



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAJIADO

ORIGINATING SUMMONS NO. 400 OF 2017

(formerly Nairobi ELC No. 629/14)

IN THE MATTER OF ORDER 37 & 40 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE KAJIADO RESIDENT MAGISTRATE COURT MISC. APPLICATION NO. 69 OF 2011

AND

IN THE MATTER OF THE DEFUNCT KAJIADO NORTH LAND DISPUTE TRIBUNAL CAUSE NO. TC/ 223/ 100/ 010

AND

IN THE MATTER OF THE ESTATE OF WUANTAI OLE SAIRE (DECEASED)

PARMUAT OLOIHORUA KORE.....APPLICANT

-VERSUS-

PHILIP SANTAMO WUANTAI.....1ST RESPONDENT

WUNTAI OLE SAIRE.....2ND RESPONDENT

**NISA OLE WUANTAI(suing on behalf as the legal Representative of the
estate of the late Wuantai Ole Saire).....3rd RESPONDENT**

KAJIADO RESIDENT MAGISTRATE.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5th RESPONDENT

RULING

What is before Court for determination is the Applicant's Notice of Motion dated the 11th January, 2019 brought pursuant to Order 42 Rule 6 and Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant seeks a stay of execution of the judgment dated the 20th November, 2018 pending appeal.

The Application is premised on the grounds that the judgement in this matter was delivered on the 20th November 2018 where the Court

upheld the Land Dispute Tribunal findings which were adopted vide KAJIADO PRINCIPAL MAGISTRATE MISC. APPLICATION NO. 69 OF 2011. The court ordered that the public road which had been demarcated by the District Surveyor Kajiado in May 2014, should be excavated as earlier planned by the community and local authority ignorant to the fact that the public road falls on the compound of the Applicant's matrimonial home. The balance of twenty two (22) hectares to be shared equally between the applicant and the 1st, 2nd and 3rd defendants' families respectively does not consider innocent parties who had purchased the same prior to the commencement of the suit. The 1st, 2nd and 3rd Respondents will now proceed to execute the orders issued in the judgement delivered on 20th November 2018. The Applicant is aggrieved with the said judgement and has preferred an Appeal against it by filing a Notice of Appeal. The 1st, 2nd and 3rd Respondents will proceed in pursuance to the judgement and orders of the court to remove the Applicant and/or other 3rd parties. The Applicant had sold sections of land from all that property known as KAJIADO/OLCHORO ONYORE/80 notwithstanding the pendency of the lodged appeal. The Appellant is apprehensive that the entire substratum of the Appeal may be lost unless the orders sought are granted. The Appeal has high chances of success and this application has been brought without undue delay.

The application is supported by the affidavit of PARMUAT OLIUOSHURIA KORE who is the Applicant herein where he reiterates his claim above and contends that the substratum of the Appeal lies in the existence of the suit property as it is and its determination should be undertaken with the suit property as it is. He contends that he is ready to comply with any conditions set down by the court and will prosecute the intended Appeal within reasonable time.

The application is opposed by the Respondents who filed a replying affidavit sworn by the 1st PHILIP SANTAMO WUANTAI who deposes that the application is frivolous, vexatious and mischievous. He explains that the Court rendered its regular judgement on 20th November 2018 which date the applicant sought stay of execution for 30 days which the Court granted. Further that even after the lapse of 30 days on 20th December 2018 which the Applicant ought to have utilized by filing a formal application for stay, the Applicant is now coming too late in the day and specifically on 14th January 2019 and further too late in serving the Respondents on 12th February 2019. He insists the judgement complained of, was rendered after the Respondents were heard. The Applicant failed to attend Court on all instances that the suit was set down for hearing and vide the current application, he is bringing forth extraneous and new matters that were never raised in the suit. He claims the application does not clearly meet the mandatory requirements of Order 42 Rule 6 of the Civil Procedure Rules as the Applicant has not satisfied this Court that substantial loss will be occasioned unless the stay order is granted. Further, the instant application was not filed in a timely manner and without unreasonable delay as the judgement was rendered on 20th November 2018. He avers that the Applicant has not offered any security for costs which should be amount equivalent to the value of the suit property. Further, there is no substantial loss likely to be suffered by the Applicant if the stay order is denied as he has not demonstrated that the subject matter of appeal will no longer be available in the unlikely event of the appeal succeeding. He states that the suit property has throughout the pendency of the suit remained available and it is not at risk of being disposed off by the Respondents. Further, that to defeat justice, the Applicant has continued to sell portions of the suit properties to 3rd parties who were never party to this suit at all. Further, in any event the Applicant as the person who knows the identity of these 3rd parties never sought to join them in the suit. He reiterates that the Applicant has filed the instant application in bad faith and as an afterthought in order to continue to illegally dispose off portions of the suit property which conduct continues to be prejudicial to the Respondents' interest in the said property. He reiterates that the Court in rendering its judgement was guided by the District Land Surveyor who proceeded to the suit land and made his report on the best way to settle the dispute. He further insists that there is absolutely no way the intended Appeal has the claimed high chances of succeeding. He explains that there are no structures on the disputed

50 hectares and therefore the denial of the stay orders cannot cause irreparable damage that cannot be compensated by way of damages.

