



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC APPEAL NO. 55 OF 2019**

**(Appeal From The Ruling And Order Of The Hon. J. Ong’ondo Principal Magistrate Of The Environment And Land, Magistrate’s Court-Siaya Law Court In Siaya Mc. E&L Case No. 69 Of 2019 Delivered On 28<sup>th</sup> November, 2019)**

**NEHEMIAH MWANDA ONYANGO.....APPELLANT**

**VERSUS**

**MAURICE ODUR ABUNY.....1<sup>ST</sup> RESPONDENT**

**WYCLIFFE OGOLA OCHIENG.....2<sup>ND</sup> RESPONDENT**

**WILLIAM OCHIENG OGWANT JUNIOR .....3<sup>RD</sup> RESPONDENT**

**WILLIAM ONYANGO OLOLO (Being sued as administrators of the estate of the late DOLROSA AKINYI OCHIENG).....4<sup>TH</sup> RESPONDENT**

**RULING**

**APPELLANT’S CASE**

Nehemiah Mwanda Onyango, (Appellant) brings this application dated 16/1/2020 against Maurice Oduor Abony and 3 others (Respondents) praying that pending hearing and determination of the appeal filed herein this honourable court be pleased to issue an order of temporary injunction against the 1<sup>st</sup> defendant/respondent, his agents assigns and/or employees from constructing and/or continuing construction of any structure, permanent or otherwise, selling, disposing off, charging land parcel no. central alego/hono/1560. The costs of this application be provided for.

The application is based on grounds that the Appellant/Applicant purchased the Suit Property sometime in August 2011. That the Appellant/Applicant was defrauded of the suit property CENTRAL ALEGO/HONO/1560.

The appellant was defrauded of the suit property in that an unconfirmed administratrix of the late William Ochieng Ogwang’s estate purportedly sold the land Central Alego/Hono/1560 to 4<sup>th</sup> Respondent who purportedly sold to the 1<sup>st</sup> respondent.

It is arguable that the lower court magistrate Honourable Mbulika and Hon. Shinyanda did not hear the appellant and more so that their pecuniary jurisdiction were way below the value of the subject matter as such res judicata doctrine could not apply.

It is arguable that an unconfirmed administratrix purportedly sold the suit land to the 4<sup>th</sup> respondent the core point being whether that could pass the valid title under the law.

The Appellant/Applicant filed a suit in the Siaya Magistrate’s Court being No. ELC 69 of 2019 to claim the land back, but the same was dismissed before going to full hearing.

The 2<sup>nd</sup> and the 3<sup>rd</sup> Respondent have undertaken to reimburse the Appellant/Applicant all the purchase money and the legal expenses.

The 1<sup>st</sup> Respondent has fenced the suit property has constructed a temporary structure and has started constructing a permanent house.

There is every likelihood and probability that the 1<sup>st</sup> respondents will charge and/or dispose of the property being a property developer to the Appellant/Applicant's detriment.

The Appellant/Applicant will suffer irreparable loss that cannot be adequately compensated by an award in damages if an injunction or preservation of the suit property, as sought against the 1<sup>st</sup> Respondent is not granted.

The intended appeal will be rendered nugatory in the event the orders sought are not granted.

The Appellant/applicant has a cogent appeal with a high probability of success.

This application is made timely, in good faith and for the ends of justice.

That in the event this application is not granted, then the applicant will irreparably suffer loss and prejudice.

### **RESPONDANTS CASE**

The 4<sup>th</sup> respondent on his part contends that the Court in Siaya E& L Case number 69 of 2019 rightfully held that the applicant's suit was res judicata and subjudice but the applicant hastily withdrew the appeal in Kisumu High Court succession cause of 2018. The 4<sup>th</sup> respondent contends that the applicant has never given evidence of purchase of the suit property from the deceased William Ochieng Ogwang. The issue of the purchase price was substantially dealt with by the Chief Magistrates court in Succession Cause number 195 of 2016. The respondent purchased the property from the administratrix of the estate of the deceased. The property was transferred to the administratrix before transfer to the 4<sup>th</sup> respondent. The 4<sup>th</sup> respondent contends that he complied with the legal requirements for transfer of land and the suit property was transferred to his name.

### **ANALYSIS AND DETERMINATION**

The application herein is brought under Order 40 rule 1 that provides:

**“1. Where in any suit it is proved by affidavit or otherwise—**

**(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or**

**(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”**

This is an appeal and therefore **Order 40 rule 1** is not applicable. The applicable **order is 42 rule 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.

**Article 159 (2) (d) of the Constitution of Kenya 2010** requires the court to deliver substantive justice hence I will not dwell on the technicality of the provisions of law.

**Order 42 rule 6** provides for conditions for grant of a stay of execution pending appeal or temporary injunction pending appeal. The application **should have been made without unreasonable delay. The applicant must demonstrate substantial loss and that should be ready to deposit security.**

On whether the application has been brought ***without unreasonable delay***, I do find that a delay of 25 days is not unreasonable delay in the circumstances.

On substantial loss, the appellant has not demonstrated substantial loss. The appellant has not been in possession of the suit property and

therefore he cannot lose where he has not invested. Moreover, he can be refunded the purchase price if he proves that he paid.

In the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011 JAMES WANGALWA & ANOTHER –VS- AGNES NALIKA 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.”**

**In this case the appeal will not be rendered nugatory if the appellant succeeds as he can be compensated by being refunded the purchase price.**

The upshot of the above is that the application is dismissed.

Orders accordingly.

**DATED, DELIVERED and SIGNED THIS 8<sup>th</sup> 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**