



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 12 "A" OF 2014

CHARLES MUNGA KIPSANG.....PLAINTIFF

VERSUS

PATRICK TELEWA NABISWA.....1ST DEFENDANT

SAUL WEKESA NYONGESA.....2ND DEFENDANT

R U L I N G

This Court delivered its Judgment in this case on 28th July 2021. For purposes of this ruling, these are the salient disposal orders that were made: -

(a) There shall be Judgment for the plaintiff against the 2nd defendant in the following terms: -

- 1. The plaintiff has acquired by way of adverse possession $\frac{3}{4}$ of an acre out of the land parcels NO EAST BUKUSU/NORTH SANG'ALO/6573 and 6574.**
- 2. The 2nd defendant shall within 30 days of this Judgment being delivered execute all the relevant documents to facilitate the transfer of $\frac{3}{4}$ of an acre out of the land parcels NO EAST BUKUSU/NORTH SANG'ALO/6573 and 6574 in the name of the plaintiff.**
- 3. In default of the above, the Deputy Registrar of this Court shall sign all the relevant documents on behalf of the 2nd defendant.**
- 4. The defendants, their agents, servants or any other person acting through them are further permanently restrained from interfering in any manner with the said $\frac{3}{4}$ of an acre.**

Aggrieved by that Judgment, the 2nd defendant filed a Notice of Appeal on 5th August 2021.

The 2nd defendant has now moved to this Court by his Notice of Motion dated 16th August 2021 and filed herein on 18th August 2021 seeking the following orders: -

(a) Spent

(b) Spent

(c) Spent

(d) The Honourable Court be pleased to issue an order of stay of execution of the decision of the Honourable Court (HON JUSTICE BOAZ N. OLAO) delivered on 28th July 2021 pending the hearing and determination of the intended appeal.

The application which is premised on the provisions of **Sections 1A,1B, 3A and 63** of the **Civil Procedure Act** and **Order 42 Rule 6** of the **Civil Procedure Rules** is based on the grounds set out therein and is also supported by the affidavit of **SAUL WEKESA NYONGESA** the 2nd defendant herein.

The gravamen of the application is that the 2nd defendant is aggrieved by the said Judgment and has lodged a Notice of Appeal. However,

unless the Judgment is stayed, he will suffer substantial loss which is irreparable. That his intended appeal raises substantial issues of law and has high chances of success. That the 2nd defendant is willing to comply with such terms as the Court may impose. That the application has been made expeditiously and no prejudice will be suffered by the plaintiff if the application is allowed.

The application is opposed and the plaintiff swore a replying affidavit dated 13th September 2021 in which he deponed, inter alia, that he has not been served with the Notice of Appeal and the 2nd defendant had thirty (30) days from the time the Judgment was delivered and has not explained why he filed this application only three (3) days before the lapse of the thirty (30) days. Further, that the 2nd defendant has not shown the substantial loss which he will suffer and he had also not approached this Court with clean hands since there is evidence that he transferred the titles **NO EAST BUKUSU/NORTH SANG'ALO/6573** and **6574** in November 2014 during the pendency of this suit. That the 2nd defendant has not offered security and the application does not satisfy the conditions set out in **Order 42 Rule 6 (2) of the Civil Procedure Rules**. Further, that there is no arguable appeal and it is the plaintiff who stands to suffer substantial loss.

When the application was brought before me on 8th September 2021, I directed that it be canvassed by way of written submissions. The 2nd defendant would have three (3) days to serve both the application and submissions upon the plaintiff who would then have five (5) days from the date of service to file his response and submissions. The matter would then be mentioned virtually before the Deputy Registrar on 21st September 2021 to confirm compliance and take a date for ruling.

The matter was indeed mentioned on 21st September 2021 before the Deputy Registrar who confirmed that both parties had filed submissions. He then set a date for ruling on 26th October 2021.

Meanwhile, it would appear that on the same date when the parties appeared before the Deputy Registrar and confirmed having filed their submissions as directed, Counsel for the 2nd defendant filed what is referred to as **"REPLY TO PLAINTIFF'S SUBMISSIONS"**. This was done without seeking the Court's leave and, rightly so, Counsel for the plaintiff took up the issue by writing to the Deputy Registrar on the same day complaining that the submissions contravened the Court's directions and introduced new issues. Counsel sought my directions in the matter.

