



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 310 OF 2017

(Formerly Kisii ELC case No. 18 of 2016)

ANDREW NYADO OTHINA.....PLAINTIFF

VERSUS

EDWARD OUMA OTHINA.....DEFENDANT

RULING

1. By a Notice of Motion dated 18th November 2019 duly filed in court on even date pursuant to Order 42 Rule 6 (1) (2) of the Civil Procedure Act 2010, section 3A of the Civil Procedure Act 2010, Order 51 Rules 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, (hereinafter referred to as the application). The defendant/applicant, **EDWARD OUMA OTHINA** through M/s H. Obach and Associates Advocates is seeking twin orders;-

a) THAT upon inter-partes hearing of this application, the Honourable court do stay the execution of the decree issued on the 7th October 2019 pending the hearing and determination of the intended appeal.

b) THAT the Costs of the application be in the cause.

2. The application is premised on grounds (1) to (9) set out on its face. They include; that the applicant is dissatisfied with the Judgment of this Honourable court rendered on 26th June 2019 and intends to appeal the same. That he has filed a notice of appeal annexed to the application. That he stands to suffer substantial loss, he is willing to deposit such security as will be directed by this court and that the application has been brought without delay.

3. The application is further premised on the applicants supporting affidavit of ten (10) paragraphs sworn on even date. Annexed thereto, are copies of the decree issued on 4th October 2019, a notice of appeal and a taxation notice dated 7th October 2019 marked as "DL 1", "DL2", and "DL3" respectively.

4. In his 11-paragraphed replying affidavit sworn on 7th February 2020 duly filed on even date, the respondent, Andrew Nyado Othina through S.M. Sagwe and Company Advocates, deposed, inter alia, that this suit was heard on merit and Judgment delivered. That the applicant has shown sufficient cause herein. That the respondent has to enjoy the fruits of his Judgment and the applicant has to proceed with his appeal while he is out of the suit land, LR NO. **KAWERE/KAYANGO/KARADING/1429**.

5. The respondent further deposed that the Bill of costs filed and drawn to scale herein amounts to Kshs. 150,885/= which is unpaid to the respondent/plaintiff. That since the applicant is willing to deposit security as to be directed by the court, thus, the applicant be ordered to deposit Kshs. 150,885/= in the joint interest earning account of the parties herein within 30 days.

6. It is noteworthy, that on 28th November 2019, upon hearing both parties herein, order number 2 sought in the application namely a temporary stay of execution of the decree issued on 7th October 2019 to preserve the subject matter herein, was granted being guided by the Court of Appeal decision in **Ogada –vs- Mollin (2009) KLR 620**; see also **section 13 (7) (a) of the Environment and Land Court ,2015 (2011) (ELC Act)**.

7. This application was argued by way of written submission pursuant to orders of this court under **Order 51 Rule 16 of the Civil Procedure Rules,2010**; see also Practice Direction number 33 (a) and (b) of the ELC Act.

8. Learned counsel for the applicant filed submissions dated 24th February 2020 making reference to the application, the replying affidavit and that the applicant has met the threshold for granting the orders sought in the application. Counsel submitted that the applicant's family entirely relies on agriculture carried out on the suit land and that if the stay order sought herein is not granted, the applicant stands to suffer

substantial loss. That the application has been made without delay as Judgment was read on 26th June 2019, while the notice of appeal was filed on 16th July 2019. That the applicant is ready and willing to furnish security as revealed in his supporting affidavit. That if the order of stay sought is not granted, the intended appeal stands to be rendered nugatory.

9. On the other hand, by submissions dated 10th August, 2020 duly filed on 12th August 2020, learned counsel for the respondent submitted that the intended appeal has not been filed to date by the applicant who has not demonstrated the likely substantial loss to be suffered by him if the application is not allowed. That the applicant unreasonably delayed in filing the application. That if this court is inclined to allow the application, then the applicant be ordered to pay costs of the suit and **Kshs. 200,000/=** to be deposited in the joint interest earning account of counsel for the respective parties pending the hearing and determination of the intended appeal.

