REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 23 OF 2016 (O.S)

IN THE MATTER OF LAND PARCEL NO WEST BUKUSU/WEST SIBOTI/607

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF LIMITATION ACT CAP 22 LAWS OF KENYA

JOSEPH NDAFU NJURUKANI ..... 1ST PLAINTIFF/APPLICANT

SOSPETER JUMA NDAFU .....2ND PLAINTIFF/APPLICANT

TOBIAS WANGILA NDAFU ..... 3RD PLAINTIFF/APPLICANT

VERSUS

EMILY NALIAKA BARASA

(sued as personal Representative of

BARASA WASWA) ..... DEFENDANT/RESPONDENT

R U L I N G

By a Judgment delivered on 20th September 2021, this Court dismissed the claim by **JOSEPH NDAFU NJURUKANI**, **SOSPETER JUMA NDAFU** and **TOBIAS WANGILA NDAFU** (the Applicants herein) to be declared as the owners of the land parcel **NO WEST BUKUSU/WEST SIBOTI/607** (the suit land) by way of adverse possession. Instead, the Court ordered that the suit land is the property of **EMILY NALIAKA BARASA** (the Respondent herein) and shall be registered in her names and the Applicants should vacate within three (3) months or be evicted therefrom after which they, their families, agents, servants or any persons acting through them shall be permanently restrained from trespassing, ploughing or doing any acts thereon prejudicial to the Respondent's interests therein.

Aggrieved by that Judgment, the Applicants expeditiously filed a Notice to Appeal on 21st September 2021. On 24th September 2021, the Applicants moved this Court vide their Notice of Motion dated 22nd September 2021 and premised under the provisions of **Sections 1**, **1A**, **1B**, **3** and **3A** of the **Civil Procedure Act** as well as **Order 42 Rule 6** of the **Civil Procedure Rules** seeking the following reliefs: -

1. **Spent**

2. **Spent**

3. **That further proceedings and execution of the decree and Judgment in BUNGOMA ELC CASE No 23 of 2016(OS) be stayed pending the hearing and disposal of the intended appeal.**

4. **Costs of the application be provided for.**

The application is predicated on the grounds set out therein and is also supported by the affidavit of **JOSEPH NDAFU NJURUKANI** the 1st Applicant herein.

The gist of the application is that the Applicants may suffer substantial loss if the order of stay of execution is not granted as the Respondent is likely to execute the decree and that would render their intended appeal nugatory. That the suit land is the only property which they own and if the Judgment is executed, they and their families will be rendered homeless.

Annexed to the application are the following documents: -

1: Copy of the Judgment sought to be appealed.

2: Notice of Appeal filed on 21st September 2021.

3: Letter dated 21st September 2021 from the Applicants' Counsel applying for certified copies of the proceedings herein.

The application is opposed and the Respondent filed a replying affidavit dated 18th October 2021 describing it as made in bad faith, bad in law, incompetent and fatally defective. She averred that the application is also premature as there is no decree extracted and no looming execution to warrant the orders sought. That the Applicants lied to this Court about the ownership of the suit land and are therefore not deserving of the exercise of this Court's equitable discretion since equity assists those who approach it with clean hands.

That this suit has been in Court since the year 2016 and the Respondent has been homeless all this time and justice delayed is justice denied. That the Applicants have not shown what substantial loss they will suffer nor demonstrated that their pending appeal is arguable. In any case, the Applicant's right of appeal must be balanced against an equally weighty right of the Respondent to enjoy the fruits of the Judgment. That the Applicants have not met all the three (3). Conditions set out in **Order 42 Rule 6** of the **Civil Procedure Rules** and this application should therefore be dismissed with costs.

When the application was placed before me on 27th September 2021, I directed that it be served upon the Respondent and be canvassed by way of written submissions.

Those submissions were subsequently filed by **MR WAMALWA** instructed by the firm of **WAMALWA SIMIYU & COMPANY ADVOCATES** for the Applicants. The Respondent informed the Court that she would not be filing any submissions and would solely rely on her replying affidavit.

