REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO 101 OF 2004(O.S)

JAMES KIKECHI..... PLAINTIFF

VERSUS

SEPSTIANO WAFULA.....1ST DEFENDANT

DAVID MWECHER CHONGWONY.....2ND DEFENDANT

R U L I N G

By a Judgment delivered on 27th May 2020, this Court decreed as follows: -

1: That the plaintiff has acquired by adverse possession a portion measuring 14.8 acres out of the land parcel NO ELGON/CHEMOGE/ 188.

2: That the 2nd defendant's proprietary interest in the said portion has been extinguished by operation of law.

3: That the purported registration of the 2nd defendant as owner of all that parcel of land comprised in title NO ELGON/CHEMOGE/188 was illegal and fraudulent.

4: That the 2nd defendant to execute all the necessary documents to facilitate the registration of 14.8 acres out of the land parcel NO ELGON/CHEMOGE/188 in the names of the plaintiff within 30 days from the date of Judgment and in default, the Deputy Registrar of this Court shall be at liberty to execute the said documents on behalf of the 2nd defendant.

5: The 2nd defendant, his agents, servants or any one acting through him are restrained from taking, tilling, trespassing, wasting, alienating, selling or in any other way dealing with the portion of 14.8 acres out of the land parcel NO ELGON/CHEMOGE/188.

6: The 2nd defendant shall meet the plaintiff's costs.

7: The case against the 1st defendant is marked as withdrawn as per the orders dated 18th December 2017.

Aggrieved by that Judgment, the 2nd defendant intends to appeal and has already filed a Notice of Appeal dated 29th may 2020.

By a Notice of Motion dated 2nd June 2020 and premised under **Section 3A of the Civil Procedure Act** and **Order 46 Rule 6(1)** and **(2) of the Civil Procedure Rules**, the 2nd defendant has approached this Court for the following orders: -

1. Spent

2. Spent

3. There be a stay of execution of the said Judgment and/or decree issued by this Court on 27th May 2020 and all consequential orders pending the hearing and determination of the intended appeal.

4. Costs be provided for.

The application is founded on the grounds set out therein and also supported by the 2nd defendant's affidavit dated 2nd June 2020.

The gravamen of the application is that being aggrieved by this Court's Judgment dated 27th May 2020, the 2nd defendant has filed a Notice of Appeal dated 29th May 2020. That the intended appeal is arguable and has high chances of success. That the plaintiff is at liberty to commence the execution process which would render the appeal nugatory and occasion him great hardship. That the 2nd defendant is willing to abide by any conditions that this Court may grant and no prejudice will be occasioned to the plaintiff.

The application is opposed and by his replying affidavit dated 12th June 2020, the plaintiff has deponed, inter alia, that the application is fatally defective and incompetent having been filed by a firm of lawyers not on record and should be struck out. That this Court found that the plaintiff was in possession of the land parcel **NO ELGON/CHEMOGE/188** from 1968 upto 1992 when he moved out following the 1992 clashes. That there are no houses on the land and the 2nd defendant was ordered to execute all documents to facilitate the transfer of 14.8 acres to the plaintiff who is entitled to enjoy the fruits of the Judgment. That the 2nd defendant has not demonstrated what substantial loss he will suffer if a stay of execution is not granted and therefore, the Court should order the 2nd defendant to give him possession of the 14.8 acres out of the 15.5 Hectares. That the 2nd defendant can deposit the title for the 14.8 acres in Court or the sum of Kshs. 740,000/= being the loss of user for the 2½ years that the appeal may be pending in Court.

The application was canvassed by way of written submissions which have been filed both by **MR WEKESA** instructed by the firm of **AMANI WEKESA & ASSOCIATES ADVOCATES** for the 2nd defendant and by **MR NYAMU** instructed by the firm of **KIARIE & COMPANY ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and submissions by counsel.

