



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
CIVIL APPEAL NO.26 OF 2015

JOHN ASUKE ODONGO.....1st
APPLICANT

ENOCK OGADA.....2ND
APPLICANT

JARED O. ASUKE.....3RD
APPLICANT

MONICA AKOTH ODONGO.....4TH
APPLICANT

LEONIDA LIECH ACHIENG.....5TH
APPLICANT

CALEB ODERA

ACHIENG.....6THAPPLICANT

JACOB OMER ACHIENG.....7TH
APPLICANT

JENIFA OYARO OWUOR.....8TH
APPLICANT

PHILIP OTIENO OWUOR.....9TH
APPLICANT

OBUYA OWUOR.....10TH
APPLICANT

ISAYA O. OWUOR.....11TH
APPLICANT

SIMON OUMA OWUOR.....12TH
APPLICANT

G. OMONDI ASUKE.....13TH
APPLICANT

SAMUEL O. ASUKE.....14TH
APPLICANT

VELEIUS OBURA ONDITI.....15TH
APPLICANT

PETER ONYANGO ONDITI.....16TH
APPLICANT

VERSUS

MATHEW ODONGO OGWANG.....1ST
RESPONDENT

GILBERT HESBON ODONGO.....2ND
RESPONDENT

(Suing on behalf of ODONGO OWAA CLAN)

RULING

1. John Asuke Odongo, Enock Oganda, Jared O. Asuke, Monica Akoth Odongo, Leonida Liech Achieng, Caleb Odera Achieng, Jacob Omer Achieng, Jenifa Oyaro Owuor, Philip Otieno Owuor, Obuya Owuor, Isaya O. Owuor, Simon Ouma Owuor, G. Omondi Asuke, Samuel O. Asuke, Veleius Obura Onditi, and Peter Onyango Onditi, hereinafter referred to as the 1st to 16th Applicants respectively, filed the notice of motion under certificate of urgency dated 11th May 2015 against **Mathew Odongo Ogwang, Gilbert Hesbon Odongo (Suing on behalf of **Odongo Owaa clan**) hereinafter referred to as 1st and 2nd Respondents respectively seeking for stay of execution of the decree in Winam **PMCC NO.119 of 2011** pending the hearing of the appeal filed herein. The application is based on the ground that the appeal is meritorious and if stay is not granted the Applicants stand to suffer irreparable loss. The Application is supported by the affidavit sworn by **John Asuke Odongo**, the 1st Applicant, on 11th May 2015. He among others depones as follows:**

a) That the Applicants were after the adjudication exercise registered as owners of Land parcels **Kowino Adjudication Section Nos, 2943, 2944, 2945, 2947, 2948, 2949, 2954, 2981, 2982, 2984, 3007, 3008, 2697 and 3698.**

b) That the Respondents filed **Winam PMCC NO.119** of 2011 claiming the suit parcels and Judgment was entered in their favour. That thereafter the Respondents invaded the parcels and shared them among themselves and intends to start cultivation.

c) That the Respondents are likely to execute the decree and have the parcels transferred to themselves and unless stay orders are granted the appeal will be rendered nugatory and they will suffer irreparable loss.

2. The Respondents opposed the application through the replying affidavit sworn by Mathews Odongo Ogwang, the 1st Respondent, on 2nd June 2015 in which he among others deponed as follows:

a) That the Applicants did not make oral or formal application of stay before the trial court and that decree has since been executed and the parcels transferred to the Respondents.

b) That the stay orders cannot be granted as the court will be acting in vain.

