



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 51 OF 2012**

**MODE OF PROCEEDINGS.....FAST TRACK**

**CHARLES ODHIAMBO KASERA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**CATHERINE ACHIENG ODHIAMBO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**SALOME NAFULA RICHARD.....DEFENDANT**

**RULING**

What is before me for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicant's Notice of Motion dated 11<sup>th</sup> February 2019 and filed on 21<sup>st</sup> February 2019 seeking the following Orders:-

**1. Spent**

**2. Spent**

**3. Spent**

**4. There be a stay of execution of the decree plus all consequential orders herein pending the hearing and determination of KISUMU COURT OF APPEAL CIVIL APPEAL NO 52 OF 2018.**

**5. There be a temporary order of injunction to restrain the defendant/Respondent by herself, servants, authorized agents from leasing, transferring disposing of part of or all that parcel of land known as E.BUKUSU/S.KANDUYI/4147 pending the hearing and determination of KISUMU COURT OF APPEAL CIVIL APPEAL NO 52 OF 2018.**

**6. Costs of this application be provided.**

The application is premised on **Order 42 Rule 6(1), (2) and (6) and Orders 40 Rules 1(a) (b) and 2 (1) and (2) of the Civil Procedure Rules and Sections 1, 1B, 3 and 3A of the Civil Procedure Act**, the grounds set out therein and the 2<sup>nd</sup> plaintiff/Applicant's Supporting Affidavit dated 14<sup>th</sup> February 2019 also sworn on behalf of the 1<sup>st</sup> plaintiff/applicant.

The gist of the application is that the Applicants are the registered proprietors of the land parcel **NO E. BUKUSU/S. KANDUYI/4147** (the suit land) as per the copy of title deed (annexture CAO – 2). That the Applicants have filed **KISUMU COURT OF APPEAL CIVIL APPEAL NO 52 OF 2018** (the appeal) arising out of the Judgment of **MUKUNYA J** delivered on 27<sup>th</sup> February 2018 which has high chances of success. That the said Judgment declared their registration of the suit land to be irregular, illegal and unlawful but their title is yet to be cancelled. That the Applicants believe that the Defendant/Respondent who resides on the suit land may be doing some under-hand dealings with a likelihood of charging, leasing or disposing it to third parties and that would render the success of their appeal null and void.

Although the application was not opposed and there was no appearance by either the Defendant/Respondent or her counsel **MR. J. S. KHAKULA** when it came up for hearing on 19<sup>th</sup> March 2019, I nonetheless directed that I would consider it and deliver a ruling on 28<sup>th</sup> March 2019. I was however not sitting on 28<sup>th</sup> March 2019 due to other official engagements outside Bungoma.

The application seeks two main orders:-

1. Stay of execution of the decree issued herein pending determination of the appeal.

2. An injunction to restrain the defendant/Respondent by herself, servants or authorized agents from leasing, transferring or disposing part of or all of the suit land.

An application for stay of execution pending appeal is governed by the provisions of **Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2)** provides that:-

*(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 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 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.”*

*(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.*

From the above, it is clear that a party seeking an order for stay of execution pending appeal should demonstrate the following:-

(a) Sufficient cause.

(b) That he will otherwise suffer substantial loss if the order of stay is not granted.

(c) The application must be made without un-reasonable delay.

(d) The Applicant must give such security as the Court may order for the due performance of such decree or order as may be ultimately binding on him.

The cornerstone of an application for stay pending appeal is substantial loss and **PLATT Ag J. A** (as he then was) captured it in the following terms in **KENYA SHELL .V. BENJAMIN KARUGA KIBIRU & ANOTHER 1986 KLR 410**:

*“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 the same case, **GACHUHI Ag J. A.** (as he then was) stated thus:

*“In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted.”*

The Judgment giving rise to this application was delivered by **MUKUNYA J** on 27<sup>th</sup> February 2018. This application was filed one year later on 21<sup>st</sup> February 2019 and there is no explanation for that delay which is clearly un-reasonable. **Order 42 Rule 6(2) (a) of the Civil Procedure Rules** demands that such an application be filed “without unreasonable delay.” There can be no basis for this Court to exercise its discretion in favour of the Applicants in those circumstances.