Before I delve into the merits of the application, I must therefore address the complaint with regard to the **"REPLY TO PLAINTIFF'S SUBMISSIONS"**.

When the parties appeared before the Deputy Registrar on 21st September 2021, they confirmed that they had filed their submissions as directed. They were then given 26th October 2021 as the date for ruling. The 2nd defendant's Counsel did not seek any leave from the Court to file further submissions in reply to the plaintiff's submissions. It is trite that submissions are not evidence upon which a Court can base its decision. Submissions are simply the respective parties' **"marketing language"** with each side endeavouring to convince the Court that its case is the better one – **DANIEL TOROITICH ARAP MOI .V. MWANGI STEPHEN MURIITHI & ANOTHER 2014 eKLR**. At the end of the trial, cases are determined on the evidence adduced by the parties and not by their submissions, no matter how long or eloquent they may be.

Having said so, however, there is justification in the protest by Counsel for the plaintiff with regard to the manner in which the 2nd defendant appears to have sneaked further submissions behind the plaintiff's back when the pleadings had closed and without leave. Parties are entitled to a level playing ground and the Judiciary, as the impartial custodian of justice, is obliged to ensure that this is achieved. One way of doing so it by ensuring that directions of the Court are complied with. Indeed, one of the overriding objectives under **Section 1A (3)** of the **Civil Procedure Act** is that: -

"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court."

It is of course common knowledge that often times and for valid reasons, parties and their advocates may not be able to keep within the time lines set for doing an act. That is why **Section 95** of the **Civil Procedure Act** makes provision for the enlargement of time. It is however not proper for parties to sneak in documents into proceedings without leave. In the circumstances, the 2nd defendant's further submission filed on 21st September 2021 are hereby expunged from the record.

The application was canvassed by way of written submissions. These have been filed both by **MR WASILWA** instructed by the firm of **BS ADVOCATES LL. P** for the 2nd defendant and by **MR BWONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and the submissions by Counsel.

Order 42 Rule 6(1) and **(2)** of the **Civil Procedure Rules** upon which this application is premised provides as follows: -

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside."

(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;

(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.

It is clear from the above that the 2nd defendant as the Applicant, was required to satisfy all the following conditions in order to be entitled to an order of stay of execution pending appeal i.e.

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order for stay is granted.
3. Offer security for the performance of any decree or order as may ultimately bind him.
4. File the application without unreasonable delay.

In the case of **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410, PLATT Ag J.A** (as he then was) stated the following with regard to the importance of establishing substantial loss in an application of this nature: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” Emphasis added.

In the same case, **GACHUHI Ag J.A** (as he then was) added that: -

“It is not sufficient by merely stating that the sum of Kshs. 20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgment.” Emphasis added.

In the case of **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN 1963 LTD 1990 KLR 365** the Court of Appeal circumscribed the jurisdiction of this Court as follows: -

“Thus the superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must of course, be made without unreasonable delay.” Emphasis added.

In an application of this nature, therefore, the Court is called upon to weigh the two competing interests and balance them as best as it can. It must ensure that the intended appeal is not rendered nugatory while also taking into account the fact that a successful party is entitled to enjoy the fruits of his Judgment. Certainly, a party who has expended time and other resources pursuing a claim in Court must be allowed the benefit of enjoying the fruits of his labour because until that Judgment is set aside by an Appellate Court, it will have determined the parties’ rights in the dispute. However, a window is available to an aggrieved party who must nonetheless satisfy **all** the conditions set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules** to enable the Court exercise its discretion in his favour. This Court will therefore be guided by the above precedents in addition to others.

It is common ground that the 2nd defendant timeously filed a Notice of Appeal on 5th August 2021 expressing his intention to appeal against the Judgment herein. That is sufficient cause.

The 2nd defendant also filed this application on 18th August 2021 without unreasonable delay.

The 2nd defendant has also demonstrated that he is willing to offer security. In paragraph 11 of his supporting affidavit, the 2nd defendant has deponed as follows: -

“That I am willing to comply with such terms as this Honourable Court shall impose.”

In my view, that averment satisfies the requirement for offer of security.

The cornerstone of such an application, however, is substantial loss – **KENYA SHELL LTD .V. KIBIRU** (supra). Further, in the case of **MACHIRA 1/a MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD (No 2) 2002 2 KLR KULOBA J** captured that requirement in the following terms: -

“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (e.g. appeal or intended appeal).”

