



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 218 OF 2017

(Formerly Kisii ELCC No. 461 of 2010)

ELISHAPHAN OMOLLO NYASITA.....PLAINTIFF/RESPONDENT

VERSUS

GRADUS ATIENO OTHIM.....1ST DEFENDANT/APPLICANT

KENNEDY OCHIENG ATIENO.....2ND DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of an application dated 29th November 2018 filed on even date brought pursuant to sections 3A,1A,1B of the Civil Procedure Act (Cap 21) and Order 22 Rule 22 of the Civil Procedure Rules, 2010. The 1st defendant namely Kennedy Ochieng Atieno (the applicant herein) through S.M. Sagwe and Company Advocates is seeking the following orders:-

i. Spent

ii. Spent

iii. That the court be pleased to order stay of execution of the judgment and decree of this court pending hearing and eventual determination of appeal in the Court of Appeal.

iv. Costs of this application be provided for.

2. The application is premised on seven (7) grounds on its face and the applicant's supporting affidavit sworn on even date together with a notice of appeal dated 21st November 2018. The applicant asserts that he is aggrieved by the Judgment of this court delivered on 20th November 2018. That he has lodged an appeal which has high chances of success and it may be rendered nugatory if the order of stay sought herein is not granted as execution process shall be commenced to realize the fruits of the Judgment hence displace him and the 2nd defendant from the suit land, LR NO. Kamagambo/Kamwango/1115. That the application has been made promptly and that the applicant stands to suffer substantial loss in the nature and to the extent of the judgment.

3. By a replying affidavit sworn on 6th February 2019, the plaintiff (the respondent) through M/s Oguttu, Ochwangi, Ochwal and Company Advocates, opposed the application, termed the same as a blatant abuse of the process of the court and devoid of merits. He averred, inter alia, that the suit was heard and determined in his favour and that the applicant has no protectable rights and interests over the suit land. That the applicant has not demonstrated evidence of substantial loss that may accrue unless the orders sought herein are granted. That the application is a gimmick crafted by the applicant to continue to restrict the enjoyment of the respondent's proprietary rights in the guise of a pending appeal.

4. In support of his replying affidavit, the respondent annexed a document marked as EON 1, namely a copy of title deed of the suit land. He also stated that since he is the registered proprietor of the suit land, he is by law enjoined to use the same to the exclusion of all and sundry including the applicant.

5. The instant application was argued by written submissions further to orders of this court granted on 11th February 2019; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.**

6. In his submissions dated 28th February 2019 learned counsel for the applicant urged the court to grant the order of stay of execution sought in the application. He relied on authorities, inter alia, **Oraro and Rachier Advocates –v- Co-Operative Bank of Kenya Ltd (2000)**

eKLR and ICDC –v- Kemuma Onyango and 3 others (1983) eKLR,

7. On the part of the respondent's submissions dated 16th July, 2019, his learned counsel gave the background of the case framed and analysed three (3) issues for determination relating to likely substantial loss on the part of the applicant, merits of the application and whether the applicant is entitled to the orders sought. To buttress the submissions, counsel relied on authorities including **Kenya Shell Ltd –vs- Benjamin Karuga Kibiru and another (1986) eKLR** and **Mbuthia Macharia –vs- Anna Mutua Ndwiga and another (2017) eKLR**.

8. I have thoroughly studied the application in its entirety, the replying affidavit and the parties' submissions including the authorities cited therein. The point to resolve is whether the application has satisfied the conditions set out in **Order 42 rule 6 (2) of the Civil Procedure Rules, 2010** which provides thus:-

“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” (Emphasis added)

9. In respect of substantial loss, the applicant contended that if the instant application is not allowed, he will suffer substantial loss of the suit land to strangers. That this court as a court of equity has the discretion to grant the orders sought in the application; see also **Article 10 (2) (b) of the Constitution of Kenya, 2010** regarding the principles of equity.

10. The respondent submitted that the applicant has not tendered any evidence of substantial loss hence he is not entitled to the orders sought in the application. That in the absence of any evidence thereof, the orders of stay of execution are sought in a vacuum as observed in the case of **Mukoma -vs- Abuoga (1988) KLR 645**.

11. It is trite law that it is not merely sufficient for the applicant to state that he or rather she is likely to suffer substantial loss if the application for stay of execution sought is not allowed. The applicant has not shown the damage or loss that he is likely to suffer if the order sought in the application is not granted. Moreover, to grant the order aforesaid would deny a successful litigant (respondent) the fruits of his Judgment as held in **Kenya Shell Ltd case (supra)**.

12. On unreasonable delay, the applicant asserted that the application has been brought without unreasonable delay. He stated so under ground five (5) on the face of the application and in his submissions.

13. The respondent's counsel contended that the applicant has not proved his assertion as envisaged under **section 107 of the Evidence Act (Cap 80)**. However, the said counsel did not squarely deal with the aspect of inordinate delay.

14. Notably, Judgment herein was rendered on 20th November 2018 and the instant application was mounted on 29th November 2019. Quite plainly, a period of about nine (9) days cannot be termed as inordinate delay in the instant scenario; see the Supreme Court of Kenya decision in the case of **Chairman KNUT and another –vs- Henry Inyangla and 2 others (2018) eKLR**.

15. On security, the applicant proposes that the decretal sum of kshs. 75,000/= be deposited in a bank in the joint names of counsel for the respective parties until the intended appeal at the Court of Appeal is heard and determined. The sum alluded in the applicants submission was awarded to the respondent as general damages for trespass.

16. Learned counsel for the respondent submitted that the applicants have not even offered any security as a sign of goodwill regarding their commitment to doing equity should their intended appeal fail. That the instant application is made to just waste the court's time.

17. In the case of **Malindi Law Society of Kenya –vs- Law Society of Kenya, Nairobi Branch and 5 others (2017) eKLR**, it was held that the grant of stay of existing orders cannot be a matter of course. That it rests upon genuine conditions, grounds, merit and dispatch.

18. In the present application, it has not been demonstrated that the applicant is likely to suffer substantial loss and there is no indication as to security for the performance of the decree. Apparently the defendants/applicants have not mounted any appeal since 20th November 2018 for unknown reasons. Whereas the application was brought promptly, I find the same want of merit.

19. Accordingly, I dismiss the applicant's application dated 29th November 2018 with costs to the respondent.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of SEPTEMBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. P. Ochwangi learned counsel for the plaintiff/respondent.

Mr. S.M. Sagwe learned counsel for the defendants/applicants.

Tom Maurice – Court Assistant.