



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC APPEAL NO 20 OF 2021

(FORMERLY MIGORI ELC APPEAL NO. 9 OF 2020)

1. CHRIS ANTONE OUKO.....1ST APPELLANT/APPLICANT

2. JOHN NYADONGO OLWERO.....2ND APPELLANT/APPLICANT

3. JAMES OTIENO OLWER.....3RD APPELLANT/APPLICANT

-VERSUS

1) PETER OMOI OPADO.....1ST RESPONDENT

2) MARGARET ENDESIA.....2ND RESPONDENT

3) JOHN OTIENO OPAPA.....3RD RESPONDENT

RULING

1. The present application by way of notice of motion dated 6th November 2020 and filed herein on 19th November 2020 was originated pursuant to Order 42 Rule, Order 42 Rule 27 as read with Order 51 Rule 1 of the Civil Procedure Rules 2010. The applicants through M/S G S OKOTH AND COMPANY ADVOCATES have sought that:

a) Spent

b) Spent

c) The Honourable court be pleased to issue an order of stay of execution of the decree and order issued on the 20th day of February 2020 and any subsequent orders pending the hearing and determination of the appeal.

d) The Honourable court be pleased to issue an order of inhibition restricting the registration of any transaction pending the hearing and determination of the appeal hereof.

e) The Honourable court be pleased to issue an order allowing the appellant to produce additional evidence to be admitted as part of the record of this appeal at the hearing of the appeal hereof.

f) The costs of this application be awarded in favour of the applicants

2. The anchorage of the application is set out on grounds 1 to 5 thereon. The application is also anchored on the 1st applicant's supporting affidavit of eleven paragraphs sworn on even date and copies of the annexed documents, among them, memorandum of appeal marked as "CA2" herein. At the heart of this appeal is LR No. Kabuoch.K.K/Konyango/4. The trial Magistrate (R.B.N MALOBA, PM) in Homa-Bay Chief Magistrate's Court Environment and Land CASE No. 5 of 2018 rendered judgment on 20th February 2020 where the applicants' suit was dismissed with costs.

3. The respondents through M/S NYAUKE AND COMPANY ADVOCATES opposed the application by way of a relying affidavit sworn on 23rd February 2021 by the 3rd Respondent and duly filed in court on even date. They termed the same unsubstantiated and lacks merit.

4. Pursuant to this court's orders and directions of 24th February 2021, the applicants' counsel filed three (3) paged submissions dated 1st

October 2021. I note the entire submissions.

5. Mr. S. Nyauke, learned counsel for the respondents did not file and serve submissions or at all in this application. In lieu thereof, he has informed this court thus;

“We propose that the notice of motion dated 6th November 2021, be allowed in terms of orders 3, 4 and 5 sought therein and costs to abide the appeal. . . .”

6. Mr G S Okoth, learned counsel for the applicants has affirmed the position taken by the respondent’s counsel.

7. I have keenly considered the entire application, the replying affidavit, the applicants’ submissions and heard counsel for the respective parties herein. On that account, are the applicants entitled to the orders sought in the application?

8. It is noteworthy that the respondents have conceded to orders sought in the application. In that regard, the parties are hereby applauded for their decision have the application determined without delay.

9. **Article 159 (2) (b) of the Constitution of Kenya 2010** reads;

“Justice shall not be delayed.”

10. The same Constitution at **Article 159 (2) (c)**, provides for the application of Alternative Dispute Resolution forms. Compromise and or settlement of interlocutory applications including the instant one, is also envisioned thereunder to meet the ends of justice as held in **Hastings Irrigation (K) Ltd-vs-Standard Chartered Bank Ltd and 2 others (1987) KLR 532, Ruithibo-vs-Nyingi (1984) KLR 505 and Kanwal Sarjit Singh Dhiman-vs-Keshavji Jivraj Shah (2008) eKLR.**

11. Moreover, the applicants have an undoubted right to prosecute the present appeal; see **Butt-vs- Rent Restriction Tribunal (1979) eKLR.**

12. It is trite law that the court has the ancillary power of safeguarding the character and integrity of the subject matter of the appeal, pending the resolution of the contested issues; see the Supreme Court of Kenya decision in the case of **Board of Governors, Moi High School, Kabarak and another –vs- Malcolm Bell (2013) eKLR.**

13. To that end, it is the finding of this court that the application is merited. The applicants are entitled to the orders sought in the application.

14. Accordingly, the application dated 6th November 2020 commenced by the applicants is hereby allowed in terms of orders 3, 4 and 5 sought therein and as stated in paragraph 1 (c), (d) and (e) hereinabove.

15. Costs of the application to be costs in this appeal.

16. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT HOMA BAY THIS 16TH DAY OF NOVEMBER 2021.

G M A ONGONDO

JUDGE

In the presence of;

Mr G S Okoth, learned counsel for the applicants/appellants

Mr S Nyauke, learned counsel for the respondents

Okello A, court assistant.

G M A ONGONDO

JUDGE