



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT BUSIA**

**CIVIL CASE NO. 127 OF 2015**

**WANJALA OJIMBO MUBWEKA.....1<sup>ST</sup> PLAINTIFF**

**OJIAMBO PETER RODGERS.....2<sup>ND</sup> PLAINTIFF**

**= VERSUS =**

**LEONARD ONGWENI BARASA.....DEFENDANT**

**RULING**

1. The defendant has moved this Court under the provisions of Section 1A, 3, 3A of the Civil Procedure Act and Order 10 Rule 11; Order 7 Rule 1; Order 22 Rule 22 and Order 50 Rule 6 of the Civil Procedure Rules in his notice of motion dated 21<sup>st</sup> May 2019. The Defendant/Applicant in the motion prays for orders;

**1) Spent**

**2) Spent**

**3) That there be a stay of execution of the Judgment of this Court delivered on 21<sup>st</sup> May 2019 and any consequent orders pending the hearing and determination of the Appeal.**

**4) That the costs of this Application be provided for.**

2. The application is supported by the grounds on the face of it *inter alia*;

**1. The consequence of the judgment delivered is that the applicant will be evicted from his home where he has lived for about 40 years and if evicted, he has nowhere to go.**

**2. The defendant has lodged an appeal against the said judgment.**

**3. The applicant will suffer irreparable loss unless the orders herein are granted.**

3. The application is opposed by the plaintiff who filed grounds of opposition which stated thus;

a) *No security for costs has been deposited as provided for. We have suggested Kshs.100,000/= but the applicant has NOT reached out to us.*

b) *The Annexed Notice of Appeal does NOT show when the same was lodged in Court and signed by the Deputy Registrar hence it is defective.*

4. The application was prosecuted by filing of written submissions. The Respondent submitted that it is a requirement of law that a party seeking stay of execution must deposit security for costs. It is the Respondent's submission that owing to the circumstances of this matter, the Applicant stand no chance of succeeding in his intended appeal other than escalating costs to the detriment of the Respondent. The Respondent also submitted that the Applicant will not suffer irreparable loss if the orders are not granted. However in the event the Court agrees to grant the stay the Respondent prays that it should be granted upon the deposit of security for costs to cushion the Respondent.

5. The Applicant's submissions were filed on 31<sup>st</sup> October 2019. The defendant/applicant submitted that he has already filed a notice of appeal dated 21/5/2019. That the execution of the decree will have him evicted from his home which he has dwelt on for approximately 40

years. That if he is evicted, it will be difficult to restore their property. Further that if the orders sought are not granted, his appeal will be rendered nugatory. The Applicant submits that the right of appeal is anchored in Section 65 of the Civil Procedure Act. That this application is seeking to preserve the suit property before the appeal is heard and determined.

6. The Applicant addressed himself on the provisions of Order 40(1) of the Civil Procedure Rules which is inapplicable to this application. On security for costs, the Applicant submitted that there exists a caution on the suit title Bukhayo/Bugengi/7919 which prevents him (the Applicant) from transferring the land to any person. Therefore the demand for Kshs.100,000 by the Respondent is not tenable. The Applicant agreed to deposit a sum of Kshs.50,000 as a compromise for security for costs. He supported his submissions with the Case of **Butt Vs Rent Restriction Tribunal (1982) KLR 417**. He urged the Court to find merit in the application grant the orders sought.

7. From the pleadings filed in regard to this application, there is no dispute that a notice of appeal to the Court of Appeal has been lodged. The two questions I frame for my determination are;

(i) *Whether or not the Applicant has shown he will suffer irreparable loss if the orders are not granted.*

(ii) *Whether an order for depositing security for costs should be made.*

8. Order 42 rule 6(2) (a) of the Civil Procedure Rules provides thus;

*“The court be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay”.*

The Applicant pleaded and submitted that he will suffer irreparable loss if he is evicted from his home of 40 years and his goods that may be destroyed during the eviction exercise may not be restored. In granting prayer (b) of the plaint; trial judge allowed the plaintiff’s claim for an order of permanent injunction to issue against the defendant/(applicant herein) restraining him from entering L.R. No. Bukhayo/Bugengi/9224. In prayer (a) of the plaint; orders of eviction were issued against the applicant over L.R. No. Bukhayo/Bugengi/9224.

9. The Respondent has not denied the nature of loss the Applicant has stated since no replying affidavit was filed to counter the facts. When a person is displaced from a home set up, there is likely to be emotional suffering and financial loss attached to such displacement. Such loss and suffering cannot be easily quantified in monetary terms. Thus before exposing a party to an eventuality of an eviction, it is only fair and justiciable that he be accorded an opportunity to exhaust all options provided in law to defend himself. I am therefore satisfied that the Applicant has demonstrated that he is likely to suffer substantial loss unless the orders of stay is granted.

10. The second issue is whether or not to grant an order of security for costs. Order 42 rule 6(2) (b) provides;

*“That the court can order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

The decree awarded by the Court in this Case was not a monetary decree. The party and party costs have not been taxed or at least the Respondent did not state as much.

11. The Respondent did not lay any basis for the sum of Kshs.100,000 he wanted the Applicant to deposit as security for costs when there is no money decree that is sought to be stayed. The issue in dispute was in respect of ownership of Land Parcel No. Bukhayo/Bugengi/9224 and 9225. The Applicant submitted that there is a caution registered on the suit titles which prohibits him from transferring the same to any person. The existence of the caution which I direct to remain registered on the titles until the appeal is heard and determined in my view is sufficient security to preserve the interest of the Respondent over the suit title pending the hearing and determination of the pending appeal. Consequently I decline to make an order for the depositing of security for costs in the sum of Kshs.100,000 as pleaded by the Respondent or any amount.

12. In conclusion, I find merit in the motion dated 21/5/2019 and allow it in terms of prayer 3. The costs of the application shall abide the outcome of the Appeal filed before the Court of Appeal.

**Dated, signed and delivered at Busia this 6<sup>th</sup> day of February, 2020.**

**A. OMOLLO**

**JUDGE**