



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO 82 OF 2018

FORMERLY KISII ELC CASE NO. 212 OF 2014)

GEOFFREY SURE OGADA

(Suing as the administrator of the estate

of JOSHUA OGADA OGONDA(Deceased).....PLAINTIFF

-VERSUS-

REUBEN OTIENO DISI.....1ST DEFENDANT

KARILUS ODIE.....2ND DEFENDANT

DISTRICT LAND REGISTRAR MIGORI.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4th DEFENDANT

RULING

1. By a Notice of Motion dated 27th December 2019 and filed in court on 30th December 2019 mounted under Order 42 Rule 6 and Order 22 Rule 25 of Civil Procedure Rules, 2010 and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, (Cap 21 Laws of Kenya), (Hereinafter referred to as the application), Reuben Otieno Disi and Karlus Odie, the 1st and 2nd defendants respectively (the 1st and 2nd applicants herein), who appear in person are seeking the orders as follows:

I. That, there be orders staying the execution of this court's judgement issued on 3rd day of December, 2019 pending the determination of the intended appeal.

II. That this Honourable Court be pleased to lift orders or decree arising from the said judgement pending the determination of the intended appeal.

III. That the costs of this application be in the cause.

2. The application is anchored on grounds 1 to 11 set out on its face and supported by an affidavit of even date sworn by the 1st applicant together with the accompanying copies of green cards marked as "ROO1" and "ROO2" for the mother parcel of land namely LR No. Kanyamkago Kawere I/697 and the resultant subdivisions respectively. Briefly, the appellants contend inter alia, that this court's judgement rendered on 3rd December 2019 is unjust and inequitable as the same vests the suit land born out of the mother parcel of land on the plaintiff/respondent who did not follow the laid down procedure in its acquisition. That if the orders sought in this application are not allowed, a decree arising from the judgement may be executed at the detriment of the 1st and 2nd applicants.

3. In his 13-paragraphed replying affidavit sworn on 28th February 2020 and filed in court on 2nd March, 2020, the respondent through his counsel Ndeda and Associates Advocates, opposed the application. He deposed, inter alia, that the application does not conform with Order 42 Rule 6 (supra) under which it is filed. That the same is meant to deny him the fruits of his judgement and that it is a waste of time and should be dismissed with costs.

4. The application was argued by way of written submissions pursuant to this court's order of 2nd March, 2020; 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.