Before I delve into the application, I need to consider the averments in paragraph 4 of the plaintiff's replying affidavit in which he has deponed as follows: -

> ***4: "That I am advised by my advocate on record that the application dated 2/6/2020 is fatally defective and incompetent for being filed by a firm of lawyers which is not properly on record and for which reason it should be struck out with costs"***

From the record, the 2nd defendant was represented by the firm of **AREBA ATACHA & COMPANY ADVOCATES** upto 27th May 2020 when the Judgment was delivered. However, the application has been filed by the firm of **AMANI WEKESA & ASSOCIATES ADVOCATES**. Perhaps the plaintiff had in mind the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** which provides that where there is a change of advocates after Judgment, such change shall only be effected upon application and by an order of the Court or upon a consent filed between the out – going advocate and the in – coming advocate. However, the Court of Appeal in **TOBIAS M. WAFUBWA .V. BEN BUTALI 2017 eKLR** took the view that where non – compliance with **Order 9 Rule 9 of the Civil Procedure Rules** ***"did not undermine the jurisdiction of the Court or affect the core of the dispute in question or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the Constitution and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings."***

In **BONIFACE KIRAGU WAWERU .V. JAMES K. MULINGE 2015 eKLR** the Court took the same view that non – compliance with **Order 9 Rule 9 of the Civil Procedure Rules** is more procedural than fundamental. The appeal by the firm of **AMANI WEKESA & ASSOCIATES** is a new proceeding and my understanding of those two decisions therefore is that once a party mounts fresh proceedings like an appeal, then the requirements of **Order 9 Rule 9 of the Civil Procedure Act** do not strictly apply. The 2nd defendant herein has not only filed a Notice of Appeal but there is also annexed to his application a Memorandum of Appeal. This application is therefore not incompetent.

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows: -

> ***"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may <u>for sufficient cause</u> order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.***
>
> ***(2) No orders for stay of execution shall be made under sub rule (1) unless: -***
>
> ***(a) the Court is satisfied that <u>substantial loss may result</u> to the applicant unless the order is made and that <u>the application has been made without unreasonable delay;</u> and***
>
> ***(b) <u>Such security</u> as the Court orders for the due performance of such decree or order <u>as may ultimately be binding on him has been given by the applicant</u>."*** Emphasis added.

It is clear from the above that before a Court grants the order of stay pending appeal, the Applicant must satisfy the following criteria: -

> **1: Sufficient cause**

2: Substantial loss

3: Offer security

4: Approach the Court without unreasonable delay.

The grant of an order of stay of execution pending appeal is a discretionary remedy. It must therefore be exercised rationally and on sound basis and not capriciously. The scales of justice must be weighed properly taking into account that at the end of the trial, one party has a Judgment whose fruits he is entitled to enjoy while on the other hand, the other party who is aggrieved has the right to pursue an appeal. While the trial Court may have done it's best to deliver justice to the parties, there is always the likelihood that the Judgment sought to be stayed may ultimately be set aside by the Appellate Court. The intended appeal should therefore not be rendered nugatory or a mere academic exercise. A successful Appellant is entitled to be restored to the position in which he was prior to the impugned Judgment just as the decree holder is entitled to be assured that even as the appeal process is determined and concluded, he will benefit from the decree. The bottom line therefore is that even as the Court considers those competing interests, the best course to take is the one that ensures that justice shall be served to all the parties.

This application was filed on 2nd June 2020 less than one week after the delivery of the Judgment on 27th May 2020. The Notice of Appeal was filed on 29th May 2020 just two days after the Judgment. The 2nd defendant therefore moved to Court without unreasonable delay.

The 2nd defendant is also required to demonstrate that unless the order for stay is granted, he will suffer substantial loss. In **KENYA SHELL LTD .V. KIBIRU 1986 KLR 410**, **PLATT Ag J.A** (as he then was) expressed this principle as follows at page 416: -

> ***"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in it's various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money."***

In the same case, **GACHUHI Ag J.A** (as he then was) added the following: -

> ***"In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted."***

See also **SILVERSTEIN .V. CHESONI 2002 1 KLR 867** and **MUKUMA .V. ABUOGA 1988 KLR 645**. While I notice that in his application, the 2nd defendant does not specifically refer to the term ***"substantial loss,"*** he has nonetheless stated that if execution proceeds, it will occasion him "***great hardship and loss."*** He has also deponed in paragraph 8 of his supporting affidavit as follows: -