I have considered the application, the rival affidavits and the submissions of the Applicants.

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

6(1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appeal from except in so far as the Court appealed from may order but, the Court appealed from may <u>for sufficient cause</u> 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 sub rule (1) unless –

(a) the Court is satisfied that <u>substantial loss may result to the applicant</u> unless the order is made and that the application has been made <u>without unreasonable delay</u>;

and

(b) <u>such security as the Court orders</u> for the due performance of such decree or order as may ultimately be binding on him <u>has been given by the applicant</u>." Emphasis added.

It is clear from the above that the Applicants were required to satisfy **<u>all</u>** 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 they will suffer substantial loss unless the order for stay is granted.**

3. **Offer security for due performance of any decree or order as may ultimately bind them.**

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 such an application: -

> ***"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 it's 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 the 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 while considering an application of this nature in the following terms: -

> ***"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 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(1)** and **(2)** of the **Civil Procedure Rules** before the Court can exercise its discretion in his favour. This Court shall be guided by the above precedents.

There is no doubt that the Applicants moved to this Court without unreasonable delay. Indeed, they approached this Court on 21st September 2021 just one day after this Court delivered its Judgment on 20th September 2021.

On the issue of substantial loss, the Applicants have stated in paragraph (a) of their Notice of Motion as follows: -

> ***(a) That substantial loss may result to the Appellant unless the order of stay of execution is granted."***

The Applicants have not however demonstrated what substantial loss they will suffer if no order for stay of execution is granted. **In MACHIRA t/a MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD (No 2) 2002 KLR 63** the Court stated that: -

> ***"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 ……***
>
> ***Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay …….***
>
> ***Indeed, remote contingencies would not warrant the Court's interference with ordinary course of justice and the process of law."***

In paragraphs 8 and 9 of his supporting affidavit, **JOSEPH NDAFU NJURUKANI** the 1st Applicant herein has averred as follows: -

> ***8: "That the suit land is the only property we own having developed the same and settled therein."***
>
> ***9: "That the orders in the Judgment are grave to us and should they be executed; we shall be rendered homeless together with our families that are settled thereat."***

The Applicants now feel that the disposal orders issued by this Court through its Judgment are ***"grave"*** to them. The view that I take of the matter is that it was even ***"graver"*** for the Applicants to disposes the Respondent of the suit land where her husband's **grave** lies. Surely it cannot be that this Court's Judgment is only ***"grave"*** when it directs the Applicants to vacate from the suit land but ***"not grave"*** when it directs that the suit land be restored to the Respondent whom this Court already has found to be the rightful owner. This is a Court of Equity. Equity, it is often said, is like a double edged sword. It cuts both sides.

The Applicants allege that if the Judgment herein is executed, they will be rendered homeless since the suit land is the only property that they

own. It is however not lost to this Court that when the Applicants filed the originating Summons herein, they all confirmed that their late father one **MORRIS NDAFU MBOTIKI** was the owner of another land parcel **NO WEST BUKUSU WEST SIBOTI/524** measuring 66 acres where they lived. This is what the 1st Applicant averred in paragraphs 8 and 9 of his supporting affidavit dated 3rd March 2016: -

> ***8: "That the land parcel NO WEST BUKUSU/WEST SIBOTI/524 was bought by my father in the year 1953 where upon in the year 1969 the said land was surveyed by the Government and the same was a huge tract measuring about 66 acres."***
>
> ***9: "That being the eldest son I recall very well that we moved with our parents in that land from KABUCHAI in the year 1953 and that apart from HENRY NYONGESA who was born in the year 1950, and ROSEMARY NASIMIYU who was born in the year 1952 the rest of my brothers and sisters were born in that land."***

