



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO 1130 OF 2016 (O.S)

(FORMERLY HCCC NO. 119 OF 2010)

RHODA MONGINA ONDORO.....1ST RESPONDENT

THOMAS ONDORO.....2ND RESPONDENT

MARGARET ONDORO.....3RD RESPONDENT

VERSUS

JOHNSTONE NYANYUKI MENGE.....APPLICANT

RULING

INTRODUCTION

1. The Applicant moved the court by way of Notice of Motion dated 16th December 2019 seeking the following orders:

a) Spent

b) Pending the hearing and determination of the instant application, the Honourable court be pleased to grant an interim order of stay of execution and/or implementation of the judgment and decree herein dated 9th October 2019 albeit delivered on the 23rd day of October 2019 with a view to ensuring and/or maintaining the status quo over and in respect of a portion measuring 12 acres and 2 acres in LR. No. GESIMA SETTLEMENT SCHEME /337 and 343 respectively.

c) Further and in the alternative and without prejudice to the foregoing and pending the hearing and determination of the instant application, the honourable court be pleased to grant an order of injunction restraining the Respondents herein from inter alia entering, upon and/or taking possession of the portions measuring 12 acres and 2 acres in LR. No. GESIMA SETTLEMENT SCHEME /337 and 343 respectively which were the subject of the instant suit before this honourable court.

d) Further and in the alternative, and without prejudice to the foregoing and pending the hearing and determination of this application, the honourable court be pleased to grant an order of inhibition, inhibiting any dealings and/or transactions over and/or in respect of LR. No. GESIMA SETTLEMENT SCHEME /337 and 343 and in particular the portions measuring 12 acres and 2 acres respectively. Which are the subject of the instant suit before this honourable court.

e) The Honourable court be pleased to grant an interim order of stay of execution and/or implementation of the judgment and decree herein dated 9th October 2019 albeit delivered on the 23rd day of October 2019 with a view to ensuring and/or maintaining the status quo over and in respect of a portion measuring 12 acres and 2 acres in LR. No. GESIMA SETTLEMENT SCHEME /337 and 343 respectively pending the hearing and determination of the Intended Appeal to the Court of Appeal

f) The honourable court be pleased to grant an order of injunction restraining the Respondents herein from inter alia entering, upon and/or taking possession of the portions measuring 12 acres and 2 acres in LR. No. GESIMA SETTLEMENT SCHEME /337 and 343 respectively which were the subject of the instant suit before this honourable court pending the hearing and determination of the Intended Appeal to the Court of Appeal

g) The honourable court be pleased to grant an order of inhibition, inhibiting any dealings and/or transactions over and/or in respect of LR. No. GESIMA SETTLEMENT SCHEME /337 and 343 and in particular the portions measuring 12 acres and 2 acres respectively. Which are the subject of the instant suit before this honourable court pending the hearing and determination of the Intended Appeal to the Court of Appeal.

h) The honourable court be pleased to grant such further or other orders as may be deemed just, appropriate and/or expedient.

i) The costs of this application abide the appeal.

2. The application is based on the grounds stated in the Notice of Motion and the supporting affidavit of Johnstone Nyanyuki Menge, the Applicant herein sworn on 16th December 2019 and his Supplementary affidavit sworn on 27th January 2020. In the said affidavit the Applicant deposes inter alia that he intends to appeal against the judgment delivered on 23.10.2019 and in that regard he has filed a Notice of Appeal dated 31.10.2019 and applied for a certified copy of the proceedings. He further deposes that following delivery of the judgment, the Respondents have, with a view to executing the judgment commenced to fence the portions of the suit property developed by the Applicant and are intent on denying the Applicant access to the said portion where he has been plucking tea leaves. He deposes that if the Respondents take possession of the said portions of the suit property, his appeal will be negated and he will suffer substantial loss. He avers that conversely the Respondents would not suffer any prejudice if the orders of stay are granted as they would still be able to recover vacant possession of the suit property in the event that the appeal is dismissed.

3. The application is opposed by the Respondents through the replying affidavit of Rhoda Mongina Ondoro, the 1st Respondent herein sworn on the 22nd January 2020 in which she deposes that there is nothing to be stayed as the court dismissed the Applicant's suit with costs. This being a negative order, the only thing that remains is for the Respondents to pay costs and the Applicant has not demonstrated that if the said costs are paid and the appeal succeeds, the Respondents will be unable to refund the same. She deposes that the Applicant has not demonstrated that he has an arguable appeal as he failed to demonstrate that he is in adverse possession.

4. The application was canvassed by way of written submissions and both parties filed their submissions in which they cited various authorities to support their arguments.

ISSUES FOR DETERMINATION

5. Having considered the application, rival affidavits and the parties' submissions the only issue for determination is whether the Applicant is entitled to an order of stay of execution or injunction pending appeal.

6. In his submissions learned counsel for the Applicant cited the cases of **Malcom Bell v Daniel Toroitich Arap Moi (2013) eKLR, Reliance Ltd v Norlake Investments EALR (2002) 1E.A 227 and Governors Balloon Safaris Ltd v Skyship Co Ltd & Another Civil Appeal No. 32 of 2015** for the proposition that in an application for stay pending appeal the Applicant must demonstrate that he has an arguable appeal and that if the application is not granted, the appeal will be rendered nugatory. Counsel further submitted that the Applicant has developed portions of the suit property which he relies on for his livelihood and therefore if an order of stay is not granted, he will suffer substantial loss which cannot be compensated by way of damages by the Respondents, whose economic income is not known. I must observe that the issue of the Respondents economic status was never raised in the Applicant's affidavit.

7. On his part learned counsel for the Respondents relied on the Replying affidavit and submitted there is nothing to stay as the court merely dismissed the Applicant's suit with costs. He relied on the case of **Nairobi Metropolitan PSV SACCOS Union Ltd & 25 Others v County of Nairobi Government (2014) eKLR, Republic v Kenya Wildlife Service & 2 Others Civil Application No. 2 of 2007 and Mary Wanjiku Kamonde v Daniel Muriithi Kerugoya ELCA No. 6 of 2015** for the proposition that where there is no positive and enforceable order, the court cannot grant an order of stay or injunction. In other words, it is not possible to grant an order of stay of "execution" or "implementation" where the action has been dismissed as was held in **Marangu Rucha & Another v Attorney General & 10 Others (2014)eKLR**.

8. Similarly, in the instant suit, the court dismissed the Applicant's suit for adverse possession. The court did not order any party to do or refrain from doing anything. Therefore, there is nothing which can be executed except payment of costs. In the circumstances, an order for stay cannot be granted.

9. The Applicant also seeks an order of injunction restraining the Respondents from taking possession of the suit property pending appeal. This aspect of his application is brought pursuant to Order 40 rules 1 and 2 of the Civil Procedure Rules.

10. Unlike the Court of Appeal which may exercise jurisdiction under rule 5 (2) (b) of the Court of Appeal Rules to grant an injunction in order to preserve the subject matter of the appeal, the power donated to this court under order 40 rules 1 and 2 of the Civil Procedure Rules to issue temporary injunctions limits those powers to the court's original jurisdiction "until the disposal of the suit or until further orders" In the case of **Western College of Arts and Applied Sciences v Oranga & Others 1976-78 at page 81** the Court observed that:

"The High Court has no specific power to issue a temporary injunction in connection with an order for stay of execution of a decree or order which is the subject of an appeal to the High Court"

11. In view of the foregoing, I find and hold that the application lacks merit and it is dismissed with costs to the Respondents.

Dated, signed and delivered via video link this 28th day of July 2020.

J.M ONYANGO

JUDGE