



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO 744 OF 2017

(Formerly Kisii Elcc No. 156 of 2010)

JAMES OWUOR AMOLO (Suing as legal representative of

JACKTONE AMOLO OYARE).....PLAINTIFF

VERSUS

PETER ADONGO OKONGO.....1ST DEFENDANT

JOHN ANGIRO ODUKE.....2ND DEFENDANT

MARY AWACH.....3RD DEFENDANT

RULING

A. The application

1. This ruling is in respect of a notice of motion of dated 5th April, 2019 and filed on even date brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and section 3A of the Civil Procedure Act (Cap 21) (Hereinafter after referred to as the application). The intended appellant (applicant) who initially appeared in person in this application and presently represented by M/s Kerario Marwa and Company Advocates is seeking the following orders;-

(a) Spent

(b) Spent

(c) **THAT the Honourable court be pleased to order stay of execution of the judgment delivered by the Honourable court against the applicant herein, on the 20th day of March, 2019, in Migori ELcc No. 744 of 2017; JAMES OWUOR AMOLO – vs- PETER OKONG’O, JOHN AGINA and MARY AWACH pending the hearing and determination of the intended appeal.**

(d) **THAT the costs of this application be provided for.**

2. The application is premised on grounds (a) to (g) set out on it’s face. The grounds are :-

i. THAT the applicant herein, being dissatisfied with the judgment delivered by this Honourable court on the 20th day March 2019, in Migori Elc No. 744 of 2017; JAMES OWUOR AMOLLO –VS- PETER ADONGO OKONG’O JOHN AGINA and MARY AWACH has lodged a notice of Appeal which is equally treated as lodging an appeal, against the said judgment.

ii. THAT , currently there are no orders for stay of execution of the said judgment and the applicant yet to be furnished with certified copies of court’s proceedings despite having requested and paid for the same to enable him lodge an appeal against the said judgment.

iii. THAT the respondents, following the foregoing, may move at any time to execute the said judgment against the applicant.

iv. THAT the applicant has an arguable appeal with probability of success.

v. THAT if the stay of execution is not granted, The applicant’s appeal will be rendered nugatory and he is poised to suffer

substantial loss as the respondents may execute against him on the basis of the foresaid judgment at any time.

vi. THAT the applicant is ready, able and willing to give security as this Honourable court may order to be so deposited in court or held jointly by both parties herein awaiting the outcome of the appeal.

3. The application also rests on the applicant's supporting affidavit sworn on the same date and annexed copies of the documents namely the notice of appeal dated 21st March 2019, a letter dated 22nd March 2019 being request for certified typed copies of proceedings and Judgments dated 22nd March 2019 as well as the receipt dated 22nd March 2019 being deposit fee for proceedings herein marked as "JOA", "JOA2 and "JOA3" respectively. The applicant deponed, inter alia that further to the Judgment rendered on 20th March 2019, he may be evicted from the suit land, LR NO. Kanyamkago/Kajulu/488 on which he has been staying since 1970's. That the learned counsel who appeared for him in this matter failed to appear during the delivery of the Judgment and to pray for the orders sought in the application and for certified typed copies of proceedings and Judgment. That there are no orders of stay of execution of the said judgment and that the court has the discretion to grant the orders sought in the application in the interest of justice.

B. Response to the application

4. The respondents through learned counsel, Mr. Steve Ndege of S. Ndege and company Advocates opposed the application by way of grounds of opposition dated 18th April, 2019 and affidavit sworn on even date by the 2nd respondent and filed in court on 25th April, 2019. They are seeking it's dismissal with costs. Annexed to the replying affidavit is a copy of Judgment in Migori Principal Magistrate's court Criminal case No. 519 of 2002 relating to a charge of forgery, among others, against the deceased father of the applicant and another over title documents of the suit land. Generally, the 2nd respondent reiterated and adopted the grounds of opposition in his replying affidavit

5. The respondent's five (5) grounds of opposition include that ;

a) "The notice of Appeal purportedly filed by the plaintiff/applicant in person was so drawn and filed in contravention of Order 9 Rule 9 of the Civil Procedure Rules is incapable of signifying institution of an appeal and therefore the plaintiff's applicant's Notice of motion dated 20/3/2019 in so far as the same seeks stay at execution pending appeal is not predicated upon any appeal filed by the plaintiff and is therefore an abuse of the court process.

b) The plaintiff/applicant's notice of motion dated 5/4/2019 has not satisfied the test set out under order 42 Rule 6 (2) of the Civil Procedure Rules"

C. Applicant's submissions

6. By his submissions dated 14th October, 2019 and filed in court on 16th October, 2019, learned counsel for the applicant made reference to the orders sought in the application and grounds on it's face. That the respondents are aware that he filed an appeal namely Civil Appeal No. 73 of 2019 in the Court of Appeal at Kisumu as per the annexed copy of the memorandum of appeal dated 7th May 2019 to the submissions. Counsel submitted that since the appeal is duly filed, this court has jurisdiction to entertain the application and that the appeal is not frivolous as noted in **Safaricom Limited –vs- Ocean View Beach Hotel Ltd and others (2010) eKLR and Kenya Tea Growers Association and another –vs- Kenya Planters and Agricultural Workers Union Control Appeal at Nairobi Civil Appeal No. 72 of 2001** respectively.

7. Counsel also submitted that the applicant has satisfied the considerations under Rule 5 (2) (b) of the Court of Appeal Rules for the court to exercise it's discretion in favour of the applicant as held in **Butt –vs- Rent Restriction Tribunal (1982) KLR 417. That under Order 42 Rule 6 (1) (supra)** and in view of the decision in **House Finance Company of Kenya Ltd –vs- Sharok Kher Mohamed Ali Hirji and another (2015) eKLR**, this court has the discretionary power to grant the orders sought herein to alleviate any undue hardship that would be suffered by the applicant, if the same are refused.

