REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 326 OF 2013

ROSALIA MASABAKWA ABWOBA

SARAH ANYONA ABWIBA

ERENEST MASABAKWA ABWIBA

NICHOLAS CHIBOLE ABWIBA.....APPLICANTS

VERSUS

FRANCIS WALUMBE S/O JOSEPH MAPESA)

ACTION FOR CHILD DEVELOPMENT TRUST.....RESPONDENTS

RULING

The application is dated 20th November 2018 and is brought under Order XXXVI, Rule1 (a) & 2 (b) and O.XLIV, Rule 1 (a) & (b) of Civil Procedure Rules 2010 seeking the following orders:-

1. That the judgment delivered on 28th June, 2018 be set aside.

2. That the County Lands Registrar – Kakamega be enjoined in this suit as a respondent.

3. That Sarah anyone Abwiba be enjoined in this suit as one of the applicants.

The applicant submitted that, the entire process of transacting the disposition of LR. BUTSOTSO/SHIKOTI/225 be verified by thorough examination of all the related transaction instruments which include Land Control consents, mutation plan, land transfer, sale agreement and any other instruments the honourable court may deem necessary in the facilitation of land disposal. Their advocate failed to file their submissions which comprised their case thus resulting in the ruling even though he did draw it, paid for it but did not put it in the court file which made it not to be highlighted therefore granting defence undue advantage that led to the ruling, which ruling if the submissions were highlighted or included could change the entire ruling. That their advocate disadvantaged them by only raising one issue "Adverse possession" That at all material time none of them had had knowledge that their late father had sold a portion of Butsotso/Shikoti/225 to anybody. That the 1st respondent – Francis Walumbe S/O Joseph Mapesa has never lived nor indicated to them that their father ever sold to him portion of LR – Butsotso/Shikoti/225 other than emerging from nowhere and laid a claim on the portion occupied by the entire family and where the entire homestead including the grave of the deceased owner Arnol Masabakhwa. That between the two mutated portions as shown on the purported mutation form, which portion of the Butsotso/Shikoti 1449 did he buy and how he allowed their fathers body to be buried on the portion he has laid his claim on as this is their homestead. That the mutation form in respect of LR – Butsotso/Shikoti/225 is incomplete as it was endorsed only by one Mr. J. Achungo. That in the alleged disposition of part of LR. Butsotso/Shikoti/225, spousal consent/knowledge of the entire family was not sought whose strict prove should be provided by the 1st defendant herein.

The respondents opposed the application on the following grounds that the application is misconceived, bad in law and an abuse of the court process. The application has been filed by a stranger. That the judgment delivered on 28/6/2018 has not been appealed against. That the application is meant to delay the conclusion of the matter. That the application does not raise any triable issues. That the application is not supported by any evidence to warrant the orders prayed for. That the application does not meet the requirements upon which it is alleged to be brought. That the application has been filed out to time. That the affidavit is fatally defective.

This court has carefully considered the application and the submissions herein. The applicants seek to set aside judgement entered by this court on 28th June 2018 and my understanding of their application is that they seek to appeal against the same. The applicants state that their advocate failed to file submissions and did not present all the evidence. The principles for granting stay of execution are provided for under **Order 42 rule 6 (1)** of the **Civil Procedure Rules** as follows:

"No appeal or a 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 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside."

Order 42, rule 6 states:

"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."

The applicants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.

2. The application has been made without unreasonable delay, and

3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR)**, thus:

"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,

2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in **Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR** where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

"…… The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated……"

In the case of **Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR**, the court stated that:-

"That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right ……."

We are further guided by this court's decision in **Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4** as follows:

" . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .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, and the application must, of course, be made without unreasonable delay."

From the grounds of the application the applicants have not fulfilled any of the grounds to enable me grant the stay or set aside the judgement. No memorandum of appeal has been availed to the court to show that the applicants have chances of success if they were to go on appeal. The applicant has not shown t*hat the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal.* I find the application dated 20th November 2018 has no merit and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF APRIL 2019.

N.A. MATHEKA

JUDGE