



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL NO. 6 OF 2017

JOHN MBEWA OLANDE..... APPELLANT

VERSUS

KIBIRI CONSTRUCTION AND TRADING COMPANY LIMITED.....RESPONDENT

RULING

A. Introduction

1. This ruling is in respect of two (2) applications initiated by the appellant, **JOHN MBEWA OLANDE** (the applicant herein) against the respondent, KIBIRI Construction and Trading Company Limited and the application are :-

- a) A notice of motion dated 30th April, 2019 and filed in court on 2nd May 2019 under Order 40 of the Civil Procedure Rules, 2010 (Hereinafter referred to as the 1st application).
- b) A notice of motion dated 20th May 2019 and filed in court on 21st May, 2019 brought under Order 45 of the Civil Procedure Rules, 2010 (Hereinafter referred to as the 2nd application).

2. The applicant is represented by the firm of Abuodha and Omino Advocates. The respondent is represented by the firm of Nyauke and Company Advocates.

3. The subject matter in the instant appeal which was originated by a memorandum of appeal dated 19th October 2018 and filed in court on 25th September 2018, is land parcel number West Karachuonyo/Koyugi/501 measuring approximately 0.30 hectares in area and valued at approximately kshs. 5,000,000/= (Kenya shillings five Million only). The suit property is situate within Homa-Bay County.

4. The respondent sought orders of eviction and permanent injunction and costs of the suit against the applicant in Oyugis CMCC No. 115 of 2015 by way of a plaint dated 30th September 2015 and filed in court on 1st October 2015. After hearing the suit, the trial court (Hon. J.P. Nandi, Senior Resident Magistrate, as he then was) rendered Judgment in favour of the respondent on 12th September,2018 thus provoking the instant appeal and the two (2) applications.

5. In the 1st application, the orders sought are:-

i. Spent

ii. Spent

iii. THAT the court do order stay of execution of the orders and decrees in Civil suit No. 115 of 2015 pending the hearing and determination of the Appeal.

iv. Cost of the application.

6. The 1st application is premised on the applicant's affidavit sworn on 30th April, 2019 with copies of a plaint together with verifying affidavit in Oyugis CMCC No. 77 of 2018, In IKimwanya Auctioneers bill of costs and Warrant of Attachment following Judgment of the trial court. The same is further premised on three (3) grounds namely:-

a) THAT the applicant was none suited in civil suit No. 115 of 2015 and the court made an error in entering any Judgment or award of cost against him.

b) THAT the appeal herein is highly meritorious with all chances of success

c) THAT any execution for cost or any other order arising from the Judgement appealed shall render the appeal nugatory.

7. The applicant deponed, inter alia, that in spite of the glaring evidence before the trial court that he had nothing to do with the suit property, the honourable court did erroneously grant the respondent the orders including costs against him. That subsequent to the said Judgment, one Prisca Odero Okwaro, the owner of the suit property lodged a suit namely Oyugis CMCC No. 77 of 2018 against the respondent. That as the instant appeal is pending awaiting complete typing of the proceedings, the respondent has instructed M/s Ikimwaya Auctioneers to attach the respondent's property to satisfy the costs awarded before the trial court.

8. The applicant also deponed that the appeal is extremely meritorious and if the intended execution is allowed to proceed, the appeal shall be rendered nugatory. He urged this court to order stay of execution pending the hearing of the appeal and Oyugis CMCC No. 77 of 2018.

9. In the 2nd application, the applicant is seeking the following orders:-

a) **Spent**

b) **THAT** the Honourable court be pleased to review his orders of 06/04/2019 by vacating the same and replacing the same with an interlocutory order of injunction barring the respondent or Ikimwenya Auctioneers from attaching the property proclaimed and as per the proclamation dated 03/04/2019 pending hearing of this application and the application dated the 30/04/2019.

c) **THAT** cost be in the cause.

10. The said application is further anchored on the applicant's affidavit of even date accompanied with a copy of Judgment, a decree and a certificate of costs in Oyugis CMCC No. 115 of 2015. The applicant averred, inter alia, that he has now attached to the application the Judgment and order appeal from further to court order made on 6th April, 2016) (I think he meant 6th May 2019) and also relied on the 1st application as well as grounds (1) to (iv) set out on its face which I note accordingly.

11. The 2nd application is anchored on four (4) grounds which include; that Judgment which was not attached to the application has since been processed and attachment thereto. That Ikimwenya Auctioneers has already proclaimed the applicant's goods and unless restrained, the appeal is bound to be rendered nugatory and that he will suffer irreparable loss thereby.

