



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 4 OF 2019

BENARD ODUOR RADIERAPPELLANT

VERSUS

FESTO OWINO OMOLLO1ST RESPONDENT

LAND REGISTRAR – SIAYA ... 2ND RESPONDENT

RULING

The Appellant filed a Notice of Motion application dated 13th March 2019 orders for a stay of execution of the judgment and decree delivered by Hon TM Olando (SRM) on 23rd January 2019 against the Appellant in Siaya PMC & E No. 126 of 2013 pending the hearing and final determination of the Appellant's appeal. The application is supported by an affidavit dated 13th March sworn by Benard Oduor Radier, the Appellant.

The Appellant avers that he instituted a land case Siaya PMC & E No. 126 of 2013 seeking nullification of parcels SIAYA/NYANDIWA/3818 and 3819 which were subdivisions from SIAYA/NYANDIWA/2022 which was ancestral land. That the 1st Respondent had transferred the original parcel into his name and fraudulently subdivided it. That the suit proceeded to full hearing and judgment finally delivered against the Appellant on 23rd January 2019.

The Appellant avers that he filed an appeal against the judgment on 22nd February 2019 and the same is yet to be heard. That the Defendant is now scouting for buyers to dispose of another portion of the suit property. The Appellant contends that he has a good and arguable appeal with a high probability of success and that should the stay of execution not be granted, the object of the intended appeal will be defeated and rendered nugatory. That the Appellant stands to suffer irreparable loss and damage in the event that the Respondents are not stopped from their illegal activities. That the Appellant is ready and willing to abide by any reasonable condition that the court directs.

1st Respondent's Preliminary Objection

In response to the application, the 1st Respondent filed a Preliminary Objection dated 28th March 2019 on the grounds that this court does not have any jurisdiction to take cognisance of, hear and determine the issues in the application and thus the application is an abuse of the process of the court which ought to be struck out with costs to the 1st Respondent.

Appellant's Submissions

Counsel for the Appellant reiterated that the 1st Respondent was in the process of scouting for buyers to dispose of the land in a manner which would be beyond the reach of the Appellant hence substantial loss may result if the stay was not granted.

Counsel submitted that the Appellant had an arguable appeal with a high probability of success as the Appellant was one of the beneficiaries of the estate of the registered owner of the original land parcel while the 1st Respondent was an intermeddler. That the Appellant was willing to provide security for the performance of the decree as the court may deem fit.

Counsel submitted that should the 1st Respondent dispose of the suit land, the appeal will turn into an academic exercise that will result in unenforceable orders. Counsel cited Order 40 Rule 1 (a) and (b) as well as **Robert Mugo Wa Karanja v Ecobank (Kenya) Limited [2019] eKLR**.

On the 1st Respondent's preliminary objection, Counsel submitted that under Order 42 Rule 6 of the Civil Procedure Rules, this court was

seized with the jurisdiction as the appellate court in the main appeal to entertain an application for stay.

1st Respondent's Submissions

Counsel for the 1st Respondent submitted that Order 42 Rule 6 and Order 42 Rule 3 of the Civil Procedure Rules strictly provided that an application for stay of execution pending appeal should be made before the court that issued the decree. Counsel also submitted that the Appellant filed his application for stay approximately 50 days after judgment was issued and this way past the statutory period required by the law.

Issues for Determination

1. Whether the court has jurisdiction to entertain the application

Order 42 Rule 6 (1) of the Civil Procedure Rules provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”

The implication of this provision is that so long as an appeal has been lodged against the orders of the lower court to this court, an application for stay of execution can be made to this court without a similar application having been first considered by the court appealed from.

Meoli, J in *Patrick Kalava Kulamba & another v Philip Kamosu and Roda Ndanu Philip (Suing as the Legal Representative of the Estate of Jackline Ndinda Philip (Deceased))* [2016] eKLR held that:

“12. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court “shall be at libertyto consider” an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed “original jurisdiction”. And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof...”

17. So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court.”

This court is therefore properly clothed with the jurisdiction to hear and determine this application.

2. Whether stay of execution should be granted

Order 42 Rule 6 (2) of the Civil Procedure Rules provides that:

- 2) No order for stay of execution shall be made under subrule (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.

The period between the delivery of the judgment on 23rd January 2019 and filing of this application on 13th March 2019 is not inordinate. The Appellant is also willing to furnish security as the court may order. The main basis of the appeal according to the memorandum of appeal is that the Learned Magistrate erred in finding that the original parcel was originally solely registered yet it was jointly registered; in failing to consider that the 1st Respondent never conducted succession in the estates of the registered owners of the original parcel; and in disputing the fact that the Appellant was related to the registered owners of the original parcel because he lived in Kisumu and not the subject land parcel. The issues raised in the appeal make a convincing case for an arguable appeal.

On the issue of whether substantial loss may result unless the order is made, there has been no denial by the 1st Respondent of the allegation that he is planning to dispose of the suit land, leading to the conclusion that on a balance of probability that the appeal could be rendered nugatory should the order for stay not be granted.

Therefore the order for stay of execution pending appeal should be, and is hereby granted with the Appellant furnishing the security of the value of Ksh 100,000 for the performance of the decree.

DATED AT KISUMU THIS 12TH DAY OF MAY 2020

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE