REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 172 OF 2014

MODE OF PROCEEDING …….... MULTI TRACK

BILDAD SIMIYU KHAKINA.....1ST PLAINTIFF

MOSES KHAKINA WAKHUNGU.....2ND PLAINTIFF

DAVID NYONGES WAMBILIANGA.....3RD PLAINTIFF

VERSUS

DR. HENRY KERRE WAKHUNGU..... 1ST DEFENDANT

DR. PHOEBE KHASIALA WAKHUNGU.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR.....3RD DEFENDANT

R U L I N G

On 27th May 2020, this Court delivered its Judgment in this dispute. Aggrieved by the said Judgment, the Applicants (originally the defendants in the suit) promptly filed a Notice of Appeal dated 28th May 2020 and filed herein on 3rd June 2020.

By a Notice of Motion dated 4th June 2020 and filed herein on 9th June 2020 and anchored on the provisions of **Order XLI rule 4(1) (2) (a) of the Civil Procedure Rules**, the Applicants seek the following orders: -

1. **That there be a stay of execution in this case pending the hearing and determination of the appeal to the Court of Appeal.**

2. **Costs of this application be in the cause.**

The application is premised on the grounds set out therein and is also supported by the affidavit of their Counsel **MR JULIAS SAWENJA KHAKULA**.

The gravamen of the application is that being dissatisfied with this Court's Judgment delivered on 27th May 2020, the Applicants filed a Notice of Appeal. That the appeal had high chances of success and that the Applicants stand to suffer irreparable loss should the appeal succeed when execution is already carried out.

In opposing the application **MR WAYNE OLONYI** Counsel for the Respondents (the original plaintiffs) filed a replying affidavit in which he deponed, inter alia, that the application is utterly defective, bad in law and only calculated to delay the Respondents' enjoyment of the fruits of the Judgment. That the Applicants are guilty of laches and only moved to the Court when the County Surveyor had already moved to the site to place beacons in execution of this Court's Judgment. That the Applicants have not demonstrated the exact damage that they will suffer and their appeal has no chances of success. That the application should therefore be dismissed with costs.

When the application was placed before me on 4th August 2020, I did not certify it as urgent but directed that it be canvassed by way of written submissions. Those submissions were subsequently filed both by **MR JULIAS SAWENJA KHAKULA** for the Applicants and **MR**

WAYNE OLONYI for the Respondents.

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

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 provides as follows: -

> ***6 (1) "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 appeal and 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."***
>
> ***6 (2) "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."*** Emphasis added.

It is clear therefore that to justify the grant of order of stay of execution pending appeal, the Applicant must satisfy the following criteria: -

1. **Demonstrate that he will suffer substantial loss unless the order is made.**

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

3. **Offer security.**

It is clear from the decision of the Court of Appeal in **VISHRAM RAVJI HALAI .V. THORNTON & TURPIN 1990 KLR 365** that whereas that Court's jurisdiction to grant such an order of stay pending appeal is not fettered, this Court's jurisdiction to grant such an order is fettered by the above conditions. The wording of **Order 42 Rule 6(1) and (2) and the Civil Procedure Rules** also makes it clear that not some but all those conditions must be proved.

In **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1982 – 88 1 KAR 108 [1986 KLR 410] PLATT Ag JA** (as he then was) said the following about the need to establish substantial loss:-

> ***"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 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."*** Emphasis added.

In **MACHIRA T/A MACHIRA & CO ADVOCATES .V. EAST AFRICAN STANDARD (NO 2) 2002 2 KLR 63**, it was stated thus: -

> ***"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."***

Although the applicants claim that they will ***"suffer irreparable loss should the appeal succeed when execution is already carried out,"*** no effort was made to demonstrate what that irreparable loss will entail. It is not enough to simply allege irreparable or substantial loss. It must be satisfactorily demonstrated. Indeed, in paragraph 10 of the replying affidavit, **MR OLONYI** has alluded to that and deponed as follows: -

> ***"That the defendants/Applicants have fallen short of demonstrating the exact damage they are bound to suffer should the application be disallowed."***

The onus was on the Applicants to prove that they will suffer substantial loss. They have not done so.

The Judgment sought to be appealed was delivered on 27th May 2020 and this application was filed on 8th June 2020. Bearing in mind that the Notice of Appeal was lodged on 3rd June 2020, I am prepared to find that there was no unreasonable delay in filing this application.

However, the Applicants were also supposed to offer security ***"for the due performance of such decree or order as may b e ultimately binding"*** on them.

In **HALAI & ANOTHER .V. THORNTON & TURPON LTD** (supra), the Court of Appeal held as follows: -

> ***"The High Court's discretion to order stay of execution of it's order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay."*** Emphasis added

In **WYCLIFF SIKUKU WALUSAKA .V. PHILIP KAITA WEKESA 2020 eKLR** this Court stated as follows on the issue of furnishing security: -

> ***"The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of Justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."***

There is no mention either in the Notice of Motion itself or the supporting affidavit of any offer of security by the Applicants or any indication that they are prepared to abide by any terms that the Court may impose as a condition of any orders of stay of execution pending appeal. There can therefore be no sufficient cause to warrant the grant of the orders sought.

From all the above, it is therefore obvious that other than having approached this Court without unreasonable delay, the Appellants have been unable to establish the other conditions set out in **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules**.

Ultimately therefore, I find that the Notice of Motion dated 4th June 2020 and filed herein on 9th June 2020 is devoid of any merit. The same is accordingly dismissed and as the parties are family, each shall meet their own costs.

Boaz N. Olao.

J U D G E

15th October 2020.

Ruling dated, signed and delivered this 15th day of October 2020 at **BUNGOMA** by way of electronic mail pursuant to the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

15th October 2020.