



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MIGORI

ELC CASE NO 342 OF 2017

(FORMERLY KISII E.L.C CASE NO. 493 OF 2013 CONSOLIDATED WITH E.L.C CASE NO. 475 OF 2013)

FRANCIS OGOLA AMOTH.....1ST APPLICANT/DEFENDANT

PETER OSORE.....2ND APPLICANT/DEFENDANT

DANIEL OYUGA.....3RD APPLICANT/DEFENDANT

GABRIEL ODONGO.....4TH APPLICANT/DEFENDANT

MARGARET OPONDO.....5TH APPLICANT/DEFENDANT

-VERSUS-

**ALOYCE ODHIAMBO DULO (suing as the legal representative of the estate of
DOMINIC DULO OWUOR (DECEASED))**

ISABEL OMOLO DULO.....1ST PLAINTIFF/RESPONDENT

GEORGE OMOLO DULO.....2ND PLAINTIFF/RESPONDENT

MICHAEL OUMA DULO.....3RD PLAINTIFF/RESPONDENT

PIUS OKUKU DULO.....4TH PLAINTIFF/RESPONDENT

RULING

1. This ruling is with regard to an application by way of Notice of Motion dated 27th December 2019 mounted under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya (The application herein). The applicants are seeking the following orders:

a) Spent

b) That, there be orders staying the execution of this court's judgement issued on 10th December 2019 pending the intended appeal.

c) That, this Honourable Court be pleased to lift orders or decree arising from said judgement pending the intended appeal.

d) That the costs of this application be in the cause.

2. The application is anchored on eight (8) grounds set out on its face and a 13-paragraphed supporting affidavit sworn on even date by Francis Ogola Amoth, the 3rd defendant (the 3rd applicant) for and on behalf of the 2nd to the 5th applicants in the application. On that basis, the 3rd applicant deposed, inter alia, that applicants are next of kin and administrators of the estate of Dominic Dulo Owuor (Deceased) hence they are automatically constructive trustees thereof. That unless the orders sought herein are granted, the plaintiffs/respondents may execute the judgement of this court rendered on 10th December 2019 and the subsequent decree at the detriment of the applicants. That therefore applicants' intended appeal may be rendered nugatory and expose them to great suffering and prejudice.

3. The 1st to 5th plaintiffs (The respondents) through the firm of O. M Otieno and Company Advocates, opposed the application and sought its dismissal with costs. By a 15-paragraphed replying affidavit sworn on 29th February, 2020 and filed in court on 2nd March 2020 by the 1st respondent namely Aloyce Odhiambo Dulo, the respondents stated in part that the applicants were afforded an opportunity to present their evidence before this court. That the suit was heard and judgement delivered in favour of the respondents who are entitled to the fruits of the judgement.

4. The respondents further stated that the present application is devoid of merits and an abuse of the process of this court. The respondents also stated that the application has been brought with unreasonable delay, no security has been offered for the due performance of the decree and that the respondents have not demonstrated that they shall suffer any substantial loss to warrant the orders sought in the application.

5. On 2nd March 2020, this court directed and ordered that the application be argued by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction Number 33 (a) of the Environment and Land Court Practice Directions, 2014.**

6. In their submissions dated 4th May 2020 and filed in court on 13th May 2020, the applicants gave a brief background of the application and the orders sought therein. They identified four (4) issues for determination including whether the intended appeal has chances of success and whether the applicants have met the grounds of stay of execution pending the intended appeal. The applicants relied on section 3 (3) of the Law of Contract Act Cap 23 Laws of Kenya, the case of **James Maina Kinya-vs-Gerald Kwendeka aka Gerald Michael Kwendeka (2017)eKLR as well as the decision in Silverstein-vs-Chesoni (2002) 1KLR 867** and analysed the issues for determination in favour of the grant of orders sought in the application.

7. On their part, the respondents' counsel filed submissions dated 19th May 2020 whereby reference was made to the consolidated suits and the judgement delivered on 10th December 2019 herein. Counsel framed and argued issues for determination in the negative. The issues are whether: the applicants have met the requirements for stay of execution of the decree pending the intended appeal as sought in the application, there is an appeal or intended appeal on record, the intended appeal is arguable, the applicants will suffer substantial loss should the court not grant the orders sought in the application and security has been offered as prescribed by the law.