5. In their 9-paged submissions dated 4th May 2020 and filed in court on 12th May 2020, the 1st and 2nd applicants gave the background of the matter, identified four (4) issues for determination including whether or not the applicants have met the grounds for the grant of orders sought in the application and urged this court to grant the orders in the peculiar circumstances herein. That they have demonstrated sufficient reasons for the grant of the orders in order to guarantee justice of the case.
6. To fortify their submissions, the applicants made reference to Section 103 (1) and (2) of the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act), Section 6 (1) of the Land Control Act Chapter 302 Laws of Kenya and Order 42 Rule 6 (supra). They also cited **Macharia Mwangi Maina and 37 others –vs- Davidson Mwangi Kagiri (2014)eKLR** and **Silverstein –vs- Chesoni (2002)1KLR 867**.
7. By his 4-paged submissions dated 9th June 2020 and filed in court on 12th June 2020, the respondent's counsel framed three (3) issues for determination as per the three (3) conditions stipulated at Order 42 Rule 6 (supra) and analysed them not in favour of the grant of the orders sought in the application. Counsel concluded that the application deserves dismissal with costs to the respondent.
8. To buttress her submissions, counsel relied on authorities which include:-
- a. **Independent Electoral and Boundaries Commission and another –vs- Stephen Mutinda Mule and 3 others (2014)eKLR** that the parties are bound by their pleadings.
 - b. **Butt –vs- Rent Restriction Tribunal (1982)KLR 417** on how the court should exercise discretion in the present application.
9. I have thoroughly considered the entire application alongside the replying affidavit and the parties' respective submissions herein. In that regard, I concur with the issues for determination in the respondent's submissions.
10. The application is originated under the provisions of the law including Order 42 Rule 6 (supra) which provides the following prerequisites for the grant of the orders sought:
- a) Substantial loss may result to the applicant unless the order was made.
 - b) The application was made without unreasonable delay; and
 - c) 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.
11. As regards substantial loss, I am guided by ground II and affidavit. The applicants asserted that they stand to be prejudiced as the respondent may be exposed to greater suffering and prejudice as the respondent may execute the decree arising from the judgement and that definitely may render the intended appeal nugatory; see **Silverstein and Butt cases (supra)** as well as **Republic v Kasamani t/a Kasamani and company Advocates (2005)2KLR 297** at 300 and paragraph 13 of the supporting affidavit.
12. On his part, the respondent contended that the applicants have not demonstrated likely substantial loss. Accordingly, I note paragraphs 5, 6 and 7 of his replying affidavit thereof.
13. It is pretty clear from the record that the decree in this suit was issued on 3rd January, 2020. There is nothing to bar the respondent from executing the same against the applicants who are thus, likely to suffer substantial loss in view of the nature and circumstances of the matter.
14. On the issue of delay, there is no doubt judgment was rendered on 3rd December 2019 while the application was initiated on 30th December 2019. This court is aware of Order 51 Rule 8 of the Civil Procedure Rules, 2010 and Section 57 of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya with regard to computation of days.
15. Article 10(2) (b) of the Constitution of Kenya, 2010 provides for the national values and principles of governance including equity. This court is further aware of the principle: delay defeats equity. Quite plainly, the application has been brought without unreasonable delay in the present circumstances.
16. With regard to security for the performance of the decree, the applicants crave for the convenience of this court at paragraph 13 of the supporting affidavit. On the other hand, the respondent deposed at paragraphs 5 and 9 of the replying affidavit that no security has been offered by the applicants herein.
17. It is trite law that a successful litigant is entitled to the fruits of his judgment. That an application for a stay of execution is a discretionary power which should be exercised in such a way as not to prevent an appeal. Moreover, the grant of such a stay cannot be a matter of course. That it rests upon genuine conditions, grounds, merit and dispatch; see **Butt case (supra)** and **Malindi Law Society of Kenya –vs- Law Society of Kenya Nairobi Branch and 5 others Civil Application number 20 of 2017 (2017) eKLR**.
18. In the case of **Board of Governors, Moi High School, Kabarak and another v Malcom Bell Applications numbers 12 and 13 (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. Furthermore, Section 13 (7)(a) of the Environment and Land Court 2015 (2011) mandates this court to grant interim preservation orders.
19. To that end, it is the finding of this court that since the conditions set out in Order 42 Rule 6(c) are cumulative and must be satisfied as held in **Trust Bank Ltd v Ajay Shah and 3 others (2012) eKLR at 22**, the applicants have met the threshold for the grant of the orders

sought in the application in the obtaining scenario. The application is full of merit.

20. A fortiori, the application dated 27th December 2019 be and is hereby allowed in terms of orders (2) and (3) sought therein.

21. In the spirit of Article 159 (2)(b) of the **Constitution (supra)**, it is further ordered thus:

a) The applicants to file and serve a complete record of appeal at the Court of Appeal within the next forty five (45) days from this date.

b) The applicants to give security for the due performance of the decree in the sum of **Ksh 100,000/=** to be deposited in this court within the next forty five (45) days from this date.

c) The costs of this application to abide the intended appeal.

d) Failure to comply with orders (a) and (b) hereinabove, the orders granted in paragraph 20 hereinabove to lapse accordingly.

Delivered, Signed and Dated at Migori in open Court and 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 22nd day of JULY, 2020.

G.M.A ONGONDO

JUDGE

In Presence of:-

1st Defendant/Applicant – Present in person

Tom Maurice – Court Assistant