



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L NO. 3 OF 2019**

**GILBERT KIMANI NYUMU.....APPELLANT**

**VERSUS**

**GIDION KIPKOECH KIPTISIA.....RESPONDENT**

**RULING**

This ruling is in respect of an application dated 25<sup>th</sup> November 2019 and filed on 5<sup>th</sup> December 2019 by the applicant seeking for the following order:

- a) That in the interim the court be pleased to order status quo in respect to the title over parcel No. IRONG/ITEN/600 pending hearing and determination of the application.
- b) That in the interim, the court be pleased to order status quo in respect to the title over parcel No. IRONG/ITEN/600 pending hearing and determination of the intended appeal.
- c) That costs be provided for.

The court gave an order in the interim for status quo to be maintained pending the hearing and determination of this application. Counsel submitted on the principles for grant of stay of execution provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

"No order of 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; 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.

Counsel submitted the applicant has preferred an appeal by filing a notice of appeal and the case having been dismissed the respondent may proceed to register the decree of the court which will have the effect of the appellant's title over the suit land being cancelled. That there is a likelihood that the respondent may sell, transfer and or charge the suit and alienate the same which will render the appeal nugatory.

Counsel submitted that the judgment was never delivered on 17<sup>th</sup> October 2019 and the application filed on 5<sup>th</sup> December 2019 which is less than 60 days from the day the judgement was delivered. Counsel urged the court to find that there was no inordinate nor unreasonable delay in so far as the filing of the application is concerned.

On the issue of security for the due performance of the decree, Counsel submitted that the applicant is willing to abide by any condition that the court will order and that the same is within the courts discretion to impose depending on the circumstances of this case. Counsel therefore urged the court to allow the application as prayed.

**RESPONDENTS' SUBMISSIONS**

Counsel for the respondent submitted that the application lacks merit and should be dismissed with costs. That vide a consent order dated 31<sup>st</sup> July 2019 this Honourable Court ordered the appellant/applicant to deposit and surrender the completion documents of the suit property comprising of duly executed transfer forms among other documents pending the hearing and determination of the appeal and reserved the judgement for 17<sup>th</sup> October , 2019.

It was Counsel's submission that the appeal having been dismissed on 17<sup>th</sup> October 2019, the respondent was automatically entitled to implement the decree of the subordinate Court since the completion documents were surrendered as a condition for the grant of the conservatory orders.

Mr Arap Mitei counsel for the respondent submitted that Court granted the aforesaid conservatory orders dated 31<sup>st</sup> July, 2019 in exercise of its appellate jurisdiction and that the court concluded its business and became functus officio and cannot exercise appellate jurisdiction over its own decision.

Counsel further submitted that the applicants are seeking restraining orders, which are clearly injunctive orders hence the court does not have jurisdiction to entertain the present application and grant the orders sought by the applicants.

Mr Mitei relied on the case of **Tahir Sheikh Said Investments Ltd v Administrator, TSS Grain Millers Ltd & 2 others [2019]eKLR** in upholding the decision made in **Chembe Katana Changi Vs Ministry of Lands & Settlement & 4 others** held that;

*"I am persuaded to take the same position that was taken by Angote J that an application such as this does not lie to this court I take this position because an order of injunction can only be given where there is an existing suit. In this instance, until the Court of Appeal finds that I was wrong in striking out the plaintiff's suit, I am unable to find that I have jurisdiction to entertain an application for temporary injunction pending appeal i.e. I am functus officio to deal with the present application. The applicant sought orders of injunction in prayer (3) of the motion pending determination of her application before the court of Appeal, however no such copies of the application before the Court of Appeal were annexed to either of her applications. The court of Appeal has powers to grant orders to preserve the status quo as it deems fit and does not need the help of this court in determining matters that are filed before it'.*

It was Counsel's submission that Honourable Court in its judgement dated 17<sup>th</sup> October 2019 dismissed the appeal herein with costs to the respondent which in essence is negative in nature and orders of stay are not envisaged in such circumstances. Counsel cited the case of Charles **Munvendo Olinqo v Salim Chetechi Makokha & another [2019] eKLR** held that;

*"We have carefully perused the record and submissions by counsel and the issue for our determination is whether the applicant has satisfied the laid down principles for grant of stay of execution pending appeal. However before we venture into those principles, we must first address the issue as to whether a negative court order is capable of being stayed. The applicant moved the ELC court seeking a declaration that he was the proprietor of the suit land. His claim was dismissed The court did not order either party to do anything. It simply dismissed the appellant's case with costs. In the case of **George Ole Sangui v Kedong Ranch Limited CA NAI 55 OF 2015**, this Court while determining an application under Rule 5(2) (b) of this Court's rules which sought to stay an order of dismissal framed the issues for determination as follows:*

*"Has the applicant shown that (1) the appeal is arguable; (2) that the appeal if it succeeds will be rendered nugatory if stay is not granted; (3) that an order for dismissal of the suit can be stayed In considering these issues, we propose to deal with the last issue because the success or otherwise of the application reposes on it Can an order dismissing a suit be stayed under rule 5(2) (b)" If the answer is in the negative, that will dispose of the application. If it is in the affirmative, a consideration shall ensue of the twin principles regarding the arguability of the appeal and the nugatory effect of the appeal if it succeeds and stay is not granted. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted".*

Counsel therefore urged the court to dismiss the application with cost to the respondent.

### **ANALYSIS AND DETERMINATION**

This is an application seeking that the status quo be maintained pending the hearing and determination of the appeal. I have considered the submissions of counsel and come to the conclusion that the issue for determination is whether the court is capable of staying a negative order.

The applicant filed this appeal before this court which was heard and a judgment delivered on 17<sup>th</sup> October 2019. The applicant filed this application of 5<sup>th</sup> December 2019 which was 49 days after the delivery of the judgment. The judgment was to the effect that the appeal is dismissed.

In the case of **Abdulrahman C. Kirao & 3 others v Said Seif & 3 others [2019] eKLR** the court observed;

*Further, in the judgment delivered on 14<sup>th</sup> January 2019, the court dismissed the applicants' petition. There are no positive orders to stay as the order dismissing the petition was a negative order and is incapable of execution, save perhaps, for costs.*

The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything.

Similarly in the case of **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, Makhandia, J (as he then was)**

held:

*“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant’s appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court’s judgement or decree.”*

I find that the application is rendered incompetent and therefore not available as was held in the case of **Muhamed Yakub & Another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.** A party cannot seek to stay an order against which an appeal is not directed. Is the applicant appealing against the dismissal of the appeal or the lower court judgment?

Further looking at the principles of grant of stay of execution, the applicant is not clear whether he is applying for stay of execution or status quo. The applicant has also not satisfactorily convinced the court that he has met the threshold for grant of the order for stay of execution.

The issues of substantial loss is the cornerstone of the application for stay of execution and should come out clearly in the supporting affidavit.

Consequently I find that the application lacks merit and is therefore dismissed with costs to the respondents.

**DATED and DELIVERED at ELDORET this 23<sup>RD</sup> DAY OF APRIL, 2020**

**M. A. ODENY**

**JUDGE**