REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

APPEAL CASE NO 45 OF 2019

LAKE BASIN DEVELOPMENT AUTHORITY.....APPELLANT/APPLICANT

VERSUS

JOSEPH OCHIENG.....RESPONDENT

RULING

Applicant's case

Lake Basin Development Authority (hereinafter referred to as the applicant) comes to this court seeking a stay of the judgment and consequential decree of the orders issued on 21st May 2019 pending the hearing and determination of the appeal from the ruling therein.

The application is based on grounds that judgment was entered on 21st May 2019 against the appellant in terms of a declaration that the plaintiff was the lawful and legitimate owner of land parcel no Kisumu /Tonde/59.

The court further issued a permanent injunction against the defendants restraining her from entering, remaining upon or carrying on any form of work on the suit parcel of land. General damages were awarded at ksh 1,000,000. The applicant filed an application for review dated 15th August 2019 but was dismissed on 31st October 2019. The applicant has filed an appeal against the ruling. The applicant states that he has filed the application for stay pending appeal timeously and that he is likely to suffer substantial loss if stay is not granted. The applicant is ready to abide by any orders on security.

The gravamen of the applicants appeal is that the learned Magistrate misdirected himself in both law and fact in failing to find sufficient cause based on public interest, new and important evidence and errors apparent on the face of record which could have led him to arrive at a decision recalling or otherwise reviewing his judgment dated 21/5/2019.

On substantial loss the applicant states that the operations will be hampered.

Respondent's Case

The respondent states that he holds a valid title of the suit property having purchased it from Patrick Onyango Ochieng . The applicant was advised in the year 2012 by the Ministry of Lands that the suit parcel of land belonged to individuals and that it did not belong to the applicant. According to the respondent, the application is an appeal against the judgment of the lower court delivered on 21/5/2019 disguised as an appeal against the ruling dated 31/10/2019. There is no appeal against the judgment of the lower court. The judgment in the lower court was given on the 21st May 2019 whilst the application for review was filed on the 15th of August 2019 and the application in the lower court for stay of execution was filed on the 22nd of August 2019 and the ruling for all the applications was delivered on the 31st of October 2019. The respondent states that substantial loss does not arise.

ANALYSIS AND DETERMINATION

This application is brought under **order 42 rules 6** that provides:

> **"6. (1) 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".

(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. (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

The import of the above is that the application **should have been made without unreasonable delay. The applicant must demonstrate substantial loss and that he should be ready to deposit security**.

On whether the application has been brought ***without unreasonable delay***, I do find that the application was filed on the 9th December 2019 more than 37 days after the ruling of an application that had been filed under a certificate of urgency. A delay of 37 days is unreasonable in these circumstances and ought to have been explained.

On substantial loss, the appellant has merely claimed that he is likely to suffer, but has not demonstrated how he will suffer, substantial loss. The appellant has been in possession of the suit property for 5 years but has not told the court what he did with the land for the 5 years that if lost will amount to substantial loss.

In the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER –VS- AGNES NALIAKA CHESETO** the court held that:

"The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail..''

The court defined substantial loss as outlined above as factors which show that the execution of the judgment will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.

In the case of **JASON NGUMBA KAGU & 2 OTHERS –VS- INTRA AFRICA ASSURANCE CO. LIMITED** the High Court held that;

"The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal.

Even though many say that the test in the High court is not that of "the appeal will be rendered nugatory'', the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."

I do find the application unmeritorious and therefore the same is dismissed with costs. Orders accordingly.

DATED, DELIVERED and SIGNED THIS 8th 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