



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 353 OF 2017

[FORMERLY NAIROBI HCCC NO. 196 OF 2007]

RODGERS KATAMI WAMBIA.....1ST PLAINTIFF

ALEX KIMIYA.....2ND PLAINTIFF

JONATHAN OMBEMBA OMBIMA.....3RD PLAINTIFF

[As officials of Lugari Yearly Meeting of Friends (Quakers)]

VERSUS

RACHEL ODERA.....1ST DEFENDANT

FELIX ODERA.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

AND

BOARD OF MANAGEMENT – MARULA PRIMARY SCHOOL.....INTERESTED PARTY

RULING

[MOTION DATED 27TH MAY, 2020]

1. The 1st and 2nd Defendant moved the Court through the notice of motion under certificate of urgency dated the 27th May, 2020, seeking for stay of execution of the judgment and decree dated 13th May, 2020 pending the hearing and determination of the intended appeal and that costs be provided for. The application is based on three grounds on its face and is supported by the affidavit sworn by the 1st Defendant on the 28th May, 2020. That it is their case that they are the legal owners of *Kakamega/Lugari/183*, the suit property, by dint of being the administrators and beneficiaries of the estate of the late **Salome Muhonja Odera**, who is the registered owner of the suit property. That the judgment delivered on 13th May, 2020 if executed will affect the suit property's ownership, and they will be evicted from thereon rendering the intended appeal nugatory if successful, hence suffering substantial loss. That they are willing to furnish security and undertake not to dispose or interfere with the suit property pending the determination of the intended appeal. That they have filed the application without undue delay.

2. The application is opposed by the Plaintiffs through the replying affidavit sworn by **Rodgers Katami Wambia** on 2nd July, 2020. That it is the Plaintiffs' case that the suit property is owned by Lugari Yearly Meeting of Friends Church (Quakers), the Church. That on the suit property is a church where they conduct church services every Sunday. That they have also been utilizing part of the suit property for training of farmers, leasing to Lake Basin Authority and established on a portion of land Marula Primary School, Interested Party. That the 1st and 2nd Defendants moved onto a portion of the suit property in 2009 after obtaining injunctive orders in 2007 hence restricting the Plaintiffs' use of the land. That the Plaintiffs have no intention of disposing the suit property.

3. The 3rd Defendant and Interested Party also opposed the application through their grounds of opposition dated 8th July, 2020 setting out seven grounds summarized as follows;

(a) That the application is fatally defective, incompetent, untenable and devoid of merit.

(b) That the application is aimed at denying successful parties from enjoying the fruits of litigation and perpetuate their use of the suit property.

(c) That the 1st and 2nd Defendants have not satisfied the requirements for stay pending appeal to be granted and must provide security.

4. That the Court granted temporary stay of execution *ex parte* on the 29th May, 2020, pending the hearing and determination of the application. The court also gave directions on filing and exchange of replying papers and written submissions. That consequently, the learned Counsel for the 1st and 2nd Defendants, the Plaintiffs, 3rd Defendant and Interested Party filed their written submissions dated 18th June 2020, 16th July 2020 and 24th July, 2020 respectively. The learned Counsel also made additional oral submissions and highlighting of the written submissions virtually on the 27th July, 2020.

5. The following are the issues for the Court's determinations;

(a) Whether the 1st and 2nd Defendants have satisfied the requirements of Order 42 rule 6 of Civil Procedure Rules for granting of stay of execution orders pending determination of the appeal.

(b) Who pays the costs of the application?

