



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCA NO 4 OF 2019**

**PETER KING'ORI.....APPELLANT**

**-VS-**

**1. CAROLINE AKINYI OLOO**

**2. JULIUS OTIENO OLOO**

**(Applying as Administrators of the Estate of Oloo Agoro Oloo).....RESPONDENTS**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 18<sup>th</sup> February 2019 brought under Order 42 Rule 6(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Appellant/Applicant seeks orders of stay of execution of the orders issued on 13/2/19 in Mombasa CMCC No.41 of 2018 pending the hearing and determination of the appeal herein. The application is based on the grounds on the face of the motion and supported by the affidavit of Peter Kingori, the applicant, sworn on 18<sup>th</sup> February 2019 and a supplementary affidavit sworn on 15<sup>th</sup> March 2019.

2. It is deposed that on 6/2/17, the respondents filed Mombasa ELC No.14 of 2017 simultaneously with a notice of Motion application. The applicant applied to have the suit transferred to the chief magistrate's court and the application was allowed on 23/7/2018. The case was given a new number CMCC No.41 of 2018. That on 28/8/2018, the Respondents filed an application for contempt of court in ELC No. 14 of 2017 which no longer existed. The applicant states that despite bringing this to the attention of the trial magistrate Hon. Ndegwa, P.M. he ignored the same. That the respondents fixed the application for hearing and served the applicant's advocates with a hearing notice in the new file CMC Land Caste No.41 of 2018. That the Applicant filed a replying affidavit and thereafter both parties filed their written submissions. The applicant avers that the matter was scheduled for hearing on 12/2/2019 and was called out in the absence of the applicant's advocates and was adjourned to 13/2/2019 for hearing. That instead of proceeding for hearing on 13/2/19, the court delivered a ruling and made orders for the arrest of the applicant without any hearing at all. The applicant was aggrieved by that ruling and filed the appeal herein. The applicant avers the appeal has high chances of success and has listed various grounds. The applicant states that a warrant of arrest has now been issued against him and may be arrested at any time and his constitutional right to liberty may suffer and that he may suffer substantial and irreparable loss, adding that the appeal shall be rendered nugatory. The applicant states that the respondents will not be prejudiced if the orders sought are allowed.

3. The application is opposed by the respondents who filed a replying affidavit jointly sworn by Caroline Akinyi Oloo and Julius Otieno on 28<sup>th</sup> February, 2019, and a further affidavit sworn on 25<sup>th</sup> March 2019. It is the Respondents contention that the application lacks merit, it misconceived, incompetent and that the applicant does not deserve the orders for having abused orders of the court. The respondents aver that the applicant ought to be arrested and appear before court to defend himself rather than taking the court in circles. The respondent state that the ruling was properly delivered by the trial magistrate after having exhausted all avenues required and that the same is still in force. It is the respondents' contention that the application is premature as the matter is due to be concluded in a full trial and should be dismissed with costs.

4. The application was canvassed by way of written submissions. The applicant's submissions were filed on 17<sup>th</sup> July 2019 while the Respondents' submissions were filed on 9<sup>th</sup> August, 2019.

5. I have considered the application. The only issue for determination is whether the applicant should be granted stay of execution of the orders issued on 13/2/2019 in Mombasa CMCC Land Case No.41 of 2018 pending the hearing and determination of the appeal herein.

6. Order 42 Rule 6(1) and (2) provided as follows:

1) No 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 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.

7. It is clear from the provisions of order 42 rule 6 (1) that the applicant must satisfy the following conditions; namely: a) that substantial loss may result to him unless the order is made, b) the application has been made without undue delay and c) security has been given by the applicant.

8. In the present application, the applicant alleges that if the order appealed against take effect he will suffer substantial loss and the appeal shall be rendered nugatory. The orders appealed against were made on 13<sup>th</sup> February, 2019 and this application was filed on 18<sup>th</sup> February, 2019 . I am satisfied that the application was brought without undue delay.

9. Regarding the second pre-requisite in order 42 rule 6, that is substantial loss occurring to the applicant, I wish to refer to the case of Kenya Shell Limited –v- Benjamin Karuga Kigubu & Another (1982 - 1988) KAR 1018, where the Court of Appeal stated:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone for granting stay.”

10. Also in the case of Absalom Dora –v- Turbo Transporters (2013) eKLR it was stated that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

11. In this particular case, how does the court balance the rights of the parties? The appeal is against a ruling on contempt application. Should the applicant be arrested and punished, there is no doubt the appeal shall be rendered nugatory. That would certainly amount to substantial loss. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. In the instant case, it is my considered opinion that it would be in the interest of justice to exercise the court’s discretion and grant stay to prevent the appeal being rendered nugatory.

12. The upshot is that I find the Notice of Motion dated 18<sup>th</sup> February 2019 has merit and is allowed in terms of prayer (c) thereof. Costs of the application to abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 27<sup>th</sup> day of January 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mwawasa holding brief for Mutisya for Appellant

Respondents present in person

Yumna Court Assistant

**C.K. YANO**

**JUDGE**