



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 598 OF 2017

(FORMERLY KISII ELC CASE NO. 70 OF 2011)

NELSON NYAMACHE OBUBA.....PLAINTIFF/APPLICANT

VERSUS

ITIRA MOKONO NYAMBWATANIA.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 17th October 2018 and filed in court on the even date pursuant to Order 42 Rule 6 of the Civil Procedure Rules, 2010 (the application herein), the plaintiff, Nelson Nyamache Obuba (the applicant) through Orare and Company Advocates, is seeking the following orders;

i. Spent

ii. Spent

iii. That pending the lodging, hearing and determination of the applicant's intended appeal, there be a stay of the judgment and order delivered herein on 25th day of September 2018 by the Honourable Justice G.M.A Ongondo.

iv. That the costs of this application be provided for.

2. The application is premised on grounds A to M set out on its face, a 15-paragraphed supporting affidavit of the applicant filed on even date as well as a copy of the judgement and a copy of the Notice of Appeal annexed to affidavit and marked as "A" and "B" respectively. The applicant deposed, inter alia, that he was unrepresented at the time of delivery of the judgement hence could not apply for the orders sought in this application. That he has commenced appeal process by way of document marked as "B" and that the appeal may be rendered nugatory should the respondent proceed to execute the decree which was extracted contrary to Order 21 Rule 8 of the Civil Procedure Rules, 2010. That he is ready and willing to comply with any conditions imposed by the court in compliance with the stay orders sought in the application which has been brought expeditiously.

3. In his six (6) paragraphed replying affidavit sworn on 6th November 2018 and filed in court on 7th November 2018, the defendant, Itira Mokono Nyambwatania (the respondent) through Kerario Marwa and Company Advocates, deposed, inter alia, that the applicant has not given reasons for the stay of execution of the decree. That the same are not discernible from the grounds of the application and the supporting affidavit herein.

4. The respondent further deposed at paragraphs 4 and 5 thus:-

a) That I know of my own knowledge that I cannot dispose off my land because the applicant is preferring an appeal so his appeal cannot be rendered nugatory.

b) That I sincerely believe that the applicant should just proceed with his appeal and if he succeeds, the land in issue will be there for him to return to.

5. The parties argued the application by way of written submissions pursuant to orders of this court made on 2nd October, 2019; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33(a) and (b) of the Environment and Land Court Practice Directions, 2014.**

6. By his submissions dated 7th November 2019 and filed in court on 11th November, 2019, learned counsel for the applicant urged this court

to allow the application on just and fair grounds. Counsel submitted that they are properly on record and that they have discharged the requirements of Order 42 Rule 6 (supra). Counsel relied on the High Court of Kenya decision in **Amal Hauliers Ltd –vs- Abdulnasir Abukar Hassan (2017)eKLR** and the Court of Appeal decision in **Butt –vs- Rent Restriction Tribunal (1982)KLR 417** regarding the conditions for stay of judgement and discretionary powers of the court respectively.

7. In his submissions dated 10th May 2020 and filed on 11th May, learned counsel for the respondent, too, cited **Order 42 Rule 6 (supra)**, **Canvass Manufacturers Ltd –vs- Stephen Reuben Karunduru (1994) LLR 4853** and **Stephen Wanjohi –vs- Central Glass Industries Ltd NBI HCCC No 6726 of 1991** on the conditions for stay of judgement. Counsel submitted that the applicant has not met the prescribed conditions and urged this court to dismiss the application with costs.

8. I have duly considered the entire application, the replying affidavit and the rival submissions including the authorities cited therein. The application is mounted under **Order 42 Rule 6 (supra)** which provides.

“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.” (Emphasis mine)

9. As regards substantial loss, the attention of this court is drawn to grounds (j) and (k) of the application. The same are reinforced by paragraphs 11 and 12 of the applicant’s supporting affidavit which show the likely substantial loss to the applicant, if the orders sought in the application are not granted.

10. With regard to delay, the applicant filed a Notice of Appeal dated 8th October 2018. The same is annexed to the application. This court not unconscious of a maxim in equity: Delay defeats equity. Indeed, Article 10 (2) of the Constitution 2010 anchors equity as one of the national values and principles of governance.

11. I take into account **Section 57 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya and Order 50 Rule 8 Civil Procedure Rules 2010** with regard to computation of time. Quite clearly, judgement herein was rendered on 25th September 2018 while the present application was generated on 17th October, 2018. Thus, the application was filed timeously as shown at paragraph 14 of the supporting affidavit.

12. On the issue of security, the applicant deposed at paragraph 10 of his supporting affidavit as follows:-

“That in the circumstances the applicant Appeal will be rendered nugatory should the respondent proceed with execution of the decree. The respondent will not suffer prejudice should the orders sought herein be granted. The plaintiff has always had possession of the suit premise and is still in possession. The applicant is willing and ready to comply with any conditions imposed by the court in compliance of the stay orders sought herein.” (Emphasis supplied)

13. The applicant asserted that the grant of the orders sought in the application are discretionary as held in **Butt Case (supra)**. That the intended appeal may be rendered nugatory if the application is refused as observed in the case of **David Morton Silverstein –vs- Atsango Chesoni (202)eKLR**.

14. In the obtaining scenario, has the applicant satisfied the threshold for the grant of orders sought in the application? In **Trust Bank Ltd –vs- Ajay Shah and 3 others (2012)eKLR at 22**, it was held that:

“The conditions set out in Order 42 Rule 6 (2)(a) and (b) are cumulative. All the three must be satisfied before a stay can be granted……”

15. The orders sought in the application are preservatory in nature. Section 13 (7) (a) of the Environment and Land Court, 2015 (2011) makes provision for interim preservation orders. In the case of **Board of Governors, Moi High School, Kabarak and another –vs- Malcolm Bell Civil Application Nos 12 and 13 of 2013 (2013)eKLR**, the Supreme Court of Kenya held that the court has authority to issue orders for the preservation, in the interim, of a subject matter of appeal.

16. It is trite law that grant of stay of existing orders cannot be a matter of course. It rests upon genuine conditions, grounds, merit and dispatch; see **Malindi Law Society of Kenya –vs- Law Society of Kenya Nairobi Branch and 5 others Civil Application No. 20 of 2017 (2017)eKLR**.

17. To that end, it is the finding of this court that the applicant has attained the trio cumulative conditions for the grant of orders sought in this application which is hardly opposed by the respondent. The application is full of merits.

18. Accordingly, I allow the application dated 17th October 2018 and filed in court on even date in terms of order three (3) sought therein. Costs of the application to abide the outcome of the intended appeal.

19. The applicant shall file a complete record of appeal at the Court of Appeal within the next 30 days from this date in default, these orders

shall lapse.

20. It is so ordered.

Delivered, Signed and Dated at Migori through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 11th day of JUNE , 2020.

G.M.A. ONGONDO

JUDGE

In presence of:-

Mr. Nyangi learned counsel for the defendant/respondent

No appearance for the plaintiff/applicant

Court Assistant – Tom Maurice