



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

LAND CASE NO. 418 OF 2017

(Formerly Kisii ELC Case No. 33 of 2010)

PETER MASAKWI MOGORI (suing as the personal

representative of the estate of PAULO WANGKIO alias

PAUL WANKIO GETARI-deceased).....PLAINTIFF/RESPONDENT

VERSUS

CHRISTOPHER NYAMOHANGA.....1ST DEFENDANT/APPLICANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT/RESPONDENT

AGRICULTURAL FINANCE CORPORATION.....3RD DEFENDANT/RESPONDENT

RULING

1. On 17th August 2020, the 1st defendant/applicant, CHRISTOPHER NYAMOHANGA through his counsel, Mbugwa, Atudo and Macharia Advocates mounted the instant application by way of a Notice of motion dated 14th August 2020 pursuant to Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, section 1A, 1B,3A and 63 (c), (e) of the Civil Procedure Act, the Judicature Act Cap 8 (High Court Practice and Procedure rules Part and all other enabling provisions of law seeking the following principal orders:-

i. That the Honourable Court do grant and/or extend stay of execution pending the inter-partes hearing and determination of this application.

ii. That the Honourable court do grant and/or extend stay of execution pending the hearing and determination of the Civil Application 105/2020 filed under rule 5 (2) (b) of the Court of Appeal Rules 2010 at Kisumu Court of Appeal by the 1st defendant.

2. The application is anchored on :-

a) Grounds 1 to 8 set out on it's face

b) A 15-paragraphed supporting affidavit of the applicant sworn on even date and;

c) Annexed documents marked as "CN-1 to 5" which include a copy of Judgment of this court rendered on 15th July, 2020 , a copy of memorandum of Appeal, a copy of application for stay of execution in Civil Application No. 105 of 2020 before the Court of Appeal at Kisumu and a copy of sale of land agreement made on 8th March 2016 with regard to the suit land, LR NO. BUGUMBE/MABERA/296.

3. On 17TH August 2020, this court ordered that the application be heard on priority basis during the current court vacation further to the grant of Chamber Summons of even date and simultaneously filed with the application. So, directions regarding the service of the application and hearing of the same were made on the said date.

4. Subsequently, the learned counsel for the applicant filed a 7 paged submissions dated 20th August 2020 wherein reference was made to the application and that the applicant has met the guiding principles for the grant of stay of execution sought herein under Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010. To buttress the submissions, counsel cited authorities, inter alia: **Butt-vs- Rent Restriction Tribunal (1979) eKLR, Prilscot Company Ltd -vs- Monica Heho (2015) eKLR and Silverstein -vs- Chesoni (2002) 1 KLR 867.**

5. The respondents neither filed response to the application nor filed submissions in this matter.
6. I have duly considered the entire application and the applicant's submission. In that regard, is this court seized of jurisdiction over the present application?
7. It is worthy to note that on 15th July, 2020 immediately after the delivery of Judgment, counsel for the applicant sought stay of execution of the Judgment for purposes of appeal. The prayer was granted accordingly.
8. It is also noted that the applicant has filed an appeal namely Civil Appeal No. 105 of 2020 before the Court of Appeal at Kisumu as shown in paragraph 5 of his supporting and documents marked as "CN 3" and CN-4" annexed to the affidavit. Clearly, the applicant is seeking the same orders before the Court of Appeal.
9. By this court's Judgment delivered on 15th July, 2020, the stay of execution granted for thirty (30) days from that date and the subsequent filing of Civil Appeal No. 105 of 2020 before the Court of Appeal at Kisumu, this court is rendered functus officio. In the **Black's Law Dictionary 10th Edition at page 787**, the term "**functus officio**" which is sometimes abbreviated to "**functus**" means,
- "of an officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished"***
10. More fundamentally, the Court of Appeal is seized of the jurisdiction in respect of the instant matter. In the celebrated case of **Owners of Motor Vessel "Lilian S" –vs- Caltex Oil (Kenya) Limited (1989) KLR 1**, the late Nyarangi JA reasoned, inter alia:-
- ".....Jurisdiction is every thing....."***
11. In the **Halsbury's Laws of England 4th Edition volume 9 at page 350**, the term "**Jurisdiction**" is defined thus:-
- ".....the authority which a court has to decide matters that are litigated before it do take cognizance of the matter presented in a formal way for decision....."***
12. In the case of **Republic –vs- Karisa Chengo and 2 others (2017) eKLR**, the Supreme court of Kenya held that lack of jurisdiction renders a court's decision void; see also **Lord Denning's** decision in **Benjamin Leonard Macfoy –vs- United Africa Company Ltd (UK) (1962) AC 152**.
13. Borrowing from the above authorities coupled with the fact that the Court of Appeal is seized of the jurisdiction of the present matter, I find that this court is devoid of jurisdiction over the instant application. Thus, I can not make one more step.
14. A fortiori, the application by way of Notice of motion dated 14th August 2020 and filed in court on 17th August 2020 by the 1st defendant/applicant, is hereby struck out. Costs to abide the outcome of Civil Appeal No.105 of 2020 pending before the Court of Appeal at Kisumu.
15. It is so ordered

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 Corona Virus pandemic challenge this 24th day of August 2020.

G.M.A ONGONDO

JUDGE

In Presence of :-

Court Assistant – Tom Maurice