



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC APPEAL NO. 26 OF 2021

(FORMERLY MIGORI ELC APPEAL NO. E 017 OF 2021)

TOM MBOYA ODHIAMBO.....APPLICANT/APPELLANT

VERSUS

SARMAN GROUP CO. LTD.....RESPONDENT

RULING

1. On 12th April 2021, the applicant, TOM MBOYA ODHIAMBO through M/S G. S. Okoth and Company Advocates mounted an application by way of a Notice of Motion dated 9th April 2021 pursuant to, *inter alia*, **Order 22 Rule 25 of the Civil Procedure Rules, 2010** as read with **Order 10 Rule 11, Order 7 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules 2010**. He is seeking the orders infra;
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to make an order of stay of execution of the *ex parte* decree obtained on the 18th November 2020 pending the hearing and determination of this appeal.
 - d. Costs of this Application be costs in the cause.
2. The anchorage of the application is the applicant's supporting affidavit sworn on even date and the annexed documents including a copy of ruling in **Mbita Principal Magistrate's Court Environment and Land Case number 15 of 2019**, a copy of the eviction notice dated 19th November 2020 and a memorandum of appeal dated 12th April 2021 and filed on the same date.
3. Briefly, the applicant's lamentation is that on 18th November 2020, an *ex parte* judgment was entered against him by the trial court as his then Advocate on record, D.O.E Anyul, had omitted to file a statement of defence or a witness statement. That on 20th November 2020, he filed an application to set aside the *ex parte* judgment, which application was fixed for hearing on 9th December 2020. The respondent filed a replying affidavit and a notice of preliminary objection to the application. That on 17th March 2021, the trial magistrate delivered a ruling allowing the said preliminary objection. On 19th November 2020, the respondent extracted the decree of the original suit and issued a notice of eviction which he intends to execute against the applicant/appellant. He also laments that if the eviction warrant is executed before the appeal is heard and decided, this appeal shall be rendered nugatory hence he is seeking the stay of the execution until this appeal is determined.
4. In a replying affidavit sworn on 15th April 2021 by Osman Sharif Ibrahim, the Managing Director of the respondent, Sarman Group Company Ltd and filed herein on 7th May 2021 through the firm of M/S Oguttu Mboya, Ochwal and Partners Advocates, the application is opposed and the respondent sought that it be dismissed. He deposed, *inter alia*, that the applicant has not mounted an appeal against the judgment and decree thus, cannot purport to seek a stay of execution of the same. He further stated that the applicant has not met and/or satisfied the prerequisite conditions, established and/or provided for, before the orders sought can issue.
5. Additionally, on 7th May 2021, the respondent filed a statement of grounds of opposition arguing *inter alia*, that since the suit property, LR number Kasgunga/Kamreri/4021 in respect of which the orders are sought, belongs to and is registered in the name of the respondent. That the orders sought in the application are statutorily precluded vide the provisions of **Sections 24, 25 and 26 of the Land Registration Act, 2016 (2012)**. The respondent further stated that the application is devoid of merits and that the applicant has not established and/or satisfied the prerequisite conditions under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules, 2010**.

6. On 12th May 2021, this court ordered and directed that the application be argued by way of written submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010**; see also **Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014**.

7. Consequently, learned counsel for the applicant filed submissions dated 1st October 2021 on 5th October 2021 giving the background of the matter, noting that the application was erroneously made under **Order 22 (supra)** and that the intended and applicable legal provision is **Order 42 Rule 6 (supra)**. Counsel submitted that since the case involves the suit property upon which a large permanent house stands, eviction may mean that the said building is pulled down while the appeal is still pending hence likely to occasion substantial loss to the applicant/appellant.

8. On the other hand, learned counsel for the respondent filed submissions dated 18th August 2021 on 19th August 2021 and identified four issues for determination namely; whether the Decree herein was a negative order hence capable of stay; whether the applicant has proved the conditions set for grant of orders of stay of execution; 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)**, **Kanwal Sarjit Singh Dhiman –vs- Keshavji Juvraj Shah (2008) eKLR**, and **Halai and another-vs-Thornton and Turpin (1963) LTD (1990) eKLR**, among others.

9. From the foregoing, the following issues fall for determination:

- a. Whether the applicant has satisfied the requisite conditions for grant of orders of stay of execution; and
- b. Who should bear the costs of the instant application

10. This court is pretty aware of the prescribed conditions for stay of execution. **Order 42 Rule 6 (supra)** 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.(Emphasis added)

11. Notably, section 75 of the **Civil Procedure Act Chapter 21 Laws of Kenya** sets out the orders from which appeal lies. **Section 79 G** of the same Act governs the time for lodging an appeal from the subordinate courts. Whereas the applicant indicates at paragraph 3 of his submissions that the decree sought to be stayed in this suit was issued on the 18th November 2020, on the face of the memorandum of appeal lodged on 12th April 2021, the appellant seeks to appeal against the ruling delivered on 17th March 2021 in **Mbita PM's court Environment and Land Case No. 15 of 2019**. Nonetheless, I am satisfied that no harm would be caused to the respondent as noted in the case of **Gatu-vs-Muriuki (1986) KLR 211**.

12. **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**.

13. It is trite law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system: see **James Kanyiita Nderitu and another-vs- Marios Philotas Ghikas and another (2016) eKLR** and **Onyango Oloo-vs-Attorney General (1986-89) EA 456**.

14. In the instant case, there is an impending eviction of the applicant from the suit property as discerned on ground (c) and in prayers 2 and 3 of the application as well as paragraph 7 of the applicant's supporting affidavit and his submissions. Therefore, it may occasion him substantial loss if the stay sought is not granted herein. Moreover, the application was mounted timeously and the court's orders as to security is discretionary as disclosed at paragraph 15 infra. Plainly, there are special circumstances in this application to make an order staying execution as per the application and the applicant has an undoubted right of this appeal which is arguable as revealed in the memorandum of appeal of even date.

15. On that score, I subscribe to the Court of Appeal decision in **Butt –vs- Rent Restriction Tribunal (1979) eKLR**, where it was observed that;

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, L J in *Wilson –vs – Church (No. 2) 12 Ch D (1879) 454 at p 459.....**

...and the appellant has an undoubted right of appeal.” (Emphasis added)

16. To that end, I find that the application has met the threshold for the grant of stay of execution sought therein. The application is meritorious.

17. A fortiori, the stay order sought in the application dated 9th April 2021 and filed in court on 12th April 2021 as set out in paragraph 1 (c) hereinabove, be and is hereby granted pending the hearing and determination of the present appeal.

18. Costs of the application be the costs in the appeal.

19. 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 OSMAN S IBRAHIM, THE MANAGING DIRECTOR OF THE RESPONDENT

A. OKELLO, COURT ASSISTANT

G M A ONGONDO

JUDGE