The Judge went on to add that: -

“Moreover, a Court will not order a stay upon mere vague speculation; there must be the clearest ground of necessity disclosed on evidence Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of prosecuting the appeal or intended appeal. So, really, stay is normally not to be granted, save in exceptional circumstances.”

In paragraph 8 of his supporting affidavit, the 2nd defendant has deponed as follows on the issue of substantial loss: -

8: “That I will suffer substantial loss if my registration as proprietor is ordered cancelled but on the other hand no real loss will be occasioned to the Respondent if orders sought herein are granted.” Emphasi added.

The Court has of course already ordered that the plaintiff is entitled to be registered as the proprietor of $\frac{3}{4}$ of an acre out of the land parcels **NO EAST BUKUSU/ NORTH SANG’ALO/6573 and 6574** and directed the 2nd defendant to execute the necessary documents to facilitate that transfer and in default, the Deputy Registrar of this Court to do so. Therefore, the order to transfer the $\frac{3}{4}$ of an acre to the plaintiff has already been made and there is nothing to stay. What can be stayed is the execution process. The 2nd defendant has not suggested by tangible evidence that the plaintiff intends, upon being registered as the proprietor of the $\frac{3}{4}$ acre of land, to dispose off the same or deal with it in any manner so as to make it out of reach by the time his appeal is determined in his favour. The Court cannot act on mere conjecture. The plaintiff, as the Court has already found, is the party in possession and occupation of the said $\frac{3}{4}$ acre of land. The 2nd defendant has other land which he occupies. In the case of **PRISCILLA MUTHONI KIRUGI & 19 OTHERS .V. ELGON INSURANCE CONSULTANTS 2010 eKLR** the Court of Appeal declined to order a stay of execution having found that the Applicants had other land to which he could relocate even if he was evicted. It said: -

“Thus should they be evicted, they would have somewhere to relocate to and as they have not alleged that the respondent intends to dispose of the suit property, if they succeed in their intended appeal, the suit land will revert to them or they will be at liberty to seek damages for any loss suffered as a result of execution of the superior Court’s orders. In short, the results of the success of the intended appeal, were it to succeed, would not be rendered nugatory.”

In addition to the above, the remedy sought by the 2nd defendant is an equitable one to be granted at the discretion of the Court. The 2nd defendant was therefore required to approach the Court with clean hands. This Court has already found, by the Judgment sought to be appealed, that the suit land was transferred during the pendency of this trial. At page 26 of the said Judgment, this Court make the following observation: -

“It is also not lost to this Court that the transfer of the land parcels NO EAST BUKUSU/NORTH SANG’ALO/6573 and 6574 was done in November 2014 in the course of these proceedings. The only inevitable conclusion that this Court can arrive at in the circumstances is that, being cognizant of the fact that the plaintiff had mounted this case claiming $\frac{3}{4}$ acre out of the land registered in the name of the 2nd defendant, the transfer of the land parcels NO EAST BUKUSU/NORTH SANG’ALO/6573 AND 6574 could only have been done to frustrate the plaintiff’s claim to the $\frac{3}{4}$ acre of land which, as is now clear, falls within the above two parcels.”

In view of the above antecedents, the 2nd defendant cannot be deserving of the exercise of this Court’s equitable discretion in his favour.

The up – shot of all the above is that the 2nd defendant has not demonstrated what substantial loss he will suffer if his application is denied. It is not enough to merely plead substantial loss. He was required to go further and confirm what the substantial loss would entail. This is because, the term **substantial** is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as: -

“Considerate in amount or value; large in volume or number

Having permanence or near permanence; long lasting

No such evidence has been placed before the Court to demonstrate the substantial loss which the 2nd defendant will suffer.

The Notice of Motion dated 18th August 2021 is devoid of merit as the 2nd defendant has only satisfied some of the conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules**. It is accordingly dismissed with costs to the plaintiff.

Boaz N. Olao.

J U D G E

7th December 2021.

RULING DATED, DELIVERED AND SIGNED AT BUNGOMA ON THIS 7TH DAY OF DECEMBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES AND WITH NOTICE TO THE PARTIES.

Boaz N. Olao.

J U D G E

7th December 2021.

Explanatory notes: -

This ruling was due to be delivered on 26th October 2021. However, I have been un – well and out of the station until 29th November 2021. The delay is regretted but was inevitable in the circumstances.

Boaz N. Olao.

J U D G E

7th December 2021.