



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 17 OF 2019

JOSHUA ALUKAKA OKENO

ERICK OKENO

GODFREY OKENO

SOSPETER ARINGO

LEONORAH OKENO

ANDREW OKENO.....APPELLANTS/APPLICANTS

VERSUS

CLIFTON AYIETA OKENO

COLLINS WABWERA OKENO.....RESPONDENTS

RULING

The application is dated 21st May 2019 and is brought under Section 1A, 1B, 3, 3A, 18, 63 (e), 75 (1) (h) and 79G of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified as urgent and service be dispensed with in the first instance.
2. That before the inter parties hearing of this application the Butere PMC ELC No. 2 of 2019 which is subject to this application and appeal be transferred to this honourable court and be consolidated with this matter for expeditious determination.
3. That this honourable court be pleased to issue an order staying the execution of order dated 23rd May, 2019 pending the hearing and determination of this application.
4. That this honourable court during inter parties hearing be pleased to issue an order staying the execution of order dated 23rd May, 2019 pending the hearing and determination of appeal herein.
5. That costs of this application be provided for.

It is based on the following grounds that, the appellants/ applicants are aggrieved by the order dated 23rd May, 2019 by Butere PMC ELC No. 2 of 2019 and have filed an appeal against the said order. That unless this honourable court stays execution of order dated 23rd May, 2019 pending hearing and determination of the appeal herein which challenges the said order, the respondents intend to execute the said order thus rendering the appeal herein nugatory. That the respondents have never been in occupation or possession of the suit lands hence they stand to suffer no prejudice by the grant of the orders sought herein. That the appellants/applicants have been in occupation and possession of the suit land for a period of over twelve years hence they have suffered substantial loss by the orders dated 23rd May, 2019 at Butere PMC ELC No. 2 of 2019. That it is in the interest of justice and the balance of convenience tilts in favour of the appellants/applicants that the orders sought be granted. That the appeal lodged herein by the appellants has high chances of success.

The 1st respondent submitted that he knows the applicants because they are his family members. That the allegations that the applicants that the respondents intent to execute the orders issued in Butere PMC ELC No. 2 of 2019 delivered on 23rd May, 2019 is not true as the

applicants have never been in occupation or be in possession of the suit land and therefore they stand themselves not to be prejudiced if the appeal and the application for stay orders is not granted. That it is not true that the applicants have been in occupation and possess the suit land for a period of twelve years and that they will suffer substantial loss when the respondents have extensively developed the land built houses and structures and are in occupation and in use of the land that form the subject matter in dispute. That to wit the same cannot be entertained at the expense of the respondents who are lost for words on what the applicant's intention are as their intentions are unclear given that the respondents grandfather and their father's father, their father being one who gave them the portion which form the subject matter herein and which their father inherited it from his father and is separate from Kisa/Wambulisho/669. That customarily the youngest son, who is Norman Wabwera resides at the homestead where their parents lived and the others who are elderly such as Joshua Alukaka and others built their houses in a different portion which is Kisa/Wambulisho/669 and in their case is where the applicants currently reside, and not Kisa/Wambulisho/2232 or 2233 as the applicants put it in their sworn affidavit filed and now before this honourable court. That the allegation that the orders sought by the applicant will not prejudice him is wrong since the applicants allegations harm him and his co-respondent who have built houses and have since fenced the land in dispute, planted mature trees and are in use of or possess the land despite the 1st applicant purporting that they have not been doing so. That the applicant's information whose sources of information of facts have not been disclosed or ascertained to rebut his case is weak because they rely on the ruling delivered in his favour to press their agenda of cancellation of title and reverting the title documents in the name of the deceased Javan Okeno when they have their own portions which in his opinion is a ploy to interfere with their inheritance from their grandfather and from his father. That the allegation that Gladys Keya Okeno who is his aunt and who is unmarried was to share the land currently known as Kisa/Wambulisho/2232 and 2233 is a facade designed to defeat the interest of justice as his aunt is merely being used as a conduit for the applicant's joint efforts which is cancellation of the grant. That while it is indeed true that the petitioner did in fact leave out LR. Kisa/Wambulisho/669 which is part of the late Javan Okeno and that it needs to be included in the list of inventories that this only necessitates that the confirmed grant be rectified to include and mark this matter as settled on grounds that there has been bad blood between the applicants and the respondents ever since the meeting held at Norman Wabwera's home concerning similar issues and he has not cooperated with them since then. (Annexed are copy of minutes and are marked as CAO-1). That the applicants conduct in this whole affair has been nothing less of reeking of mischief and in any event the applicant's application certified urgent dated 3rd day of June, 2019 and supporting affidavit sworn by Joshua Alukaka Okeno was made in bad faith and the court ought not to exercise its discretion in the applicant's favour or entertain the applicants on grounds that their intent or attempts are impliedly hostile when all suits must come to a definite end.

This court has carefully considered the application and the submissions herein. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (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.”*

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,*
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”*

The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in Chris Munga N. Bichange Vs Richard Nyagaka Tongi & 2 Others eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus:-

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In the case of Mohamed Salim T/A Choice Butchery Vs Nasserpuria Memon Jamat (2013) eKLR, the court stated that:-

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right”

We are further guided by this court’s decision in Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997, at Page 4 as follows:

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”

From the grounds of this application, the appellants/ applicants are aggrieved by the order dated 23rd May, 2019 by Butere PMC ELC No. 2 of 2019 and have filed an appeal against the said order. That unless this honourable court stays execution of order dated 23rd May, 2019 pending hearing and determination of the appeal herein which challenges the said order, the respondents intend to execute the said order thus render the appeal herein nugatory. That the respondents have never been in occupation or possession of the suit land. From the said ruling in Butere PMC ELC No. 2 of 2019, the court found that the respondents were the registered owners of the suit parcels of land having obtained the same through succession. The applicants have never challenged the said succession proceedings. This court is not persuaded, that the appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, I am not persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. I find that the applicant has not fulfilled any of the grounds to enable me grant the stay. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE