**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC MISCELLANEOUS APPLICATION NO. 17 OF 2020**

**1. MOSSY KHAEMBA MUCHANGA........................................................1ST APPLICANT**

**2. DAVIS WABWILE MUCHANGA..........................................................2ND APPLICANT**

**VERSUS**

**PAUL LUTOTI KHAWANGA.........................................................................RESPONDENT**

**R U L I N G**

**MOSSY KHAEMBA MUCHANGA** and **DAVIS WABWILE MUCHANGA** (the 1st and 2nd Applicants respectively) moved to this Court through their Notice of Motion dated 16th September 2020 in which they sought the following orders: -

**1. Spent**

**2. Spent**

**3. That there be a stay of execution of the Judgment/decree in BUNGOMA CMCC ENVIRONMENT & LAND COURT CASE No 14 of 2018 pending the hearing of and final determination of the appeal.**

**4. That costs be in the cause.**

The application is premised on the provisions of **Order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules** as well as **Sections 3 and 3A of the Civil Procedure Act**. It is founded on the grounds set out therein and supported by the affidavit of the 1st Applicant.

The gravamen of the application is that following a Judgment delivered on 20th February 2020 and a decree issued on 3rd September 2020 in favour of the Respondent in **BUNGOMA CMCC ENVIRONMENT AND LAND COURT CASE No 14 of 2018**, the Respondent may enforce it by evicting the Applicants from the land parcel **NO EAST BUKUSU/EAST SANGALO/311** (the suit land) yet the Applicants have already filed an appeal which is pending. That if the Applicants are evicted, they stand to suffer substantial loss and damage. That they are willing to abide by any terms that the Court may impose and the appeal has high chances of success. That the appeal has been filed promptly and in good faith. Annexed to the application is a copy of the Judgment in the Subordinate Court delivered on 20th February 2020, the Memorandum of Appeal in **ENVIRONMENT AND LAND COURT BUNGOMA CIVIL APPEAL No 3 of 2020** and a Notice of Motion dated 8th September 2020 by the Respondent in which he seeks Police assistance to evict the Applicants from the suit land and the decree issued in the Subordinate Court.

The application is opposed and **PAUL LUTOTI KHAWANGA** (the Respondent herein) has filed a replying affidavit dated 25th September 2020 in which he has averred, inter alia, that the decree has been partially executed as the restriction placed on the title to the suit land has been removed and the 2nd Applicant has moved to stay on his father's land. That the Applicants have not explained the delay of 7 months in filing this application as the Judgment was delivered on 20th February 2020 and this application was only filed following the Respondent's application dated 8th September 2020. That there is no arguable appeal and the Applicants have not met the threshold under **Order 42 Rule 6 of the Civil Procedure Rules**. Further, that this application is incompetent having been filed in violation of the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** since the Applicants were represented in the Subordinate Court by the firm of **BULIMO & COMPANY ADVOCATES** yet the application has been filed by the firm of **SITUMA & COMPANY ADVOCATES** without leave of the Court.

The application has been canvassed by way of written submissions which have been filed both by the firm of **SITUMA & COMPANY ADVOCATES** for the Applicants and by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by Counsel.

The starting point must be the non – compliance with the provisions of **Order 9 Rule 9 of the Civil Procedure Rules**. It is not in dispute that during the trial in the Subordinate Court, the Applicants were represented by the firm of **BULIMO & COMPANY ADVOCATES** who even filed the Memorandum of Appeal. This application has been filed by the firm of **SITUMA & COMPANY ADVOCATES**. In paragraph 11 of his replying affidavit, the Respondent urges this Court to find that the application is therefore incompetent.

**Order 9 Rule 9 of the Civil Procedure Rules** provides as follows: -

**"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –**

**a. upon an application with notice to all the parties; or**

**b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."**

The firm of **SITUMA & COMPANY ADVOCATES** has neither filed an application to come on record not a consent between them and the firm of **BULIMO & COMPANY ADVOCATES**. It is clear therefore that there is a violation of the provisions of Order 9 Rule 9 of the Civil Procedure Rules by the firm of **SITUMA & COMPANY ADVOCATES**. However, the Court of Appeal in the case of **TOBIAS M. WAFUBWA .V. BEN BUTALI 2017 eKLR** took the view that failure to adhere to the provisions of **Order 9 Rule 9 of the Civil Procedure Rules** is not fatal so long as there is no prejudice caused to the other party. This is how the Court addressed the issue: -

**"We would go further to add that, provided that where the failure to comply with rule 9 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 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."**

The Court went on to add as follows: -

**"Once a Judgment is entered save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court but a commencement of new proceedings in another Court where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel or engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate."** Emphasis added.

