



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC CASE NO. 20 OF 2021 (O.S)

(FORMERLY MIGORI ELC CASE NO. 238 OF 2017 (O.S))

SIMON OCHIENG OBUDHO

(Suing as the Legal Representative of

DAMON OBUDHO AGOLA, DECEASED.....PLAINTIFF/ RESPONDENT

VERSUS

ANJILINA ATIENO OJWANG.....1ST DEFENDANT/APPLICANT

HENOK ONYANGO OJUANG.....2ND DEFENDANT/ APPLICANT

RULING

1. On 29th July 2020, the applicants, herein through Nelson Jura and Company Advocates mounted an application by way of a Notice of Motion of even date under **Sections 1, 1A, 1B, 3A and 63 of the Civil Procedure Act, Chapter 21 Laws of Kenya** as read with **Order 42 Rule 6** and **Order 51 Rule 1 of the Civil Procedure Rules 2010**. They are seeking the orders infra;

a. Spent

b. Spent

c. The Honourable Court be pleased to make an order of stay of any further execution of the decree of this court dated 15th February 2018 and all further proceedings in this matter subsequent to the said decree pending hearing and determination of the intended appeal.

d. Costs of this Application be provided for.

2. The application is anchored on grounds 1 to 12 (b) set out on its face. The same is further anchored on the 2nd applicant's supporting affidavit (11) paragraphs sworn on even date with the authority of the 1st applicant and the annexed documents including a copy of decree in Migori Environment and Land Court Case No. 238 of 2017 (O.S) dated 8th March 2018, a copy of Order dated 29th June 2020, among others.

3. The applicants' complaint is that on 21st February 2019, they filed a Notice of Motion dated 20th February 2019 seeking, among other orders, that the *ex parte* judgment/decree of the Honourable court delivered on 15th February 2018, be set aside together with the proceedings leading to that judgment and that the parties' cases be re-opened. That the Honourable court subsequently delivered a ruling on 10th June 2020 and issued Orders dismissing the Notice of Motion dated 20th February 2020 with costs to the respondents.

4. Being aggrieved by the court's decision, the applicants applied for certified copies of proceedings for the purpose of appeal which are yet to be supplied by the court. The applicants then filed a notice of appeal dated 19th June 2020.

5. The applicants aver that the respondent is in the process of executing the said decree and the applicants stand to suffer irreparable loss if evicted from the suit property being L.R NO. KABONDO/KAKANGUTU EAST/1596 of which they are in occupation. The applicants are also apprehensive that they are likely to be cited for contempt for failing to vacate the suit property unless a stay order is granted pending the intended appeal.

6. In a replying affidavit sworn on 12th May 2021 and filed on 24th May 2021, the respondent through the firm of M/S Oguttu Mboya, Ochwal and Partners Advocates, opposed the application and sought that it be dismissed. He deposed, *inter alia*, that the applicants are not in possession of the suit property which had been transferred and registered in favour of the deceased, the original plaintiff herein on 25th September 2018, following a decision of the Honourable Court delivered on 15th February 2018, whereby the Honourable court found that the deceased had established a case on account of adverse possession.

7. The respondent further stated that in the judgment and decree of the Honourable court, which the defendants/applicants seek to stay, the Honourable court did not direct and/or decree eviction of the defendants/applicants from the suit property. That the defendants/applicants have never been in occupation of the suit property, hence the basis of the judgment on account of adverse possession. Therefore, the defendants/applicants are not disposed to suffer and or otherwise accrue substantial loss.

8. On 27th July 2021, the court (Kullow J) ordered and directed that the application be argued by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010**.

9. So, learned counsel for the applicant filed submission dated 8th November 2021 reiterating the averments in the supporting affidavit. Counsel relied on **Order 42 Rule 6(1) (supra)** and the celebrated case of **Giela –vs- Cassman Brown (1973) EA 358**, among others, to fortify the submissions.

