



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. E004 OF 2021

STANLEY AMWAYI WERE.....APPELLANT

VERSUS

FRIDA OMARI GARDISON..... 1ST RESPONDENT

EMMANUEL NYANGALA.....2ND RESPONDENT

SHIKOTI SAKWA..... 3RD RESPONDENT

PETRO L KHAKOYA..... 4TH RESPONDENT

RULING

1. Being dissatisfied with the ruling of the Chief Magistrate's Court at Kakamega (Hon. E. Malesi, PM) delivered on 12th January 2021 in Kakamega MCELC No. 381 of 2018, the appellant filed this appeal on 9th February 2021. Subsequently, the appellant filed Notice of Motion dated 7th April 2021. The application is the subject of this ruling.

2. The following orders are sought in the application:

1. *[Spent]*

2. *[Spent]*

3. *A temporary order of injunction do issue restraining the Respondents their agents, servants and/or employees from disposing, alienation, encumbering, charging, interfering, transferring, registering any transaction or in any other way howsoever dealing with the Property described as Title No. Butso/so/Shibeye/1002, to the detriment of the Appellant/Applicant pending the hearing and determination of the Appeal.*

4. *That the costs of this application be provided for.*

3. The application is supported by an affidavit sworn by the appellant. He deposed that after delivery of the ruling on 12th January 2021, the respondents have threatened to evict him from the suit property. That the suit property needs to be preserved and that he will suffer substantial loss and his appeal will be rendered nugatory if the orders are not granted.

4. The 4th respondent filed a replying affidavit in which he deposed that there is no threat or intention to alienate or waste the suit property and that the application is an effort at wasting the court's time.

5. The appellant also filed a further affidavit whose contents I have noted.

6. Parties were ordered to canvass the application through written submissions. The respondents filed submissions while the applicant did not file any. The respondents argued that the applicant has not satisfied the test in ***Giella v Cassman Brown & Co Ltd* [1973] EA 358** and urged the court to dismiss the application with costs.

7. I have considered the application, the affidavits and the submissions. The application is brought *inter alia* under **Order 42 rule 6 (6)** of the **Civil Procedure Rules, 2010** which provides as follows:

Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate

jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

8. The test applicable when considering an application such as the present one is similar to that in an application for stay of execution pending appeal. The applicant is required to demonstrate that substantial loss will result to him if injunction pending appeal is not granted and that the application has been made without unreasonable delay. The applicant is further required to give such security as the court may order for the due performance of the decree. See **Kenya Power & Lighting Co. Ltd v Kigaita Ngare Unduthu & 36 others [2020] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR**.

9. The ruling appealed from was delivered on 12th January 2021 while the present application was filed on 8th April 2021, about three months later. A period of two months passed from the date this appeal was filed to the date the present application was filed under certificate of urgency. I am not persuaded that the application was made without unreasonable delay.

10. Having filed the application, the appellant did not advance any arguments in its support. I am not persuaded that he will suffer substantial loss if the orders sought are not granted.

11. I find no merit in Notice of Motion dated 7th April 2021. I dismiss the application. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Appellant

No appearance for the Respondents

Court Assistant: E. Juma