



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO. 82 OF 2017

(Formerly Machakos ELC No. 49 of 2016)

MUSAU KITONE..... PLAINTIFF/APPLICANT

-VERSUS-

PATRICK MAKAU KATIKU.....1ST DEFENDANT/RESPONDENT

ELIJAH MWAU MUNYALI..... 2ND DEFENDANT/RESPONDENT

ANNAH MWIKALI MUNYALI.....3RD DEFENDANT/RESPONDENT

PATRICK MAKAU KATIKU..... 4TH DEFENDANT/RESPONDENT

JULIUS KAMUYA KYENGO..... 5TH DEFENDANT/RESPONDENT

AGNES NDUKU MALIO..... 6TH DEFENDANT/RESPONDENT

MUTUKU KYENGO.....7TH DEFENDANT/RESPONDENT

R U L I N G

1. The application for determination is dated 18th February, 2020 and was filed under certificate of urgency. It is brought under Sections 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the Law. It seeks;

a) Spent.

b) Spent.

c) THAT this honorable Court be pleased to grant an order of stay of execution of its ruling delivered herein on 07th October, 2019 and subsequent order issued on 29th December, 2019 pending the hearing and final determination of the plaintiff/applicant's appeal lodged in the Court of appeal.

d) THAT costs of this application be provided for.

2. The application is supported by the grounds on its face and the affidavit of Musau Kitone, the Plaintiff/Applicant herein, sworn on the same day. The primary ground is that the taxation of the defendants' bill of costs is high and he is apprehensive that they will proceed to execute and render his appeal nugatory. He has deposed that his appeal has high chances of success and that this application has been brought without unreasonable delay. A copy of the notice of appeal has been exhibited as **MK-1**.

3. The 2nd and 3rd Respondents opposed the application through the replying affidavit sworn by Elijah Mwaun Munyali on 08th July, 2020. The gist of the opposition is that execution sought to be stayed is in respect to costs which can be refunded if the appeal succeeds. He has deposed that the application was brought after an inordinate delay which has not been explained, that the Applicant has not demonstrated any irreparable loss or damage that he is likely to suffer and that no security has been offered.

4. The ruling pursuant to which the suit was struck out has been exhibited as **EMM-1** and the taxation notice as **EMM-2**. Further, he has deposed that they are people of means and capable of refunding the taxed costs in the unlikely event that the appeal succeeds.
5. The 4th, 5th and 6th Respondents filed the following grounds of opposition;
- a) That the Court lacks jurisdiction to hear and determine the application.*
 - b) That the Court is functus Officio.*
 - c) That the application flies on the face of well settled principles of stay pending appeal.*
 - d) That the applicant has not made the least attempt to establish the substantial loss and how difficult and potentially devastating he will suffer if stay is denied.*
 - e) That the applicant is not required to persuade the honorable Court that his appeal has a high probability of success but rather the arguability of the appeal.*
 - f) That the applicant has exhibited inordinate and/or unreasonable delay in filing the application hence time barred.*
 - g) The applicant has no plausible or conceivable persuasive grounds of either facts or law to overturn the ruling delivered on 07th October, 2019 and the subsequent order issued on 29th December, 2019.*
 - h) The orders sought are highly prejudicial to the 4th, 5th and 6th Respondents because they are geared towards scuttling the enjoyment of fruits of a lawfully/regularly obtained ruling and order.*
6. There was no response from the 1st Respondent.
7. Directions were given that the application be canvassed by way of written submissions. The parties, save for the 1st Respondent, complied and filed their respective submissions.
8. The Applicant submitted that he has an arguable appeal and contends that arguability does not mean that the appeal must succeed. He submitted that an appeal is arguable if it raises a single bona fide point that is worthy of response from the other side and interrogation by the Court.
9. It was also his submission that he is seeking to protect his interest in the suit land and not merely to stop the execution of costs. He contends that if stay is not granted, nothing stops the Respondents from dealing with the suit land as they please including selling, subdividing, transferring and evicting him. He submitted that he has massively developed the suit land and his permanent home is on it.
10. He submitted that the instant application was not placed before the Court in good time despite Counsel informing the Deputy Registrar of the same. He contends that the 2nd and 3rd Respondents seized the opportunity to prosecute their bill of costs which they had fixed for taxation ex-parte. He submitted that he was surprised to learn that the ruling on the bill of costs was delivered *via* email without his consent on the mode of delivery. He submitted that he was prejudiced in view of the set procedures of preferring a reference. Further, he submitted that he had to file the application dated 18th May, 2020 under certificate of urgency in order to bring the Court's attention to the instant application.
11. The submissions by the 2nd & 3rd Respondents were that the only execution which this Court can issue is with respect to the orders on costs. They submitted that determination of issues concerning the suit land do not lie with this Court hence it cannot issue orders preserving the land.
12. They submitted that the only execution that can ensue from the two rulings is on costs only and contended that costs can be easily refunded if the appeal succeeds. Further, they contended that granting stay of execution on dealings of the suit land is tantamount to granting the orders which were declined through the backdoor.
13. As rightly submitted by the parties, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.
14. Without going into the individual conditions for grant of stay, the plaintiff's suit was struck out pursuant to a preliminary objection after this Court was satisfied that the plaintiff had not exhausted the procedure provided for under the Land Adjudication Act cap 284 of Laws of Kenya. The Court already made a finding that it lacks jurisdiction to entertain the suit and it is trite that once a Court makes such a decision, it has no mandate to make one more step. I therefore agree with the Respondents that determination of issues concerning the suit land do not lie with this Court hence cannot issue orders preserving it.
15. The upshot is that the application lacks merit and same is dismissed with costs to the 2nd and 3rd Respondents.

Signed, dated and delivered at Makueni via email this 2nd day of November, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka