

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA. CASE NO. 08 OF 2021

ELISHA ONYANGO KIBUYE.....APPELLANT

VERSUS

ANDREW NANGA ODHIAMBO.....RESPONDENT

RULING

Elisha Onyango Kibuye, (hereinafter referred to as appellant) have come to court against Andrew Nanga Odhiambo (hereinafter referred to as the respondent) praying that pending hearing and determination of the appeal at Kisumu, being Kisumu ELC Appeal No. 8 of 2021 Elisha Onyango Kibuye versus Andrew Nanga Odhiambo, a Stay of Execution of the Judgment/Decree/Order dated 4th February 2021 be and is hereby issued. The costs of this application be borne by the Respondent.

The application is premised on grounds that **the land in question herein is an ancestral land which was given to the Appellant by the grandfather in 1979 where the Appellant has been in occupation todate. The respondent herein sneaked and did the succession in the estate of Nanga Okungu who was their grandfather without involving the Appellant herein. The Appellant herein intends to move court in the succession matter to revoke the grant for a proper succession to be done. The execution of the decree/Order/Judgment herein shall render the appeal nugatory and or an academic exercise. The respondent does not stand to suffer any substantial damage/lose during the period of stay of execution pending the hearing and determination of the pending appeal. This application has been made without undue delay. The grant of the Orders prayed for shall meet the ends of justice.**

In the supporting affidavit, the appellant states that he was the defendant in Tamu ELC Case no. 3 of 2018 where a judgment was delivered on 4th February 2021 in favour of the Plaintiff therein. He was aggrieved by the said decision and he appealed in the appeal herein. That the land in question being Land parcel No. KISUMU/WANG'AYA 1/965 was registered in the name of his father Nanga Okungu. That the said land is an ancestral land which was given to the Appellant by the grandfather in 1979 where the appellant has been in occupation todate. The Respondent herein sneaked and did the succession in the estate of Nanga Okungu who was their father without involving the appellant herein. The appellant herein intends to move court in the succession matter to revoke the grant for a proper succession to be done. That the execution of the decree/Order/Judgment herein shall render the appeal nugatory and or an academic exercise.

The Respondent does not stand to suffer any substantial damage/lose during the period of stay of execution pending the hearing and determination of the pending appeal. This application has been without undue delay. That the applicant stands to suffer prejudice, damage and loss if the Orders sought are not granted. That the Respondent does not stand to suffer any loss and or damage/prejudice if Orders sought are not granted as prayed.

In the replying affidavit, the respondent states that the said application and/or appeal is based on issues that were already determined by Hon. T.W. Cherere J. in High Court Succession Cause No. 148 of 2014. That for this court to award stay, then the appellant must prove that his intended appeal is arguable and has merits, which in this case, two courts being the high court and the Magistrates court had already dealt with the facts in issue and they both arrived at the same findings. That as the court of appeal, this court is only mandated to look at issues of the law as opposed to facts which the appellant has heavily relied upon in his quest to be granted the order of stay. That the fact that the appellant herein does not want to comply with the Judgments in Tamu Principal Magistrate ELC No. 3 of 2018 and High Court Succession Cause No. 148 of 2014, only proves that he will not comply with the findings of this court. That the application has not shown or expressed an reason to warrant this Honourable Court to exercise its discretion in favour of the appellant herein hence does not meet the legal threshold for stay to be granted. That it is absolutely absurd for the appellant to come to court to seek justice while he will not respect the decision of the said court. That the respondent is still suffering from the economic stress that the appellant is continuing to subject him. That if court is not inclined to dismiss this application, as condition for stay, the court can direct that the cost incurred at the lower court be paid to him. The appellant to pay cost of this application to me.

I have considered the application under the provision of Order 42 Rule 6 that provides:

“6.(1) 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 order set aside.

(2) No order for stay of execution shall be made under subrule (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.

In this matter the Judgment appealed from was made on 4/2/2021 whilst the memorandum of appeal was filed 8 days later and the record of Appeal filed on 19/3/2021. The application for stay of execution of the Judgment and decree was made on 7/4/2021. I do find that there was no unreasonable delay in taking steps towards the appeal and in the making of the application for stay pending appeal. Moreover, I do find that the appellant is likely to suffer substantial loss in this case as he has been in occupation of the suit-land since 1979. The applicant has satisfied the conditions for grant of stay pending appeal. I do grant the appellant stay of execution pending appeal. The appeal to be fast-tracked for hearing. Costs in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3rd DAY OF DECEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE