



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL CASE NO. 11 OF 2018

PRESKILA ATIENO MAJIWA.....APPELLANT

VERSUS

ERICK GEORGE HALWENGE.....1ST RESPONDENT

CAROLINE ATIENO OWICH.....2ND RESPONDENT

RULING

1. On 18th December 2018, the Appellant namely PRESKILA ATIENO MAJIWA through the firm of Achillah T. O. and Company Advocates filed an application by way of a Notice of Motion of even date under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and Section 3A of the Civil procedure Act (Cap 21). She is seeking the following Orders:

i) Spent

ii) That stay of proceeding in Oyugis ELC No. 43 of 2018 do issue pending the hearing and determination of this Appeal filed against the Ruling of Hon. P. J. Nandi (S.R.M) at Oyugis Law Courts on 22nd October 2018.

iii) That the costs of this Application be in cause

2. The application is premised on the appellant's 10-paragraphed supporting affidavit of even date. She annexed to the affidavit, a Ruling marked "PAM 1" on a preliminary objection raised by the intended defendants whom the appellant sought to the enjoin in Oyugis SRM's Court EL case No. 43 of 2018. That if the suit is allowed to proceed, the appellant will suffer injustice therefore he urged this court to allow the application in the interest of justice.

3. The application is also premised on the five (5) grounds on it's face which include that the appeal lodged by the appellant has high chances of success, that the application has been filed without unnecessary delay and that the application be allowed in the principle of overriding interest.

4. The respondents through the firm of Bosire Gichana and Company advocates filed a Notice of Preliminary Objection dated 6th February 2019. The Preliminary Objection is to the effect that:-

a) The court lacks jurisdiction to entertain the instant appeal.

b) The appeal does not lie.

c) The appeal is otherwise an abuse of the Court machinery

d) The appeal is incompetent and utterly misconceived.

5. On 20th February 2019, this Court directed that the application and the preliminary objection to the appeal be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules and practice direction Order 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014**

6. Learned counsel for the appellant filed submissions dated 7th March, 2019. Counsel submitted, inter alia, that the Memorandum of Appeal reveals arguable issues and that unless stay of proceedings is granted the appeal will be rendered nugatory. That this Court has unlimited discretionary powers to do justice to the parties and it would be in the interest of justice that the application be allowed.

7. Counsel cited **Articles 50 (1) and 162 (2) (b) of the Constitution of Kenya, 2010** as well as **Section 13 (6) of the Environment and Land Court Act, 2015 (2012)**, to fortify his submissions herein. Reliance was made on **Meshack Otieno Aida and another =vs= Sharon Atieno Aidah and 7 others (2018) eKLR** and **National Bank of Kenya Limited & Another =vs= Geoffrey Wahome Muoti (2016) KLR** in support of the submissions.

8. Learned Counsel for the respondents filed submission dated 26th March 2019. He gave brief background of the case, framed and analysed three (3) issues for determination namely:

i) Whether the appeal herein is merited.

ii) Whether the order for stay of proceedings should be granted herein.

iii) Whether there is a right of appeal as of right or with leave only from the Ruling delivered on 22/10/2019.

9. In his submissions counsel cited **Order 7 Rule 8 Order 42 Rules 1, 2, 3, and 6 of the Civil Procedure Rules, 2010 and Section 75 (1) of the Civil Procedure Act (Cap 21)** He also relied on the case of **Muambi vs. National Social Security Fund (2004) eKLR** therein.

10. I have carefully studied the entire application, the preliminary objection and submissions of counsel for the respective parties. Therefore, are the Orders sought in the application merited?

11. The application in brought under **Order 42 Rule 6 of the Civil Procedure Rules, 2010** which provides for stay of execution. I take into account the discretion of this court as provided thereunder.

12. The application is also brought under **Section 3A of the Civil Procedure Act (Cap 21)** which provides for the exercise of the court's discretion always for the purposes of upholding the law as far as possible. This would require preserving the claims of parties so that they be heard and determined according to the law; see **Oraro =vs= Mbaja (2005)1KLR 142 at 149 and 150.**

13. The appellant contended that on 22nd October 2018, the trial court did strike out her counterclaim with costs to respondent. The trial Court's Ruling rendered on 22nd October 2018, reads in part that:

“Thus I find that the counterclaim does not disclose when the cause of action arose and I hereby strike it out with costs to the plaintiffs.”

14. I note the appellant's Memorandum of Appeal dated 8th November 2018 which was filed on 14th November 2018 in accordance with **Order 42 Rules 1 and 2 of the Civil Procedure Rules, 2010**. The appellant contends that the appeal has high chances of success and that it was filed without unnecessary delay. That the appeal shall be rendered nugatory if proceedings in the trial court is allowed to proceed to conclusion before the appeal is heard and determined; see **David Morton Silverstein –v- Atsango Chesoni (2002) eKLR**.

15. The respondents' counsel expressed misgiving at the appeal. He urged this court to dismiss the appeal and the application with costs to the respondents.

16. In the case of **Blue Shield Insurance Company Limited =vs= Mahinda (2009) KLR 551 at 561**, it was held, inter alia:

“... We are satisfied that if the application is not allowed, the intended appeal will not only be rendered nugatory, but also that the applicant is likely to suffer great hardship....”

17. In the case of the **Board of Governors High School, Kabarak and another =vs= Malcom Bell, Supreme Court of Kenya Application numbers 12 and 13 (2012) eKLR**, it was held that the Court has authority to issue orders for the preservation, in the interim, of a subject matter of appeal. Under **section 13(7) (a) of the Environment and Land Court Act, 2015 (2012)**, this court is mandated to grant interim preservation orders including the stay orders sought herein.

18. In the instant application, I find the foregoing authorities quite instructive. I am also guided by the overriding objection under **Section 3 of the Environment and Land Court Act, 2015 (2012) and sections 1A and 1B of the Civil Procedure Act (Cap 21)**. I find that the application is merited in the circumstances. The respondents' preliminary objection is without merit

19. Wherefore, I dismiss the respondents' preliminary objection dated 6th February 2019. The application dated 18th December 2018 be and is hereby allowed in terms of Orders 2 and 3 sought therein.

20. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of July, 2019.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Owaka holding brief for Tom Achillah learned counsel for the appellant.

Mr. Opiyo holding brief for Bosire Gichana learned Counsel for the respondents

Tom Maurice – Court assistant