3. The appellants counsel moved the court ex parte on 19th May 2015 and the application was certified urgent and temporary order of stay pending the interpartes hearing of the application was granted. The counsel for the parties then appeared before the court on 3rd June 2015 and directions were given that

they file written submissions on the application. The, Applicants counsel filed theirs dated 8th October 2015 while the Respondents counsel filed theirs dated 10th October 2015. The summary of the submission are as follows:

a) **Applicants submissions:**

That if the decree is executed the Applicants registration with the suit lands will be cancelled and the parcels registered in the names of the Respondents who may dispose of them. This would render the appeal nugatory and occasion the Applicants irreparable loss. That the appeal was filed on 13th April 2014 and the application on 18th May 2015 and there was therefore no unreasonable delay as the judgment of the trial court had been delivered on 30th March 2015. That the Appellants have no intention to dispose the suit property and will ensure it remains in their names pending the hearing and determination of the appeal.

b) **Respondents submissions**

That upon the trial court delivering its judgment, the Appellants did not seek for stay orders. Thereafter the Respondents obtained the decree and executed the same. That the suit lands are now in the names of the Respondents. That the orders sought cannot be granted as the execution has been completed. The counsel referred the court to the decision in the case of **Socfinac Company Limited -V- Nelphat Kamotho Muturi [2013] eKLR.**

4. The court has considered the grounds on the notice of motion the affidavit evidence and submissions by counsel and concluded as follows:

- a. That the application is brought under **Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.** The provision of **Section 3A of the Civil Procedure** invokes the courts inherent powers while **Order 42 Rule 6(1) of Civil Procedure Rules** provides for the issuance of stay orders by the trial and appellate courts. That an Applicant is under **sub rule 6(2)** required to show that he/she has not delayed unreasonably in filing the application, that unless the application is granted he/she would suffer irreparable loss and should offer to provide security for the performance of the decree.
- b. That both parties are in agreement that the trial court's judgment was delivered on 30th March 2015. This is also confirmed by the copy of the judgment annexed to the supporting affidavit. It is also clear that though the appeal was filed on 13th April 2015, it was not until the 18th May 2015 that the notice of motion dated 11th May 2015 was filed. The appellants have stated that they did not delay unreasonably in filing the application which was failed in 40 days after the judgment. That period may not ordinarily appear long or unreasonable but the Respondents have indicated that by then the decree sought to be stayed had been wholly executed and therefore there is nothing to stay. The Appellants did not attach copies of the suit land ownership to their application to confirm to the court who the registered proprietors were at the time of file the application. The Respondents did not also attach any copies of the suit land to their replying affidavit to confirm, that indeed they had been registered under their names following the trial courts decree. That as the Appellants have filed their appeal, they have reasonable grounds to be apprehensive that the Respondents may execute the decree and transfer the suit lands to their names. If that has happened, the Appellants concern that the Respondents may dispose the suit land, while the appeal is still in court is a genuine concern. Such an occurrence would lead to great complications and expenses in case the Appellants were to be successful in the appeal. Though the Appellants have not offered any explanation as to why no application for stay orders were made to the trial court upon delivery of the judgment on 30th March 2015 or a formal application made to that court soon after that or why the application for stay was not filed at the same time with the appeal, the need to secure the suit lands from disposition pending the hearing and determination of the appeal cannot be gain said. This would ensure that the suit properties are still available for the party who succeeds on the appeal.
- c. That this is a suitable case where an order of inhibition in terms of **Section 68 of the Land**

Registration Act should issue to secure the legal status of the suit properties pending the hearing and determination of the suit properties irrespective of the persons in whose names they are currently.

5. That having found as above, the court on its own motion issues an inhibition order **under Section 68 of the Land Registration Act No.30 of 2012** against all the suit properties herein and or the subdivisions thereof, if any, pending hearing and determination of the appeal. The costs will be in the cause.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **02nd day of March 2016**

In presence of;

Appellants 16th Only present

Respondents Absent

Counsel Mr Omondi for Kowino for Appellants.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

02/3/2016

2/3/2016

S.M. Kibunja J

Oyugi court Assistant

16th Applicant present

Mr Omondi for Kowino for Applicants

The Respondent counsel absent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

02/3/2016

Court: Ruling delivered in open court in presence of the 16th Applicant and Mr Omondi for Kowino for Applicants.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

02/3/2016