The application has therefore been properly filed by the firm of **SITUMA & COMPANY ADVOCATES** and I have not heard the Respondent allege that he has been prejudiced by the change of advocate.

I shall now consider the application on it's merits.

This Court's powers to order a stay of execution pending appeal are donated by **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules**. That provision reads: -

**6 (1) "No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause 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 order for stay of execution shall be made under sub rule (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."*** Emphasis added.

It is clear from the above that to justify the grant of an order of stay of execution pending appeal, the Applicant must meet the following criteria: -

1. **Demonstrate that he will suffer substantial loss unless the order of stay is granted.**

2. **File the application without unreasonable delay.**

**3. Offer security for the due performance of any order that may ultimately be binding on him.**

In **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410 PLATT Ag J.A** (as he then was) stated thus: -

> **"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.**
>
> **<u>Substantial loss in it's various forms is the cornerstone of both jurisdictions for granting stay</u>. 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."** Emphasis added.

In **MACHIRA T/A MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD (NO 2) 2002 2 KLR 63**, the Court stated that:-

> **"In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars ……… Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay."**

Other than state in paragraph (b) of the application that the ***"Applicants stand to suffer substantial loss and damage in the event that the appeal succeeds as we strongly believe the same will succeed"***, the Applicants have not demonstrated what substantial loss in tangible terms hey will suffer if the order of stay is not granted. It is not enough to simply allege substantial loss as the Applicants have done. I am not persuaded that the Applicants have shown that they stand to suffer substantial loss if the order of stay is not granted.

The Applicants were also required to file this application without un – reasonable delay. The Judgment being appealed was delivered on 20th February 2020 and to their credit, the Applicants filed the appeal 4 days later on 24th February 2020. However, it was not until 14th September 2020, 7 months later, that this application was filed. No explanation has been offered for that delay which I consider to be un – reasonable. It seems to me that the Applicants only moved to Court when he execution process commenced with the application by Respondent dated 8th September 2020 seeking Police security. That can only mean, therefore, that this application is solely designed to scuttle the execution process. And although the 1st Applicant has deponed in paragraph 10 of his supporting affidavit that this application ***"<u>has been brought promptly</u>"***, a 7-month un – explained delay cannot be described as prompt bearing in mind that the delivery of the Judgment on 20th February 2020 was done in the presence of Counsel for both parties. The Applicants did not approach the Court without un – reasonable delay.

The Applicants were also required to offer security. In paragraph 9 of the 1st Applicant's supporting affidavit the Applicants aver that a sign of good faith, they will move to have the appeal heard expeditiously. I do not consider that to be the security envisaged in **Order 42 Rule 6(2) of the Civil Procedure Rules**. However, in paragraph (c) of the application, they have stated as follows: -

> **"That the plaintiffs/Applicants (sic) ready and willing to abide with any conditions to be set by the Court in granting the orders of stay pending the hearing and final determination of the appeal."**

In my view, that is sufficient enough as it demonstrates willingness on the part of the Applicants to satisfy any requirements that the Court may impose upon them for the due performance of any decree or order that ***"may ultimately be binding"*** upon them.

Having said so, however, the Applicants were required to satisfy **<u>all</u>** the grounds set out in **Order 42 Rule 6(2)** to be entitled to the grant of orders of stay of execution pending appeal. It is not enough to satisfy one or two grounds only because they are conjunctive. The Applicants have only satisfied one ground.

The up – shot of the above is that the Notice of Motion dated 16th September 2020 and filed herein on 17th September 2020 is devoid of merit as it has not met the threshold stipulated in **Order 42 Rule 6 of the Civil Procedure Rules**. It is accordingly dismissed with costs to the Respondent.

**Boaz N. Olao.**

**J U D G E**

**22nd October 2020**

Ruling dated, signed and delivered at **BUNGOMA** this 22nd day of October 2020 by way of electronic mail as was advised to the parties in my directions dated 21st September 2020.

**Boaz N. Olao.**

**J U D G E**

**22nd October 2020**