6. The Court has carefully considered the grounds on the Motion, supporting and replying affidavits, grounds of opposition, written and oral submissions, the cited superior courts' decisions and come to the following determinations;

(a) That the application has cited Articles 25 and 50 of the Constitution 2010, Section 16 of the Environment and Land Court Act, Sections 1A, 1B and 3A of the Civil Procedure Act, Orders 42 Rule 6 and Orders 51 Rule 1 of the Civil Procedure Rules, 2010. That Article 25 of the Constitution, 2010 provides for the Fundamental Rights and Freedoms that may not be limited, and among them at sub-article (c) is "*the right to a fair trial*". That Article 50 of the Constitution, 2010 provides for fair hearing. That Sections 1A, 1B and 3A of the Civil Procedure Act provides for the objective of the Act, the duty of the Court and inherent jurisdiction (powers) of the Court respectively. That Order 51 Rule 1 of the Civil Procedure Rules sets out the procedure of moving the Court in this kind of application, while Order 42 Rule 6 thereof provides for the requirements or parameters for applications for stay orders pending appeal. That an applicant in a notice of motion for stay order, like the 1st and 2nd Defendants herein, must satisfy the Court that they moved the Court without unreasonable delay, and establish that they stand to suffer substantial loss if the application is not ruled in their favour. That they must also provide such security as the Court orders for the due performance of the judgment or decree.

(b) That the parties are in agreement, and the record confirms that the Court delivered its judgment on the 13th May, 2020. That a Notice of Appeal dated the 15th May, 2020 was filed on the 19th May, 2020 by the 1st and 2nd Defendants' Counsel; followed by the application dated the 27th May, 2020 being filed on the 28th May, 2020. That it is therefore clear that the Notice of Motion was filed on the fifteenth day from the date of the judgment. That the Court therefore find and hold that the 1st and 2nd Defendants moved the Court without unreasonable delay.

(c) That it is apparent the 1st and 2nd Defendants have already filed the appeal going by what their learned Counsel disclosed during his oral submissions. That the appeal is reportedly C.A.C.A. No. 20 of 2020, and it awaits the Court's directions as the record of appeal has reportedly been filed. That during the hearing, it was disclosed that the 2nd Defendant has established a home on a portion of the suit property, and that the 1st Defendant is reportedly accommodated thereon. That should the Court orders of 13th May 2020, especially Order 12(b)(iv) and (v) be executed, there is no doubt it will result to the houses and other structures and developments elected by the 1st and 2nd defendants thereon being demolished and or removed from the land. That the 1st and 2nd Defendants would also be evicted and enjoined from accessing the portions of the suit property that they have been using. That the possibility that their houses and other developments would be demolished during eviction of the 1st and 2nd Defendants from the suit land, thereby rendering them homeless, while their appeal is pending in the Court of Appeal, is itself evidence of the loss they are likely to suffer. That the loss of a home through eviction, while the orders thereof are awaiting further interrogation and decision of the Court of Appeal, is in the court's view not the way to go. That it would be just and reasonable for the 1st and 2nd Defendants to be allowed to continue utilizing that portion of the suit property that was under their use at the time of the judgment, on condition that they do not undertake any activities that alters the portion of the land permanently.

(d) That though no party was granted costs in the judgment of 13th May 2020, and as the 1st and 2nd Defendants have expressed their willingness to furnish such reasonable security that the court may order, the Court is of the considered view that a deposit of Kshs.200,000 (**Two hundred thousand**) as security for the due performance of the order, in an interest earning account in the joint names of the Counsel for the parties would suffice. That further, the costs of the application abide the outcome of the appeal.

7. That from the foregoing, the court finds merit in the Motion by the 1st and 2nd Defendants dated the 27th May, 2020 and allows it in the following terms;

(a) That an order of stay of execution of the Court's judgment and decree dated the 13th May, 2020 is hereby issued pending the hearing and determination of the filed appeal subject to the following conditions;

(b) (i) That the 1st and 2nd Defendants' activities be restricted to the portion of the suit property under their use as of the date of the judgment.

(ii) That the 1st and 2nd Defendants should not carry out any further developments or activities on the said portion of land that alters or likely to alter it permanently.

(iii) That the 1st and 2nd Defendants do deposit in an interest earning account with a financial institution, Kshs.200,000 (Two hundred thousands) as security for the due performance of the order in the joint names of the parties Advocates within sixty (60) days from today and in default, the stay order to automatically lapse.

Orders accordingly.

Delivered virtually and signed at Eldoret this 14th day of October, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiffs: Absent.

Defendants: Absent.

Interested Party: Absent.

Counsel: Mr. Kahari for 1st and 2nd Defendants.

Court Assistant: Christine and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.