Summary of response to the applications.

12. The respondent did not reply to the 2nd application herein.

13. In respect of the 1st application by a replying affidavit sworn on 26th June 2019 and filed on 27th June 2019 by Carilus Abich Obuya, one of the directors of the respondent termed the application scandalous vexatious and an abuse of the court process. That the same has been over taken by events as the warrant of attachment of the applicant's property have been executed as shown in a copy of return of sale dated 29th May 2019 marked as "CAO".

14. Simply put, the respondent opposed the 2nd application. That the orders sought therein can not be obtained and urged this court to dismiss it with costs to the respondent.

Submissions of the respective parties

15. On 9th July, 2019, the applicant filed submissions dated 8th July, 2018 wherein reference was made to the pleadings and the decision of the trial court in Oyugis CMCC number 115 of the 2015. The applicant also referred to Oyugis CMCC No. 77 of 2018 in which the ownership of the suit property remains unresolved between Prisca Odero Okwaro and the respondent. It was the submission of the applicant that he was an employee of Prisca Odero Opapa. That there was a threat to attach cattle of the applicant and that in spite of temporary orders to stop the auction of the cattle, the respondent's reply to the application discloses that (10) ten cows were sold at kshs. 75,000/= which did not satisfy the decretal sum of kshs. 118,000/= in favour of the applicant.

16. To buttress his submissions, Learned counsel for the applicant relied on the Court of Appeal decision in consolidated **Marine -vs- Nampijja and others** Civil Application No. 93 of 1989 that the purpose of stay of execution pending appeal is to preserve the subject matter in dispute in order not render the appeal nugatory. Counsel also relied on the case of **Kenya Shell Company -v- Benjamin Karuga 1 KAR 1018** that a stay of execution is granted only where the intended appeal would be rendered nugatory.

17. On their part, learned counsel for the respondent gave a brief background facts of the case and identified two (2) issues for determination namely whether the applicant deserves order sought in the 1st application and whether the 2nd application is meritorious. Counsel analysed the said issues and relied on authorities including **James Kanyiita Nderitu -vs- Attorney General and another (2019) eKLR** that an unreasonably delayed claim may be denied as an abuse of the court process and **Kenya Shell Ltd -vs- Kibiru (1986) 410** that if there is no evidence of substantive loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event.

18. Counsel cited **Order 42 Rule 6 of the Civil Procedure Rules, 2010** on the prerequisites for the grant of stay of execution pending appeal. Counsel submitted that the 2nd application is inordinate, discloses no substantial loss on the part of the applicant, an abuse of the court process, wrong in law, lacks merit and has been over taken by events. That the applicant does not deserve the orders sought and urged

this court to dismiss the 1st and 2nd applications.

Issues for determination

19. I have duly considered the 1st and 2nd applications, the response to the 1st application and the rival's submissions. What are the issues that emerge therefrom for determination?

20. The respondent's counsel framed and analysed two (2) issues for determination in submissions as already noted in favour of the respondent. I approve the issues accordingly.

Analysis and Determination

21. On whether the applicant deserves the issues sought in the 1st application, the applicant contends that stay of execution sought is to preserve the subject matter of the appeal and not to render the appeal nugatory as held in **Consolidated Marine and Kenya Shell cases** respectively (**supra**). That the said appeal has high chances of success. That he (applicant) was not suited in the suit before the trial court hence Judgment was entered in error against him.

22. On the other hand, the respondent asserts that the 1st application is not merited. That the applicant has failed to satisfy the prerequisite for the grant of the orders sought therein.

23. The 1st application is brought under Order 40 (*supra*) which provides for temporary injunctions and interlocutory orders. Clearly, the applicant has not sought a temporary injunction in this matter.

24. In that scenario, the applicant erroneously quoted a wrong provision of the law. Therefore, it is hardly a sound basis alone for dismissing the application as observed in the case of **Gatu –vs- Muriuki (1986) KLR 211**.

25. It is worthy to note that under **section 13 (7) (a) of the Environment and Land Court Act, 2015 (2011)**, this court is fully mandated to grant preservation orders including injunctions. The stay of execution sought can be termed as interlocutory orders and preservation orders envisaged under **Order 40 and section 13 (7) (a) (supra)** respectively.

26. The guiding principles for the grant of a stay of execution pending appeal are provided for **under Order 42 Rule 6 (2) of the Civil Procedure Rules (supra)** which has three (3) conditions that :-

a) "The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered; and

c) Such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant."