Both the Applicant and Respondents filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 11th January, 2019 including the supporting and replying affidavits as well as the submissions herein, the only issue for determination is whether there should be a stay of execution of the Judgment delivered on 20th November, 2018.

It was the Applicant's submission that he had not brought the application without inordinate delay since he had to consult other parties concerning the judgment. To support this argument, he relied on the case of *FLORENCE HARE MKAHA –VS- PWANI TAWAKAL MINI COACH & ANOTHER (2014) eKLR* where the court allowed a similar application though it was filed almost a year after the delivery of judgement. He further relied on the case of *SOCFINAC COMPANY LIMITED –VS- NELPHAT KIMOTHO MUTURI (2013) eKLR, H.C. at NAIROBI (MILIMANI) 542 OF 2012* and *KIPLANGAT KOTUT –VS- ROSE JEBOR KIPNGOK 2015 eKLR; NDEGWA WAWIRE –VS- SICILY WARWARE NJIRA (2018) eKLR; ELENA D. KORIR –VS- KENYATTA UNIVERSITY (9) JUSTICE NZIOKI WA MAKAU* to buttress his arguments. The Applicant further submitted that he is willing to deposit with the court whatever security the court obliges pending the hearing and determination of the Appeal. He relied on the case of *IN HAYWOOD –VS- COPE, (1858) 25 BEAV 140* to support this argument.

The Respondents submitted that the Notice of Appeal was filed in this Court on the 10th December, 2018 but filed in the Court of Appeal Registry on the 20th December, 2018. They relied on the provisions of *RULE 75, 82, 115 OF THE COURT OF APPEAL RULES 2010* and *ORDER 42 RULE 6 OF THE CIVIL PROCEDURE RULES* to support their arguments that the Applicant by filing his Notice of Appeal failed to adhere to the legal provisions cited above.

They further relied on the cases of *PATRICK KIRUJA KITHINJI –V-S VICTOR MUGIRA MARETE (2015) eKLR* and *PARMUATI OLOISHURU KORE –V-S ERIC NTABO & CO. ADVOCATES (2019) eKLR* to support their arguments that the Appeal is not justified. They also cited the cases of *GATHURI NGARI –V-S ALLAN NYAGA GATHURI NGARI (2019) eKLR; TERESIA WAIRIMU –V-S WANJIKU MWANGI (2018) eKLR; STEPHEN WANJOHI –V-S CENTRAL GLASS INDUSTRIES LTD NAIROBI HCC NO. 6726 of 1991* to oppose the instant application.

Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules provides that: ' (1) *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 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.* 'Rule 75 (1) and (2) of the

Court of Appeal Rules provide that: (1) Any person who desires to appeal to the Court will give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal'

Further Rule 82 of the Court of Appeal Rules provides that: ' (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty day of the date when the notice of Appeal was lodged-

(a) A memorandum of appeal, in quadruplicate;

(b) The record of appeal, in quadruplicate;'

In the case of Machakos County v Kapiti Plains Estate Ltd & another [2019] eKLR, Justice Angote held that: ' In any event, the decisions of the Court of Appeal, which are binding on this court, shows that the procurement of leave to Appeal is *sine qua non* to the lodging of the Appeal. Any Notice of Appeal filed without the leave of the court, where such leave is required, is null and void. In the case of *Peter Nyaga Muvake vs. Joseph Mutunga, Nairobi Civil Appeal No. 86 of 2015*, the Court of Appeal held as follows:

“Without leave to the High Court, the Applicant was not entitled to give Notice of Appeal where, as in this case, leave to Appeal is necessary by dint of Section 75 of the Civil Procedure Act and Oder 43 of the Civil Procedure Rules, the procurement of leave to Appeal is *sine qua non* to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short an Application for stay in an intended Appeal against an order which is appealable only with leave which has not been sought and obtained is dead in water.”

That being the law, I find and hold that the Notice of Appeal filed on 9th May, 2019 without the leave of the court is a nullity. Considering that the Plaintiff did not file an Application seeking the leave of the court to file an Appeal against its decision of 5th April, 2019 within fourteen (14) days, and in the absence of an Application seeking to extend time within which to file an Application seeking the leave of the court to lodge an Appeal, I find the Plaintiff's Application to be unmeritorious.'

In the instant application, the Applicant lodged a Notice of Appeal with the Deputy Registrar on 10th December, 2018 which was after the required 14 days without leave. The Applicant had not indicated to Court nor provided proof that he has filed a Memorandum of Appeal. I opine that Rules are supposed to be adhered to and not to be treated casually.

In associating myself with the decision above as well as relying on the legal provisions that I have cited, I find that the Notice of Appeal dated 10th December, 2018 is invalid as it was filed after the required 14 days without leave and no Memorandum of Appeal has been furnished to the Court. I further find that the Applicant brought this application with unreasonable delay and had not demonstrated what harm he will suffer if the stay is declined. It is against the foregoing that I am unable to grant him a stay of execution pending Appeal.

In the circumstances, I find the instant application unmerited and will proceed to dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 31st day of July, 2019

CHRISTINE OCHIENG

JUDGE