyama Wanjala and that of the respondents herein got extinguished on the expiry of 12 years from the time the plaintiff started occupying and or using the land way back in the 1970s.

4. The defendants are ordered to transfer to the applicant the said land parcel NOS. N. WANGA/KHALAHA/1800, 1801, 1802, 1803, 1804 and 1805 (previously forming part of L.R. N. WANGA/KHALABA/172) by executing all documents of transfer in respect of the said parcels of land in favour of the plaintiff and in default the Deputy Registrar to do so.

5. The defendants to bear the costs of this case.

2. The defendants later filed Notice of Motion dated 20th May 2021, which is the subject of this ruling. The following orders are sought in the application:

1. [Spent]

2. THAT the firm of M/S NANDWA & COMPANY ADVOCATES be granted leave to come on record for the defendants in place of the firm of M/S NAMATSI & COMPANY ADVOCATES.

3. [Spent]

4. THAT there be a stay of proceedings and execution of the judgment made on 14th May 2019 pending the hearing and determination of KISUMU COURT OF APPEAL CIVIL APPEAL NO. 229 OF 2019.

5. THAT costs of this application be provided for.

3. The application is supported by an affidavit sworn by Fatuma Naliaka Kuta, the first defendant. She deposed that she filed an appeal against the judgment being Kisumu Court of Appeal Civil Appeal No. 229 of 2019. She added that the plaintiff is in the process of executing the decree and that the defendants stand to suffer irreparable and substantial loss. She went on to state that they instructed the firm of Namatsi & Company Advocates to seek stay but the said firm did not do so.

4. The plaintiff opposed the application through a replying affidavit in which he deposed that the decree has since been executed and ownership transferred to him. He annexed copies of title deeds as well as transfer forms and added that he has filed an application dated 16th June 2021 seeking eviction against the defendants.

5. The application was canvassed through written submissions. Both sides duly filed submissions. The applicants argued that the application was filed within reasonable time since their current advocates were instructed on 15th May 2021. Further, that they will suffer substantial loss due to eviction and destruction of their homes. Regarding security for due performance of the decree, they did not offer any, arguing instead that the decree is not a money decree. They further contended that their appeal has high chances of success.

6. In his submissions, the plaintiff stated that he does not oppose prayer 2 of the application. Regarding the aspect of stay of execution pending appeal, he argued that there is nothing to be stayed since the decree has been executed following transfer of ownership to him. He added that the trial court found that he has been in possession and consequently the applicants will not suffer substantial loss. He went on to argue that the application was filed after a delay of three years which according to him is unreasonable delay. He urged the court to dismiss the application.

7. I have considered the application, the affidavits and the submissions. Applications for stay of execution pending appeal are governed by **Order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010** which provides:

6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

8. The import of the foregoing provisions is that a litigant who seeks stay pending appeal is under a duty to satisfy the court that substantial loss will result to him if stay is not granted and that the application has been made without unreasonable delay. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**, Platt Ag JA (as he then was) stated:

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

9. The judgment appealed against was delivered on 14th May 2019 while the present application was filed on 20th May 2021. There was thus a delay of two years and one week. In the intervening period, the applicants filed an appeal against the judgment, being Kisumu Court of Appeal Civil Appeal No. 229 of 2019. As is manifest from the appeal number, it was filed in the year 2019. Although the applicants have claimed that they instructed the firm of Namatsi & Company Advocates to seek stay but the said firm did not do so, nothing has been availed to demonstrate such instructions. Nevertheless, I take it that if the applicants could file an appeal in 2019, they equally had the opportunity to file an application for stay. I find that the delay herein is unreasonable.

10. What about substantial loss? The decree concerned transfer of ownership of the suit properties to the plaintiff. There is material on record demonstrating that the suit properties have since been transferred to the plaintiff. The applicants did not challenge that assertion by the plaintiff. I agree with the plaintiff that the application for stay is overtaken by events and that in the circumstances substantial loss has not been demonstrated.

11. Regarding security for due performance of the decree, the applicants have simply not offered any security. **Order 42 rule 6 (2) (b) of the Civil Procedure Rules** does not limit the obligation to provide security to money decree only.

12. I am not persuaded that the applicants have merit an order of stay of execution pending appeal.

13. Prayer 2 of the application is not opposed. I will therefore grant it.

14. In view of the foregoing discourse, I make the following orders:

a) The firm of M/S Nandwa & Company Advocates is hereby granted leave to come on record for the defendants in place of the firm of M/S Namatsi & Company Advocates.

b) Prayer 4 of Notice of Motion dated 20th May 2021 is dismissed.

c) The defendants shall bear the costs of the application.

Dated, signed and delivered at Kakamega this 30th day of November 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Nandwa for the Defendants/Applicants

No appearance for the Plaintiff/Respondent

Court Assistant: E. Juma