10. Learned counsel for the respondent filed submissions dated 12th May 2021 on 24th May 2021 and identified five issues for determination namely; whether the Honourable court can grant Orders which are sought by the defendants/respondents in vacuum; whether the defendants/applicants have satisfied and/or met the conditions requisite for granting stay of execution of decree pending appeal; whether the defendants/applicants would suffer substantial loss if the orders sought are not granted; whether the respondent herein shall suffer any prejudice, whatsoever and who should bear the costs of the instant application. In discussing the same, counsel urged this court to dismiss the application and relied on **Order 42 Rule 6(1) (supra)**, the decision in the case of **Antoine Ndiaye –vs- African Virtual University (2015) eKLR**, among others.

11. I have examined the application, the replying affidavit and the rival submissions in their entirety On that account, the issues for determination are whether;

- a. The applicant has proved the prescribed conditions for grant of orders of stay of execution,
- b. The instant appeal, if successful, will not be rendered nugatory if the orders sought in the application are denied and
- c. Who should bear the costs of the instant application.

12. This court is conscious of the conditions as regards an order for stay of execution under **Order 42 Rule 6 (supra)** which provides in part thus:

(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.*

13. It is borne in mind that section 75 of the **Civil Procedure Act Chapter 21 Laws of Kenya** provides for orders from which appeal lies. Section 79 G of the same Act sets the timelines for lodging an appeal from the subordinate courts.

14. **Article 48 of the Constitution of Kenya, 2010** anchors the right of access to justice. Furthermore, the applicant has an unlimited right to fair hearing of this appeal as stipulated in **Articles 25 (c) and 50 (1) of the same Constitution**.

15. There is a plethora of decided cases on the issue of grant of stay of execution pending Appeal; See **Civil Appeal No.107 of 2015, Masisi Mwita..vs...Damaris Wanjiku Njeri (2016) eKLR**, where the Court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halai & Another –vs- Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended

Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo –vs-Straman EA Ltd (2013) as follows:-

“In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

16. The purpose of stay of execution is to preserve the substratum of the case as stated in section 13(7) (a) of the Environment and Land Court Act, 2015(2011). In the case of **Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)**, the Court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.

17. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. The Court therefore, has to balance twin interests;

a) The Applicant who is seeking to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and

b) The Respondent who is seeking to enjoy the fruits of his judgment.

19. I endorse the decision of Kuloba J in **Machira t/a Machira & Co. Advocates vs East African Standard (No. 2) (2002) KLR 63** where he observed;

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court”

20. In an application of this nature, the applicant should show the damages he would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay; see **Kenya Shell Ltd vs. Kibiru & Another [1986] KLR 410;**

21. In the instant case, the applicants claim that they stand to suffer irreparable loss if evicted from the suit property being occupied by them. However, the respondent submitted that in the judgment and decree of the Honourable court which the defendants/applicants seek to stay, the Honourable court did not direct and/or decree eviction of the defendants/applicants therefrom. Further, that the defendants/applicants have never been in occupation of the suit property, hence the very basis of the judgment on account of adverse possession. Thus, the defendants/applicants are not bound to suffer and or otherwise accrue substantial loss.

22. It is also noteworthy that the suit property was transferred and registered in favour of the plaintiff/respondent on 25th September 2018 following a decision of the Honourable Court delivered on 15th February 2018. Moreover, by virtue of the notice of appeal dated 19th June 2020 and **Order 42 Rule 6 (4) of the Civil Procedure Rules 2010**, the applicants are at liberty to move to the appropriate forum.

23. In the foregone, I find that the application has not met the threshold for the grant of stay of execution sought therein. The application is therefore, without merit.

24. The upshot is that the Defendants’/Applicants’ Notice of Motion Application dated 29th July 2020 and filed in this court on even date, be and is hereby dismissed with costs to the Plaintiff/ Respondent.

25. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT HOMA BAY THIS 17TH DAY OF NOVEMBER 2021.

G M A ONGONDO

JUDGE

In the presence of:

Mr. S. Nyauke holding brief for W. Ochwal learned counsel for the plaintiff/respondent

A.Okello, court assistant