



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 6 OF 2020

DAVID KIMANI CHEGE.....APPELLANT

VERSUS

IDDI SHABAN ONIALE..... RESPONDENT

RULING

What is before Court for determination is the Appellant’s Notice of Motion Application dated the 21st May, 2020 and the Respondent’s Notice of Preliminary Objection dated the 16th June, 2020. The Appellant seeks an order of stay of execution of the Judgement dated the 30th April, 2020 and Decree dated the 14th May, 2020 pending the hearing as well as determination of the Appeal filed herein. The application is premised on the grounds on the face of it and the supporting affidavit of DAVID CHEGE where he deposes that the Chief issued him with a seven (7) days’ Notice of Eviction dated the 15th May, 2020. He confirms having filed a Memorandum of Appeal and that the Respondent herein intends to execute the Decree unless stay orders are issued. He contends that he stands to suffer irreparable harm and damage should the orders sought not be granted. Further, that he shall abide by the orders of the court as relates to provision of security.

In opposition to the instant application, the Respondent filed a Notice of Preliminary Objection and replying affidavit sworn by IDDI SHAABAN ONIALE where he deposes that there is no substantive appeal filed and the Court has no jurisdiction to entertain the instant Notice of Motion. He relies on the doctrine of *ex turpi causa non oritur actio* and insists the whole application is an abuse of the court process. In the replying affidavit, he deposes that the Appellant has concealed material facts and approached the court in bad faith. He insists the pleadings are incomplete as the Appellant has not filed certified copies of the proceedings. He claims to be the registered proprietor of land parcel number LR Kajiado/ Kisaju/ 3584 and provides a history of its acquisition. He confirms that they both bought their respective parcels of land from one Joseph Ndegwa Kamau. Further, that the Appellant now wants to claim his land and the one he bought from the said vendor. He provides an explanation of how the proceedings in the lower court were conducted and states that both parties entered into a consent and invited the trial court to consider all materials on record. He states that the eventual order granted by the trial court was an order of eviction as prayed for in the Plaint and not a temporary injunction as wrongly stated. Further, that no Appeal has been filed and the instant application has been brought after an inordinate delay.

The Appellant filed a further affidavit reiterating his claim above and insisting the instant application seeks for a stay pending appeal and this does not require the record of appeal for it to be determined. Further, that he has exhibited the judgement and order of the lower court.

Both parties filed their respective submissions to buttress the instant application.

Analysis and Determination

Upon consideration of the instant application, Notice of Preliminary Objection, rivaling affidavits and submissions, at this juncture, the only issue for determination is whether the Appellant is entitled to orders for stay of execution of the Judgement dated the 30th April, 2020 including Decree dated the 14th May, 2020 pending the determination of the Appeal.

Order 42 Rule 6(2) provides that:’ **No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) 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.**’

In the case of **Butt v Rent Restriction Tribunal [1982] KLR 417** the Court of Appeal provided direction on how a Court should proceed to exercise its discretion in instances where a party seeks a stay of execution and stated thus:’

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.'

In the current scenario the Appellant seeks a stay of execution pending Appeal, which has been vehemently opposed by the Respondent. Both parties admit that the Appellant has been on the suit land and erected temporary structures thereon. Further, that both parties purchased their respective parcels of land from the same vendor. The Respondent states that a stay of execution should not be granted as the Appellant has not filed a memorandum of appeal and he further relied on the **doctrine of ex turpi causa non oritur action**. I note from the Court Records, as per the receipt dated the 20th May, 2020, the Appellant indeed filed the instant application including the Memorandum of Appeal. I hence find that the Respondent's averment that there is no Memorandum of Appeal incorrect. The Respondent contended that this Court does not have jurisdiction to handle this Appeal and I wish to make reference to section 13 of the Environment and Land Court Act which confers jurisdiction to this Court and provides that: **' (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'

The above provisions are distinct in terms of the jurisdiction of the Environment and Land Court. I note that the Case herein arose as a result of the execution of a Decree relating to an eviction order and I find that this court indeed has jurisdiction to handle the instant Appeal. In the circumstance, I beg to disagree with the Respondent that this Court is devoid of jurisdiction to determine this Appeal.

Order 42 Rule 6 cited above makes it clear that filing an Appeal alone does not operate as a stay of execution. From the facts before me, it is evident the Appellant lodged the instant Application before the Respondent went through the motions of executing the Decree herein, within three weeks of the delivery of the judgement. I hence find that there is no inordinate delay as claimed by the Respondent. Further, from a perusal of the Memorandum of Appeal, I opine that there are triable issues raised therein. It is further my considered view that since a right of Appeal is a Constitutional right of an aggrieved party and even though the Respondent has contended that the Appellant failed to disclose material facts and not entitled to an order of stay pending Appeal but since the Appellant has been on the suit land for a while, which fact the Respondent admitted, I hold that he is indeed the disadvantaged party herein. Based on the standards set in the above cited case and in applying them to the circumstances at hand, I find that the Appellant has met the threshold for stay of execution pending Appeal and will grant him the same.

It is against the foregoing that I find the Appellant's Notice of Motion dated the 21st May, 2020 merited and will allow it. I find the Respondent's Notice of Preliminary Objection dated the 16th June, 2020 unmerited and will disallow it. I will proceed to make the following final Orders:

i. That a stay of execution of the judgment delivered on 30th April, 2020 by the Hon. B M Cheloti Senior Resident Magistrate in Kajjado CMCC ELC No. 20 of 2019 and Decree issued on 14th May, 2020 and any further enforcement proceedings, be and is hereby granted pending the hearing and determination of the appeal filed herein.

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

Dated Signed and delivered via email this 21st Day of September 2020

CHRISTINE OCHIENG

JUDGE