Those averments were repeated by his siblings the 2nd and 3rd Applicants herein. In paragraphs 11 and 12 of the same affidavit, the 1st Applicant states how in January 2016 some people came to the said land purporting to buy it and it was then that he visited the Lands Office only to discover that the land on which they have lived since 1970 was registered in the names of **BARASA WASWA** as title **NO WEST BUKUSU/WEST SIBOTI/607**. The 1st Applicant does not explain how the said land mutated into land parcel **NO WEST BUKUSU/WEST SIBOTI/607**. What is however clear from the Green Card to the suit land is that it was first registered in the names of **BARASA WASWA** on 1st November 1972. It is clear from all the above that the Applicants infact have other land being parcel **NO WEST BUKUSU/WEST SIBOTI/524** where they have always lived. It is not therefore true that they will be rendered homeless if the Judgment of this Court is executed. It is also instructive to note that the Applicants did not produce as part of their documentary evidence the photographs of their homes where they have lived with their families since 1970. The inevitable conclusion is that the Applicants and their families have their homes elsewhere and not on the suit land.

It has also not been suggested by the Applicants that the Respondent is planning to dispose off the suit land and therefore put it out of reach by the Applicants should their appeal be up – held. In the case of **PRISCILLA MUTHONI KIBUGI & 19 OTHERS .V. ELGON INSURANCE CONSULTANTS 2010 eKLR**, the Court of Appeal declined to grant an order for stay of execution pending appeal having found that the Applicants infact had other land to which they could relocate should they be evicted. The Court addressed itself as follows: -

> ***"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."***

The word **substantial** has been defined in **BLACK'S LAW DICTIONARY 10TH EDITION** to include: -

> ***"Considerable in amount or value; large in volume or number ……***
>
> ***Having permanence or near permanence; long lasting …."***

Arising from my findings above that the Applicants infact have land elsewhere where they have homes and in the absence of any evidence to suggest that the Respondent intends to dispose off the suit land, it cannot be said that the Applicants have met the threshold of demonstrating that they will suffer substantial loss if the orders sought are not granted. On that basis alone, their application must fail.

That is not all. The Applicants were also required to furnish security. Nowhere in his fourteen (14) paragraph supporting affidavit has the 1st Applicant offered any security as a condition for the stay nor even suggested that the Applicants are prepared to abide by any condition which this Court may impose. As was held in **WYCLIFF SIKUKU WALUSAKA .V. PHILIP KAITA WEKESA 2020 eKLR**: -

> ***"The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."***

Not only is the offer of security one of the requirements under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** but as is clear from **VISHRAM RAVJI HALAI** (supra), ***"the Applicant must furnish security."*** Similarly, the Applicants have not met this requirement. Their application can only be for dismissal.

The Applicants have also failed to show sufficient cause to warrant the orders sought. In paragraph 12 of his supporting affidavit, the 1st Applicant has deponed as follows: -

> ***12: "That the hardship that the orders for stay can correct in the circumstances shall be much better than when refused to."***

I understand the Applicants to be saying that it will be more prejudicial to them than to the Respondent if their application is disallowed. From the circumstances of this case, that cannot be true. By their own admission, the Applicants' father had land parcel **NO WEST BUKUSU/WEST SIBOTI/524** where they have always lived. That land could not have mutated into the suit land which was first registered in the names of **BARASA WASWA** in 1972. It goes without saying that the Respondent is the party who will be prejudiced in that she will continue seeking refuge in the corridors of the **REFORMED CATHOLIC CHURCH** at **NAKALILA VILLAGE** while the Applicants who have land elsewhere continue to enjoy the benefits of keeping her away from what is clearly her property.

The up – shot of all the above is that the Notice of Motion dated 22nd September 2021 has not met the threshold of the law. It is accordingly

dismissed and since the parties are family, each shall meet their own costs.

BOAZ N. OLAO.

J U D G E

6th December 2021.

6th December 2021.

Coram: Hon. Boaz. N. Olao JUDGE

CA: Joy

Language: English/Kiswahili

Mr Simiyu for Applicant – present

Respondent served – present

Court Assistant – Joy

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 6TH DAY OF DECEMBER 2021.

BOAZ N. OLAO.

J U D G E

6th December 2021.