



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA. CASE NO. 7 OF 2021

JOHN LANGO OTIENO.....APPELLANT

VERSUS

BENDEKA HOLDINGS LIMITED.....1ST RESPONDENT

STEPHEN JUMA NDEDA.....2ND RESPONDENT

(Being an Appeal from the Ruling of Hon. Gesora (CM) delivered in Kisumu on the 25th Day of January 2021 in Kisumu CM's Court ELC Case No. 67 of 2020)

RULING

The Appellant, John Lango Otieno, (*hereinafter referred to as the Appellant*) has preferred an appeal against Bendeka Holdings Ltd and Stephen Juma Ndeda (*hereinafter referred to as the Respondents*).

Accompanying the Appeal is a Notice of Motion dated 8/3/2021 seeking orders that this Honourable Court be pleased to grant an order of stay directed to the Respondents herein either by themselves or their employees, servants and or agents restraining them from further developing an or disposing off land all the parcels of land referred to as IR NO. 179155 being LR NO. 17307 and IR NO. 179156 being LR NO. 1708 pending the hearing and determination of this Appeal. The costs of this application be provided for.

The application is premised on grounds that that vide a plaint dated 12th August 2020, the Respondent filed a suit against the Appellant seeking inter alia, an order of eviction against the Defendant, his agent, servants, personal representatives and or assigns from all the parcels of land referred to as IR NO. 179155 being LR NO. 17307 and IR NO. 179156 being LR NO. 17308. That upon service, the Appellant did instruct the Firm of D.E.O ANYUL & CO. ADVOCATES to act and represent him in the suit which Firm did enter appearance but failed to file and serve its written statement of defence and counter claim within the statutory stipulated timelines.

That as a consequence of the aforesaid, the Respondent herein did proceed on formal proof on 21.10.2020 and an ex parte judgment was entered against the Appellant on 9th December 2020 albeit the Appellant's advocate having filled written statement of defence on 27th November 2020.

That upon obtaining the aforesaid judgment and or decree, the Respondents herein proceeded to instruct auctioneers to evict the Appellant herein from the suit property. That aggrieved by the aforesaid eviction, the Appellant herein filed an application dated 7th January 2021 seeking inter alia, stay of execution of the decree issued on 9th December 2020 and setting aside of the aforesaid decree and all consequential orders therein and that the matter be heard *de novo*.

That the said application was certified urgent and fixed for mention for directions on 25th January 2021 which day, the trial court did dismiss the same on the ground that it the court was functus officio.

That aggrieved by the said ruling, the Appellant herein filed the instant appeal together with the instant application seeking stay of execution of the order and decree issued on 9th December 2020. As the Respondents herein have started constructions on the suit property at the detriment of the petitioner who will be rendered destitute thus contravening the Applicant's Constitutional right.

That unless the orders herein are granted, the Appellant stand to suffer irreparable loss and damages as the Appellant herein will be rendered destitute thus not only contravening his constitutional right of being heard but also the right to own property. That the Respondents will suffer no prejudice and if the same is suffered it can be remedied by way of costs. This Application has been presented without any inordinate delay. In the supporting affidavit, the grounds are reiterated.

The 1st Respondent filed grounds of oppositions stating that the application is baseless as the same has no standing in law, is alien to law, bad in law and an abuse of court process. The application even though premised under Order 42 (6) possesses prayers that do not intend to stay execution, but which are generally injunctive in nature and which prayers are incapable of being granted as sought. In any event, the Honourable court cannot be called upon to stay execution that has already been concluded. The honourable court cannot judiciously exercise its discretion in favor of the applicant.

Subsequently, the 2nd Respondent filed a replying affidavit whose gist is that the matter in the lower court was dealt within a finality and a decree issued and executed and the respondents are in possession and have erected a perimeter wall.

I have considered the submissions on record and the facts of this case and do find that there is no dispute that the appellant has been evicted from the suit land, however, the respondents are constructing on the land and therefore the order that should have been sought by the appellant is a temporary injunction which can be allowed under order 42 Rule 6. The appellant has not sought this order of temporary injunction. The court can't grant what has not been prayed for.

The appellant has prayed for an order of **stay restraining** the respondents from developing the property. I find this prayer to be jumbled and not clear.

Order 42 Rule 6 provides that:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 subrule (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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) 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.”

However, I have discerned the application and do find that this court is called upon to consider granting an injunction pending appeal and for the sake of rendering substantive justice as opposed to determining such matters on technicalities, I have considered the prayer sought by the applicant and am convinced that he is seeking an injunctive order which this court has jurisdiction to grant pursuant to the provisions of order 42 rule 6(6) of the Civil Procedure Rules.

However, I do find that the appellant took a period of approximately 3 months to come to this court which is inordinate delay. Moreover, the appellant has not demonstrated substantial loss that cannot be compensated with damages. I do dismiss the application with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24th DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE