



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 96 OF 2013**

**LYDIA AWUOR JACKA.....1<sup>ST</sup> APPLICANT/DEFENDANT**

**PAUL OMILIA JACKA.....2<sup>ND</sup> APPLICANT/DEFENDANT**

**AMOS OKWAROI.....3<sup>RD</sup> APPLICANT/DEFENDANT**

**SIMON OMANYALA JACKA.....4<sup>TH</sup> APPLICANT/DEFENDANT**

**- VERSUS -**

**CONCEPTA MASIPWONI JACKA.....1<sup>ST</sup> RESPONDENT/PLAINTIFF**

**JANET AWUOR JACKA.....2<sup>ND</sup> RESPONDENT/PLAINTIFF**

**R U L I N G**

1. The application before me is a Notice of Motion dated 4/1/2019 and filed on the same date. It is expressed to be brought under Order 42 rule 6 (1, 2, and 5) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act (cap 21). The Applicants – **LYDIA AWUOR JACKA, PAUL OMILIA JACKA, AMOS OKWAROI** and **SIMON OMANYALA JACKA** – are the Defendants in this suit. The Respondents – **CONCEPTA MASIPWONI JACKA** and **JANET AWUOR JACKA** – are the Plaintiffs. The suit herein is already concluded and the application under consideration was filed with an appeal in mind.

2. The parties were tussling over ownership of some parcels of land and this court found in favour of the Respondents. The Applicants decided to appeal and the application herein is essentially one for stay of execution orders pending appeal. The application came with four (4) prayers – prayers (i), (ii), (iii) and (iv) – but prayers (i) and (ii) are now moot, having been dealt with at an earlier stage. The prayers for consideration therefore are (iii) and (iv), which are as follows:

Prayer (iii): Pending the hearing and final determination of this application, the honourable court be pleased to make an order of stay of the decree dated 13/11/2018 pending the hearing and final determination of the Applicant’s Appeal.

Prayer (iv): Costs be in the cause.

3. The application is anchored on grounds, *inter alia*, that the Applicants stand to lose what they have known as their ancestral homes for over fifty (50) years and if the order is not granted the appeal will be rendered nugatory. The Applicants were said also to be likely to suffer irreparable damage. Further, the Applicants’ appeal was said to be arguable.

4. The Applicants fear that if the order of stay is not granted, they might be evicted and in case the appeal is successful, it might be rendered nugatory. The Respondents were said to be unlikely to suffer any prejudice if the orders are granted.

5. The Respondents made a response vide a replying affidavit filed on 22/1/2019. According to them, the application is bad, misconceived, and an abuse of the court process. It was averred that the application is aimed at denying the Respondents the fruits of the judgement as the Applicants continue to illegally occupy and use the land that was not meant for them.

6. The application was canvassed by way of written submissions. The Applicants’ submissions were filed on 19/2/2019. It was submitted, *inter alia*, that the Respondents can dispose of, subdivide, or transfer the suit property and thus defeat the appeal and/or render it nugatory.

The Applicants therefore might end up suffering substantial loss. It was feared too that eviction might be carried out and that would completely change the situation in the sense that the Applicants might lose what they have always known as their homes for over half a century.

7. The Respondents' submissions were filed on 20/2/2019. According to the Respondents the Applicants have only alleged that they will suffer irreparable loss but have not demonstrated it. The Applicants were also faulted for not offering security for due performance of the decree. The appeal was also said to be unlikely to yield favourable results for the Applicants. The case of **MASISI MWITA Vs DAMARIS WANJIKU NJERI [2016] eKLR** was cited to illustrate the need to demonstrate the kind of substantial loss a party is likely to suffer. The cases of **WINFRED NYAWIRA MAWA Vs PETERSON ONYIEGO GICHANA [2015] eKLR** and **KENYA SHELL LIMITED Vs BENJAMIN KARUGA KIGIBU & Another (1982 – 1988) IKAR 1018** were additionally cited to emphasise the need to provide security. This court was finally asked to dismiss the application.

8. I have considered the application; the response made, and rival submissions. I have had a look too at the judicial authorities availed. It is true that the court is supposed to consider whether the Applicant has an arguable appeal and/or whether refusal to grant an order of stay might render the appeal nugatory if successful. But it also needs to be emphasised that the matter must remain in the discretion of the court to be considered upon considering all material circumstances and not only the interest of one party.

9. The courts ought to be flexible. There should always be a rigorous appreciation of the prevailing circumstances and the overarching consideration should be the need to serve the interests of justice.

10. In this matter, an order of stay already exists. It was granted at the exparte stage and uppermost in the mind of the court while granting it was the appeal then intended to be filed. That appeal has now been filed and all the Respondents are asking is that a similar order be granted this time to run until the appeal is determined.

11. The Applicants evidently live on the land claimed by the Respondents. They have already appealed against the decision of this court. I have looked at the memorandum of appeal. It is arguable. It is not good for the Applicants to pursue their appeal with the fear of execution of the decree in this suit hanging over their heads. Besides, if they are, for instance, evicted before hearing and determination of the appeal, there is clear and foreseeable loss that they are likely to suffer. Their homes are on the land. What would happen, for instance, if the homes are demolished?

12. When all is considered, the interests of justice in this matter require that an order of stay be granted. That will ensure the maintenance of the Status Quo until the appeal is determined. I therefore allow the application herein in terms of prayer (iii). There will be no order as to costs.

**Dated, signed and delivered at Busia this 25<sup>th</sup> day of July, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicants/Defendants: Absent

Respondents/Plaintiffs: Present

Counsel for the Applicant/Defendants: Present

Counsel for the Respondents/Plaintiffs: Absent

Court Assistant: Nelson Odame