8. To buttress the said submissions, counsel cited **Order 42 Rule 6 (supra), Cooperative Bank of Kenya Ltd-vs-Banking Insurance and Finance Union (Kenya)(2015) eKLR**, Rules 81 and 83 of the Court of Appeal Rules, section 3 (3) of the Law of Contract Act (supra), **John Odongo-vs-Joyce Irungu Muhatia (2019) eKLR, Mohammed Salim t/a Choice Butchery-vs-Nasserpuvia Memon Jamat (2013)eKLR and Equity Bank Ltd-vs-Taiga Adans Company Ltd (2006) eKLR.** Counsel thus urged this court to dismiss this application with costs for want of merit.

9. I have thoroughly considered the entire application, the response thereto and the rival submissions including all the authorities cited therein. So, have the applicants satisfied the settled conditions for the grant of the orders sought in the application?

10. The application is brought under some provisions of the law including Order 42 Rule 6 (2)(supra) which reads:

“No order for stay of execution shall be made under sub rule (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 supplied)

11. Regarding the condition of substantial loss, the applicants contended that the respondents may execute the judgment and /or decree at their detriment. That they are likely to suffer great suffering and prejudice in respect of the suit property LR No. Lambwe East/151, if the orders sought in the application are not granted.

12. On their part, the respondents asserted that the applicants have not shown the damage or loss likely to be suffered by them if the orders sought in the application are not granted. That the grant of the orders sought herein would deny them, if successful, the fruits of their judgement; see **Mohamed Salim case (supra) and Kenya Shell Ltd -vs- Benjamin Karuga Kabiru and another (1986) eKLR.**

13. In that regard, is it merely sufficient for the applicants to state that they are likely to suffer substantial loss if this application is not allowed? In the case of **Mukoma-vs- Abuoga (1988) KLR 645**, it was held that in the absence of any evidence of substantial loss likely to be suffered by the applicant, the orders of stay of execution are sought in a vacuum. Quite plainly, the applicants have failed to advance sufficient evidence in support of likely substantial loss in the present circumstances.

14. On the condition of unreasonable delay, it is noted that judgement was rendered in this suit on 10th December 2019 while the application was originated on 30th December 2019. I take into account **section 57 of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya and Order 50 rules 2, 3 and 4 of the Civil Procedure Act Chapter 21 Laws of Kenya** on computation of time.

15. **Article 10 (2)(b) of the Constitution of Kenya, 2010** stipulates the national values of principles of governance including equity. I do not lose sight of the maxim, delay defeats equity. In the prevailing scenario, I find that the applicants initiated this application with promptitude.

16. The third condition is whether the applicants have offered any security for the performance of the decree in this application, Clearly, the applicants neither gave nor undertook to offer security or at all thereof.

17. In **Trust Bank Ltd-vs-Ajay Shah and 3 others (2012)KLR 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. The appellants only satisfied one condition and failed to satisfy the others.....

“As regards security for the performance of the decree, no security has been offered by the plaintiff...”

18. It is trite law that this court has authority to issue orders for the preservation, in the interim, of a subject matter of appeal; see the Supreme Court of Kenya decision in the **Board of Governors Moi High School Kabarak and another-vs- Malcom Bell Civil Application Nos 12 & 13 of 2013**.

19. In the case of **Malindi Law Society of Kenya Branch-vs-Law Society of Kenya Nairobi Branch and 5 others Civil Application Number 20 of 2017 (2017) eKLR**, it was held that grant of stay of existing orders cannot be a matter of course. It rests on genuine conditions, grounds, merit and dispatch.

20. In the present matter, the applicants have satisfied only the condition regarding delay as set out in **Order 42 rule 6 (supra)**. The two conditions have not been attained for the grant of the orders sought in the application.

21. To that end, it is the finding of this court that the application dated 27th December, 2019 and filed in court on 30th December 2019 is devoid of merits. The same is hereby dismissed with costs to the respondents.

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 prevailing Corona Virus pandemic, this 3rd day of JUNE , 2020.

G.M.A. ONGONDO

JUDGE

In the presence of :-

1st Applicant/defendant – Present

Court Assistant - Tom