



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 292 OF 2016**

**OSCAR LULU MWASAMBU**

**ANDERSON MWARINGA MWASAMBU (Suing as the Administrator of**

**MASUMBUKO JAMBO MWASAMBU.....PLAINTIFFS**

**VERSUS**

**HARRISON DZENGO KENGA.....DEFENDANTS**

**RULING**

1. By this Notice of Motion application dated 19<sup>th</sup> March 2019, Oscar Lulu Mwasambu and Anderson Mwaringa Mwasambu suing as the Administrators of the Estate of Masumbuko Jambo Mwasambu (the Plaintiffs/Applicants) pray for an order of stay of execution of the Judgment and decree herein pending the hearing and determination of an appeal to the Court of Appeal.

2. The application which is supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff – Oscar Lulu Mwasambu is premised on the grounds:-

***a) That the Applicants have preferred an appeal against the Judgment delivered herein on 21<sup>st</sup> February 2019 and have received a draft decree for approval from the Defendant/Decree-Holder;***

***b) That it is only in the interest of justice that there be a stay of execution to grant the Applicants an opportunity to canvass their Appeal in the Court of Appeal; and***

***c) That the decree-holder will not be prejudiced as he is in occupation of a portion of the suit property.***

3. The Defendant/Decree-holder is opposed to the application. In a Replying Affidavit sworn by his Advocate on record Patrick Shujaa Wara, the Defendant avers that it has not commenced any execution process and that even if he were to do so, all that would be required is for the Plaintiff to surrender the Title Deed in their possession for rectification.

4. The Defendant further avers that the Plaintiffs are not in possession of the suit property and will not therefore be required to vacate therefrom. The Defendant remains in physical possession and therefore no substantial loss shall be suffered by the Plaintiffs in the event of execution.

5. I have considered the application and the response. I have also considered the submissions by Mr. Odhiambo, Learned Counsel for the Plaintiffs/Applicants and Mr. Shujaa, Learned Counsel for the Defendant/Decree-holder.

6. Order 42 Rule 6(2) of the Civil Procedure Rules provides that an applicant seeking a stay of execution pending appeal must demonstrate the following:-

***a) That substantial loss may result to the applicant unless the order was made;***

***b) That the application has been made without unreasonable delay; and***

***c) That the applicant has offered such security as the Court may order for the due performance of the decree or order as may ultimately be binding upon him.***

7. I have perused the Plaintiffs' 7-Paragraph Affidavit in support of this application. There is nowhere in that affidavit wherein the Plaintiffs even allude to the possibility of any loss, substantial or otherwise. All that the Plaintiffs state is that their Advocate has informed them that the Decree-holder's Advocates have sent him a draft decree for approval and that their Advocate has advised them that the act of sending the draft decree means the Defendant intends to proceed with execution.

8. A perusal of the Judgment delivered herein however reveals that the ensuing decree is neither for the payment of money nor to deprive the Plaintiffs of the parcel of land they presently occupy. All that they will be required to do is to surrender the Title Deed for the suit property to the Kilifi Land Registrar for the purposes of rectification.

9. As it were, it was incumbent upon the Plaintiffs to first and foremost establish other factors which show that the intended execution will create a state of affairs that will irreparably affect or negate the very essential core of their case as the successful party in the appeal. That is what substantial loss would entail.

10. In the premises herein I am not persuaded that any substantial loss shall result to the Plaintiffs unless the orders sought herein are granted. If their appeal succeeds, all that shall be required of the Defendants is to reconstitute the Title Deeds to the Plaintiffs. Accordingly I am not persuaded that there is merit in the application dated 19<sup>th</sup> March 2019.

11. It is dismissed with costs to the Defendant/Decree-holder.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**