D. The respondents' submissions

8. In their submissions dated 2nd May 2019 and filed in court on 3rd May, 2019, the respondents' counsel urged this court to find that the applicant has not shown sufficient cause, for the grant of the orders sought in the application which lacks merit and should be dismissed with costs to respondents. Counsel submitted that the applicant has satisfied only one condition for stay of execution namely the timeous filing of the application as held in the case of **Trust Bank Limited –vs- Ajay Shah (2012) eKLR** and as set out under **Order 42 Rule 6 (2) (a) and (b) (supra)**.

9. Counsel further relied on the case of **Kenya Shell Limited –vs- Benjamin Karuga Kibiru (1986) KLR 132** at paragraph 3 and the case of **Wellington Lusweti Baraza and 47 others –vs- Lands Limited and another (2015) eKLR** at page 33 that the applicant must prove substantial loss. Counsel also submitted that the applicant has not offered any security as held in **Trust Bank Limited case (supra)**. Counsel, too, relied on the case of **Francis Kuria Wainaina –vs- Lucy Wairimu Wainaina (2017) eKLR** and **Kenya Industrial Estate –vs- Anne Chepsiror and 5 others (2018) eKLR**, to buttress his submissions.

E. Issues for determination

10. I have anxiously considered the entire application, the grounds of opposition together with the replying affidavit and rival submissions including all the respective authorities relied upon therein. So, has the applicant satisfied the requirements for the grant of the orders sought in the application?

11. The application is mounted under Order 42 Rule 6 (2) (supra) which reads:-

“ 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.....” (issues emphasized)

12. **Section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya)** under which the application is also initiated ,provides that the court’s discretion be exercised on it’s equitable conscience and ever more for the purposes of upholding the law a far as is possible. That this would require preserving the claims of the parties so that they may be heard and determined according to the law; see **Oraro –vs- Mbaja (2005) 1KLR 142 at 149/150.**

E. Analysis and determination

13. On the aspect of delay of the application, it is pretty clear that Judgment of this court was rendered on 20th March 2019 and the instant application was filed on the 16th day following the said Judgment. I am very aware of the principle of equity; delay defeats equity.

14. In the case of **Macharia Mwangi Maina and 87 others –vs- Davidson Mwangi Kagiri (2014) eKLR** , the Court of Appeal held inter alia;-

“This is a court of law and a court of equity; Equity shall not suffer no wrong without a remedy...”

15. **Article 10 (2) (b) of the Constitution of Kenya,2010** anchors the application of the principles of Equity. Nonetheless, it is common ground that the instant applicant was brought timeously.

16. As regard substantial loss, I note paragraphs 10,11,14 and 15 of the applicant’s supporting affidavit and ground (e) of the application. The applicant asserts that he may suffer substantial loss if stay is refused and his appeal succeeds and the respondents are unable to refund the costs of the same as observed in the case of **House Finance Company (supra).**

17. On their part, the respondents contend that substantial loss likely to be suffered has to be proved by evidence in details and with particulars thereof by the applicant. That it is not sufficient by merely stating that the applicant will suffer loss and be prejudiced.

18. I bear in mind authorities including **Kenya Shell Ltd, Wellington Baraza and Trust Bank cases (supra)** regarding substantial loss. There is no doubt that such a loss must be considerable in amount or value. The applicant has failed to demonstrate distinctly that he is likely to suffer substantial loss in the circumstance?

19. With regard to security, I address my mind to paragraphs 12 and 14 of the applicant’s supporting affidavit and ground (8) set out on the face of the application. The applicant further asserts that he is ready and willing to offer security for the due performance of the decree following the said judgment.

20. To that extent, has the applicant offered security? The answer is not in the affirmative as clearly contended by the respondents and as held in **Trust Bank case (supra).**

21. In the case of **Butt (supra)**, it was held that it is within the discretion of this court to grant the orders sought based on good grounds, on special circumstances and not to render the appeal nugatory ; see also **David Morton Silverstein –vs- Atsango Chesoni (2002) eKLR.**

22. It is important to observe that a temporary stay of execution was granted by my brother, Mutungi J on 9th May 2019 pending the hearing and determination of the instant application. The applicant was meant to file an appeal and he has filed Civil Appeal No. 73 of 2019 at the Court of Appeal, Kisumu where he may raise all relevant issues in the matter.

23. It is trite law that grant of stay of orders can not be a matter of course, it rests upon genuine conditions, grounds, merit and dispatch see; **Malindi Law Society of Kenya –vs- Law Society of Kenya Nairobi Branch and 5 others Civil Application No. 200 of 2017 (2017) eKLR.**

24. In the premises, the applicant has only satisfied one condition in lieu of the triple cumulative prescribed prerequisites for the grant of the order of stay of execution sought in the application. This court is not inclined to grant the order as a matter of course. I find the instant application devoid of merits.

25. Wherefore, the application dated 5th April, 2019 be and is hereby disallowed with costs in the cause.

DELIVERED SIGNED and DATED at MIGORI this 26TH day of NOVEMBER 2019.

G.M.A. ONGONDO

JUDGE

In presence of:-

Mr. D. Adawo holding brief for Mr. Kerario Marwa learned counsel for plaintiff/applicant.

The Plaintiff/Applicant

The 2nd Defendant/Respondent

Court Assistant- Tom Maurice