



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**APPEAL NO. 13 OF 2019**

**BENEDICT NYAKUNDI.....APPELLANT**

**-VERSUS-**

**WAYCLIFF ONGWENYI KWENA.....1<sup>ST</sup> RESPONDENT**

**STEPHEN OMBATI KWENA.....2<sup>ND</sup> RESPONDENT**

**RULING**

The applicant had by a Notice of Motion dated 29<sup>th</sup> July, 2019 sought for orders: -

- (i) Spent
- (ii) That a stay of execution in Narok CMCC No. 115 of 2018 pending the hearing and determination of this application.
- (iii) The court be pleased to grant a stay of execution in Narok CMCC NO. 115 of 2018 pending haring and determination of the appeal against the Judgement made by the Hon. T. Gesora on the 23<sup>rd</sup> July, 2019.
- (iv) The costs of this application be provided for.

The Application was supported by the Affidavit of Benedict Nyakundi and upon the grounds the Applicants are likely to be evicted from their homes and they will suffer substantial loss. The Appellant further contends that he has reasonable chance of claim on land and therefore the said eviction will render his appeal nugatory.

The Application was opposed by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent as representatives of the estate of Kwena Nyandora Nyamweya in which they contended that the suit was heard by a court of competent jurisdiction and that the same proceed after it was adjourned severally because of the absence of the appellant and his advocate. He further contends that the Appeal and the Application was overtaken by events as he has already extended the decree, executed the same and the property transferred in his names.

I have considered the application before me and the submissions filed by the parties. This is an application in which the applicants seek for stay of execution against the judgement in Narok CMCC No. 115 of 2018. It is the applicant's contention that the said suit proceeds without their participation even though he alleges the proceedings had irregularities. The Respondent contends that the suit proceeded for hearing in his absence because both the Appellants and his advocates were absent on the date of the hearing.

I have read the proceedings of the court and it is evident that the suit was adjourned severally at the instance of the Appellant and on the date when the suit was for hearing both his advocate and himself were absent. It is alleged that the advocate was away in Nairobi for the hearing of another matter but no explanation was given for the appellant's absence.

The Appellants states that his right to a fair trial was breached when the matter proceeded. However, I must point out that the same right must also be accorded to a party.

The Respondents contends that there is nothing to stay in the matter as he has already extracted the decree and transferred the suit land in his name and hence ownership is not in contention.

Having considered the Application before me and the submissions, what is there for determination is whether the Appellant/Applicant has satisfied the requirements for grant of stay of execution pending appeal. From the pleadings the main contention is whether the Appellant has satisfied the said requirements.

From the pleadings it is clear that the Appellant was the author of his own misfortune. However, in the interest of justice since the Appellant was not heard during the trial I will allow the Application herein and allow the prayers sought on the Notice of Motion dated 29<sup>th</sup> July, 2019.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 10<sup>th</sup> day of February, 2020.**

**Mohammed Kullow**

**Judge**

**10/2/2020**

In the presence of:-

CA:Kimiriny

Mr Kiruti holding brief for Maritim for the Appellant

Mr Karia holding brief for Onduso for the Respondent

**Mohammed Kullow**

**Judge**

**10/2/2020**