The Applicants have also not demonstrated what substantial loss they will suffer if the orders of stay are not granted. They have pleaded in paragraphs 5 and 6 of the Supporting Affidavit as follows:-

5: *“That the 1<sup>st</sup> plaintiff/Applicant and I are still the registered owner of land parcel NO. E. BUKUSU/S. KANDUYI/4147 – see copy of Title Deed annexed CAO – 2.”*

6: *“That vide Decree of this Honourable Court, our registration of land in question was declared irregular, illegal and unlawful among other declarations without cancelling our registration in the title deed. See copy of annexed Decree marked CAO 3.”*

The plaintiffs/Applicants then deponed in paragraph 8 of the Supporting Affidavit that the defendant/Respondent *“may be doing some underhand dealings with a likelihood of charging the suit land leasing and/or even disposing it off to 3<sup>rd</sup> parties.”*

It is not clear what *“underhand dealings”* the defendant/Respondent may be involved in with respect to the suit land given the plaintiffs/Applicants’ own assertion that they are still the registered proprietors of the suit land which title has not been cancelled. There is also no evidence that the land Registrar has commenced any process of cancelling their title. The Judgment of **MUKUNYA J** which is the

subject of the appeal arose from the plaintiffs'/Applicants' suit seeking the eviction of the defendant/Respondent from the suit land. The suit was dismissed although the Judge also proceeded to make a finding that the plaintiffs'/Applicants' title to the suit land was irregular, illegal and unlawful. The Judge did not however cancel the plaintiffs'/Applicants' title to the suit land and therefore they remain the registered proprietors. All that the Judge did was to dismiss their prayer that the defendant/Respondent be evicted from the suit land. **MUKUNYA J** therefore only granted a negative order. He did not order the plaintiffs/Applicants to do anything and the law is that a negative order which is incapable of execution save in respect of costs only cannot be stayed – **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES .V. ORANGA & OTHERS 1979 KLR 63**. See also **CO-OPERATIVE BANK OF KENYA LTD .V. BANKING INSURANCE & FINANCE UNION 2015 eKLR** where it was held that:-

***“An order for stay of execution pending appeal is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment.”***

The second prayer seeks a temporary order of injunction to restrain the Defendants/Respondent by herself, her servants or agents from leasing, transferring or disposing of part or all of the suit land pending the determination of the appeal. It is brought under the provision of **Order 40 Rules 1 or 2 of the Civil Procedure Rules and Sections 1, 1B and 3A of the Civil Procedure Act**. It is not in doubt that this Court has powers to grant such orders.

In **PATRICIA NJERI & OTHERS .V. NATIONAL MUSEUM OF KENYA 2014 eKLR VISRAM J** (as he then was) stated that a Court considering an application such as this one should be guided by the following principles:-

- 1. An order of injunction pending appeal is a discretionary one and the Court's discretion will be exercised against an Applicant whose appeal is frivolous.**
- 2. The discretion should be refused where it would inflict greater hardship than it would avoid.**
- 3. The Applicant must show that to refuse the injunction would render the appeal nugatory.**
- 4. The Court should also be guided by the principles in **GIELLA .V. CASSMAN BROWN LTD 1973 E.A358**.**

The principles as set out in the **GIELLA** case (supra) are that:-

- 1. The Applicant must show a prima facie case with a probability of success.**
- 2. Secondly, such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages.**
- 3. If in doubt, the Court will determine the application on a balance of convenience.**

The prayer for injunction basically seeks an order that the Defendants/Respondent be restrained from leasing, transferring or disposing of part or all of the suit land pending the hearing of the appeal. As the suit land is still registered in the names of the plaintiffs/Applicants as they have confirmed by availing the title, this Court does not see how the defendant/Respondent can lease, transfer or dispose of the same in the absence of the title. This application appears to be founded on mere apprehension which is not established on any concrete evidence. It is also dismissed.

The up-shot of the above is that the plaintiffs/Applicants' Notice of Motion dated 11<sup>th</sup> February 2019 lacks merit. It is accordingly dismissed with no order as to costs.

**Boaz N. Olao.**

**JUDGE**

**9<sup>th</sup> May 2019.**

Ruling dated, delivered and signed in Open Court at Bungoma this 9<sup>th</sup> day of May 2019.

Mr. Ocharo for Mr. Kassim for plaintiff present

Mr. Murunga for Mr. Khakula for defendant present

**Boaz N. Olao.**

**J U D G E**

**9<sup>th</sup> May 2019.**