27. The trial court rendered its Judgment in favour of the respondent on 12th September 2018. The 1st application herein was mounted on 30th April, 2019. Quite plainly, there was a delay of close to 6 ½ months to commence the application.

28. Is the delay inordinate and inexcusable in the circumstances? This court is not unaware of section 57 of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya) and Order 50 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010 regarding computation of time.

29. It is trite law in an application where the applicant fails to give reasons for the delay the same is bound to be dismissed; see the case of **Naomi Wangechi Gitonga and 3 others-vs- Independent Electoral and Boundaries Commission and 17 others (2018) eKLR**, where the Supreme Court of Kenya dismissed an application for extension of time.

30. In the instant application, the delay of 6 ½ months charged against the nature and circumstances of the case, is quite inordinate. Furthermore, the delay is not excusable as the applicant has failed to give reasons for the delay..

31. I take into account the record of appeal dated 8th July, 2019 and filed in court on 9th July 2019. However, I can not say anything more as the appeal has to be heard and determined on merit

32. I also do not lose sight of Oyugis CMCC No. 77 of 2018 that has featured in the application and submissions herein. The same has to be heard and determined on merits, too. Period.

33. It is trite law that this court has the authority to issue orders for the preservation, in the interim, of a subject matter of appeal; see the Supreme Court of Kenya decision in the case of the **Board of Governors Moi High School, Kabarak and another –vs- Malcom Bell Application numbers 12 and 13 of 2012 (2013) eKLR**.

34. Be that as it may, it is well settled that the grant of stay of existing orders can be a matter of course. It rests upon genuine conditions, grounds, merit and dispatch as held by the Court of Appeal in the case of **Malindi Law Branch –vs- Law Society of Kenya Nairobi Branch and 5 others Civil Application number 20 of 2017 (2017) eKLR**.

35. It is pretty clear from the 1st application that upon delivery of Judgment by the trial court, a decree was issued on 15th March 2019. Auctioneer's bill of costs was drawn and warrant of attachment dated 15th March 2019 executed accordingly as confirmed by a copy of return of sale marked as "CAO" attached to the respondent's replying affidavit to the application.

36. Notably, on 23rd May, 2019, the court (Mutungi, J) sitting at Kisii Environment and Land Court directed thus:

" Notice dated 20/5/2019 certified urgent. A temporary stay of execution is granted pending hearing of Notice of motion dated 30/4/2019. Both application dated 30/4/2019 and 20/5/2019, to be served for inter partes hearing before the Judge at Migori on 27/6/2019."

37. As already noted the 1st application suffers from inordinate and inexcusable delay. **Article 10 (b) of the Constitution of Kenya, 2010** stipulates that equity is one of the national values and principles of governance which binds this court in the application of the law. Therefore delay defeats equity which can not apply to aid the indolent in the obtaining circumstances.

38. Moreover, applicant has not demonstrated how he is likely to suffer substantial loss. He has not even given an undertaking regarding security for the due performance of the decree. Furthermore, warrant of attachment has been executed as per a copy of the return sale exhibited. The application has been overtaken by events. In the circumstances, I find that the 1st application has not satisfied the threshold for the grant of the orders sought therein.

39. As regards the 2nd application I note the orders granted on 6th May 2019 whereby the court declined to certify the same as urgent and directed the application to be heard inter partes. The application and the 1st application were canvassed by written submission pursuant to the court order of 27th June, 2019.

40. It is important to note that the applicant averred at paragraph 4 of his affidavit in support of the 2nd application thus :-

(a) "THAT I have now attached hereto the judgment and the order a appealed and I ask that the Honourable court be pleased to grant an order in terms of prayers 2 of my application."

41. This court is very conscious of the conditions for review **under Order 45 (supra)**. The 2nd application does not meet the prescribed conditions due to the admission of the applicant to the observation and directions made by the court on 6th May 2019.

42. From the foregoing discourse, the applicant does not deserve orders sought in the 1st application as well as the 2nd application for want of merit. I find the respondent's contention sound and it thwarts the applicant's assertion in the said applications.

43. Thus, I disallow the 1st and 2nd applications herein dated 30th April, 2019 and 20th May 2019 respectively with costs in the cause.

Delivered, SIGNED and Dated in open court at **Migori** this **12th Day of NOVEMBER 2019**.

G.M.A ONG'ONDO

JUDGE

In presence of

Mr. Omino learned counsel for the appellant

Mr. Dan Simiyu learned counsel for the respondent

Tom Maurice – Court Assistant