



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 105 OF 2014.

TERESIA KHISA WANYONYI

(Through FLORENCE WEKESA

holder of Power of Attorney).....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT

LAND REGISTRAR

BUNGOMA COUNTY.....2ND DEFENDANT

LUCY NANZUSHI & CO. ADVOCATES.....3RD DEFENDANT

WANYAMA MWASAME NAMUNYU.....4TH DEFENDANT

COSMAS CHAKA MAKOKHA personal rep. of

SITEFANO MAKOKHA alias STEPHEN

MAKOKHA (DECEASED).....5TH DEEFENDANT

CHRISTOPHER WAFULA WENANI personal

rep. of WENANI MWASAME (DECEASED).....6TH DEFENDANT

RULING

I have before me the 4th Defendant/Applicant's Notice of Motion dated 8th April 2019 and brought under the provisions of **Order 42 Rule 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act. Section 7 of the Appellate Jurisdiction Act and Section 39 of the Arbitration Act** seeking the following orders:-

(a) Spent

(b) Spent

(c) The firm of **KITIWA and PARTNERS ADVOCATES** be granted leave to come on record for the 4th defendant/Applicant.

(d) The Applicant be granted leave to file an appeal out of time against the Judgment delivered on 15th November 2018 and the annexed Notice of Appeal be deemed duly filed.

(e) Spent

(f) There be an order of stay of execution of the Judgment/decree of this Honourable Court pending the hearing and determination of the appeal filed herein.

The application is based on the grounds set out therein and is supported by the Applicant's affidavit dated 8th April 2019.

The gravamen of the application is that the Applicant is aggrieved by this Court's Judgment delivered on 15th November 2018 adopting the Arbitration award and has filed a Notice of Appeal. That the delay in filing the appeal was occasioned by numerous applications and also the fact that the decree herein had to be amended. That the appeal has high chances of success and if no orders of stay are granted, the Respondent may execute thus rendering the appeal nugatory.

The plaintiff/Respondent opposed the application by her Replying Affidavit dated 16th April 2019 and filed herein on 18th April 2019 in which she has deponed, inter alia, that following this Court's Judgment, she has obtained the title to parcel **NO KIMILILI/SIKHENDU/3326** and there is nothing to stay. That no appeal has been filed and this application is therefore frivolous, scandalous and an abuse of the process of this Court and should be dismissed with costs.

When the application came up before me on 25th April 2019, both **MR ONYANDO** for the 5th and 6th Respondents and **MR KURIA** for the 1st and 2nd Respondents informed the Court that they were not opposing the application. The Court also noted from the record that on 24th April 2019 both **MR PAUL JUMA ADVOCATE** previously on record for the 4th Defendant/Applicant and **MR. KITIWA ADVOCATE** filed a consent allowing the latter to come on record for the 4th Defendant/Applicant. Prayer No (c) is therefore granted by consent.

With regard to prayer No (d), I find that it is merited. Extension of time is an equitable remedy and from the Supporting Affidavit, I am persuaded that the reasons advanced are genuine. It is common knowledge that the decree in this case had to be amended following the directions of the Court as it had not been properly drawn. No prejudice will be caused to the Respondent. The delay has been explained and in the exercise of my discretion, I grant that prayer.

With regard to prayer No (f), the remedy of stay of execution is provided for under **Order 42 Rule 6(1) and (2) of the Civil Procedure Rules** in the following terms:-

“No appeal or second appeal shall operate as a stay of execution or proceeding 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 Sub rule (1) unless:

(c) 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*

It is therefore clear that before this Court issues any orders for stay of execution pending appeal, the Applicant must prove the following:-

- 1. That there is sufficient cause to warrant the grant of the orders.**
- 2. That the application has been filed without un-reasonable delay.**
- 3. That if the orders of stay of execution are not granted, he will suffer substantial loss.**
- 4. He must also give such security as the Court may order.**

Bearing in mind that the decree herein has to be amended on 21st March 2019, I am satisfied that the application has been filed without unreasonable delay.

On the issue of substantial loss, however, the Applicant has not demonstrated what loss he will suffer. Substantial loss is the cornerstone of an application for stay pending appeal and without evidence of such loss, it would be a rare case when an appeal may be rendered nugatory – **KENYA SHELL LTD .V. KIBIRU & ANOTHER 1986 KLR 410**. See also **MUKUMA .V. ABUOGA 1988 KLR 645** and **SILVERSTEIN .V. CHESONI 2002 I KLR 867**.

Apart from stating that he would suffer **“irreparable loss”** in paragraph 11 of his Supporting Affidavit, the Applicant has not shown what

substantial loss, if any, he will suffer if the orders of stay are not granted.

In **KENYA SHELL LTD .V. KIBIRU (supra), GACHUHI Ag. J.A** (as he then was) stated that:-

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

It is not therefore enough for the Applicant in an application of this nature to simply allege that he will suffer irreparable or substantial loss if the order of stay is not granted. He must then also go further and show the nature of such loss and how it will render his appeal nugatory. It is clear from the Respondent’s Replying Affidavit that following the decree herein, she has been issued with the title deed to her portion of land being **KIMILILI/SIKHENDU/3326** and although she did not annexe a copy of the title deed as annexed in paragraph 8 of her Replying affidavit, I can see from the letter of the Land Registrar Bungoma dated 29th April 2019 and which was pursuant to his own undertaken given to this Court on 9th April 2019, that indeed a title for land parcel **NO KIMILILI/SIKHENDU/3326** has been issued. The Green Card was attached to the said letter. There would therefore be nothing to stay with regard to the issuance of a title to the suit land.

The decree also contained an order directing the return of **WANYONYI’s** family to their home under the supervision of the **OCPD KIMILILI** and the **DEPUTY COUNTY COMMISSIONER KIMILILI**. However, there is no evidence placed before this Court to show that the Respondent intends to sell the land awarded to them or deal with it in any manner that would render the appeal, if successful, nugatory. A similar scenario was considered by the Court of Appeal in the case of **CHARLES WAHOME GETHI .V. ANGELA WAIRIMU GETHI 2008 eKLR [C.A CIVIL APPLICATION NO 302 OF 2007 NBI]**

When it said:-

“The Applicant does not claim that the Respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined In the circumstances of this case, the Applicant would suffer substantial loss rendering the appeal, if successful, nugatory only if the suit land is disposed of before the appeal is determined. The Applicant does not claim that the suit land would be disposed of. The Applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal if satisfactory would be rendered nugatory.”

The above holding is very applicable to the situation obtaining in this case now before me. The Applicant has failed to demonstrate that he will suffer substantial loss if the orders of stay are not granted.

Ultimately therefore and having considered the application dated 8th April 2019, I make the following orders:-

- 1. The firm of KITIWA and PARTNERS ADVOCATES are granted leave to come on record for the 4th Defendant/Applicant.**
- 2. The 4th Defendant/Applicant is granted leave to file an appeal out of time against the Judgment delivered on 15th November 2018. The same be filed within 30 days from to-day.**
- 3. The application for stay of execution pending appeal is dismissed.**
- 4. No order as to costs.**

Boaz N. Olao.

JUDGE

9th May 2019.

Ruling dated, delivered and signed in Open Court this 9th day of May 2019.

Mr Babu for 4th defendant present

Plaintiff present in person

Boaz N. Olao.

J U D G E

9th May 2019.