10. I have carefully studied the entire application, the replying affidavit and the rival submissions. So, the issues for determination are whether the applicant has met the conditions identified in the parties' respective submissions and in consonant with **Order 42 Rule (6) (2) (supra)** which reads; -

“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)

11. Regarding substantial loss, I take into account grounds 4 and 6 of the application, paragraphs 3,5,7 and 8 including documents “DL-2” and 3” annexed to the supporting affidavit. Counsel for the applicant argued that the applicant and his family entirely rely on agriculture including cultivation of various crops on the suit land. That if the stay of execution of the Judgment and decree is not granted, he is bound to suffer irreparably.

12. The respondent deposed that the applicant has not filed the intended appeal and that even if he had done so, an appeal can not operate as stay sought herein. That the applicant has not shown sufficient cause in the application as he has not exhibited a strong case that the intended appeal is likely to succeed on merits. That irreparable harm has not been demonstrated in this application.

13. It is apparent from the application that the applicant filed a notice of appeal on 16th July 2019. Thus, the appeal to the Court of Appeal is deemed to have been duly filed as provided for under **Order 42 Rule (4) (supra)**.

14. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. He or she has to prove the same as noted in **New Stanley Hotel Ltd –vs- Arcade Tobacconist (1980) KLR 757**.

15. The applicant has satisfied this limb that he faces imminent risk of suffering substantial hardship as the suit land, the only source of his live hood, is likely to be taken by the respondent. In the case of **Blue Shield Company Limited –vs- Mahinda (2009) KLR 551 at 560** and the Court of Appeal observed thus;-

“.....we are satisfied that if the application is not allowed, the intended appeal will not only be rendered nugatory but also that the applicant is likely to suffer great hardship in the nature of financial loss which would be out of proportion to the loss that the respondent is likely to suffer” (Emphasis laid)

16. As pertains to delay, I note grounds 2 and 5 as well as paragraphs 3 to 6 of the supporting affidavit and the applicant's submissions. On his part, the respondent asserted that the application was brought late in the day as the parties were present during the delivery of Judgment in this suit which was heard and determined on merits.

17. This court is aware of computation of days as stipulated under Order 50 Rule 8 of the Civil Procedure Rules ,2010. Article 10 (2) (b) of the Constitution of Kenya 2010 anchors the doctrines of equity, among them, equality aids the vigilant and not the indolent.

18. In the instant matter, Judgment was rendered on 16th July, 2019. By the notice of appeal and the date of filing of the instant application, does unreasonable delay come into play? Quite clearly, the answer is not in the affirmative, in those circumstances.

19. As regards security, I consider ground 3 and paragraph 4 of the supporting affidavit and paragraphs 8 and 10 of the replying affidavit. Indeed, the issue is an even ground in this application. I also note the amount in the Bill of costs for taxation and as captured in the respondent's submissions herein.

20. The Concise Oxford English Dictionary 12th Edition at page 1302 defines the term **“Security”** as follows; -

“a thing deposited or pledged as a guarantee for the fulfilment of an undertaking or the repayment of a loan”

21. It is trite law that the court has the authority to issue orders for the preservation, in the interim, of a subject matter of appeal; see **Board of Governors Moi High School, Kabarak and another –vs- Malcom Bell (2013) eKLR**.

22. To that end, it is the finding of this court that the applicant has satisfied the trio conditions under **Order 42 Rule 6 (supra)** in this application. I proceed to allow the same in the following terms; -

a) Orders of stay of execution of the decree issued on 7th October,2019 pending the hearing and determination of the intended appeal.

b) The applicant shall deposit security in the sum of Kshs 200,000/= for the due performance of the decree within the next thirty (30) days from this date.

c) The applicant shall file and serve the intended appeal at the Court of Appeal within the period of thirty (30) days from the date hereof.

d) Failure to comply with orders (b) and (c) hereinabove, order number (a) hereinabove shall automatically lapse.

e) Costs of the application to abide the intended appeal.

Orders accordingly.

DATED, SIGNED and DELIVERED at MIGORI this 25TH day of NOVEMBER 2020.

G.M.A. ONGONDO

JUDGE

In Presence of:-

Plaintiff/respondent present

No appearance for the defendant/applicant

Tom Maurice- Court Assistant