> ***"That execution of the said Judgment will occasion great prejudice on me it will render my intended appeal nugatory."***

Rather than splitting hairs on whether or not failure to specifically refer to the term ***"substantial loss"*** is fatal to the application, I will adopt a holistic approach to the issue and determine whether, in the circumstances of this case, failure to grant a stay of execution will infact cause the 2nd defendant ***"substantial loss."*** In his submission in opposition to the grant of the order of stay, counsel for the plaintiff has urged that since the whole of the land parcel measures 38.285 acres and the portion awarded to the plaintiff is only 14.8 acres, the 2nd defendant can transfer that portion to the plaintiff and that will not amount to substantial loss. Counsel for the plaintiff has sought reliance on the decision in **SAMMY SOME KOSGEI .V. GRACE JELEL BOIT 2013 eKLR** where **MUNYAO J** in considering an application for stay pending appeal ordered that the defendant give vacant possession of the suit property to the plaintiff who would not sell, charge or dispose of it pending the appeal. That case however can be distinguished from the circumstances obtaining here because in this case, it is the 2nd defendant who is currently in possession of the suit property. In the **SAMMY SOME KOSGEI** case (supra), the suit property, as found by the Judge, was ***"more or less vacant. It does not appear developed."*** In this case now before me, the Court has made a finding that the plaintiff's occupation and use of the suit property between 1968 upto 1992 when he was forced out following the land clashes was a period of 24 years long enough to entitle him to orders in adverse possession. The 2nd defendant however took possession thereof in 1996 long after the title of the registered proprietor had been extinguished. Nonetheless, the 2nd defendant is currently in occupation of the suit property and so it is not vacant as was the position in the case of **SAMMY SOME KOSGEI** (supra). If the 14.8 acres is transferred to the plaintiff pursuant to the Judgment and decree herein, there is nothing to stop him from not only developing it as he wishes but also alienating the same to third parties. And when he testified before **MUKUNYA J** on 15th November 2017, the 2nd defendant told the Court that after purchasing the suit property he ***"constructed two permanent houses, stores"*** and also planted trees thereon. Nothing would stop the plaintiff from dealing with those structures and trees in whatever manner he wishes if the 14.8 acres is transferred to him. Should the appeal succeed, the loss suffered would clearly be substantial as the suit property would lose it's character. And it would not make any sense to transfer the suit property to the plaintiff and at the same time injunct him on what he may or may not carry out thereon. That would be an un – warranted abridgment of his right to property as guaranteed by **Article 40 of the Constitution**. I would therefore agree with counsel for the 2nd defendant when he submits that since the 2nd defendant is the one currently in occupation of the suit property, the plaintiff ***"can wait just a little bit more for the chain of justice to be exhausted."*** In my view, that is the safest route to take subject of course to the further conditions that I shall be giving shortly.

The 2nd defendant has pleaded in paragraph 11 of his supporting affidavit that: -

> ***"I am willing to abide by any conditions this Honourable Court will grant."***

The 2nd defendant has therefore demonstrated that there is sufficient cause to warrant the orders sought in his application and satisfied all the requirements of **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules**.

The up – shot of the above is that the Notice of Motion dated 2nd June 2020 is allowed in the following terms:-

1. There shall be a stay of execution of the Judgment dated 27th May 2020 and all consequential orders flowing therefrom pending the hearing and determination of the 2nd defendant's appeal.

2. The 2nd defendant shall within 14 days from the date of this ruling deposit with the Deputy Registrar of this Court the Original Title Deed for the land parcel NO ELGON/CHEMOGE/188.

3. In default of (2) above, the order of stay shall lapse and the plaintiff will be at liberty to execute the decree.

4. Costs of this application shall abide by the outcome of the intended appeal.

Boaz N. Olao.

J U D G E

16th July 2020.

Ruling dated, signed and delivered at **BUNGOMA** this 16th day of July 2020 through electronic mail in keeping with the guidelines following the **COVID – 19** pandemic and with notice to the parties.

Boaz N. Olao.

J U D G E

16th July 2020.