



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 09 OF 2019

EDWARD NGARI MUSA.....APPLICANT/APPELLANT

VERSUS

SHADRACK NYAGA NJERU.....RESPONDENT

RULING

1. This application is dated **7th October, 2019** and seeks the following orders:

2.(sic) That the application be certified as urgent ad service be dispensed with in the first instance.

3.That pending the hearing and determination of this application there be a stay of execution of the judgment and orders issued on 24th June, 2019 by Hon. J. M. Njoroge Chief Magistrate in Civil Case No. 127 of 2014 Chuka.

4.That pending the hearing and determination of ELC Appeal No. 8 of 2019 there be a stay of execution of the judgment and orders issued on 24th June, 2019 by Hon. J. M. Njoroge Chief Magistrate in Civil Case No. 127 of 2014 Chuka.

2. The application is supported by the **affidavit of Edward Ngari Musa**, the applicant and has the following grounds:

a. That the applicant herein was dissatisfied with the decision of the Hon. J. M. Njoroge, Chief Magistrate in Civil Case No. 127 of 2014 Chuka in the judgment delivered on 24th June, 2019 and has filed ELC Appeal No. 8 of 2019 an appeal which is arguable and has high chances of success.

b. That in the said judgment eviction orders (sic) issued against the applicant to be executed in three months' time from the date of the judgment, which period lapses on 24th October, 2019.

c. That the applicant risks being evicted from his land that he rightfully owns, resides in with his family and his property being destroyed upon the lapse of the three months' period in a week's time.

d. That unless the execution of the judgment and orders of the lower court are stayed the applicant stands to suffer irreparable loss and detriment.

e. That the appeal, if successful, will be rendered nugatory if stay of execution is not granted.

f. That the respondent has threatened the applicant, that he shall proceed to immediately execute the orders upon the lapse of the three months' period.

g. That there was no undue delay in bringing the present application.

h. That time is of essence in determining this application.

i. That the applicant shall not suffer any prejudice if the appeal is allowed.

3. The application was canvassed by way of written submissions.

4. The applicant's submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if they exist.

Submissions

Your Lordship,

The applicant/appellant herein filed an application dated 7th October, 2019 seeking for orders that:

1. That the application be certified as urgent and service be dispensed within the first instance.
2. That pending the hearing and determination of this application there be a stay of execution of the judgment and orders issued on 24th June, 2019 by Hon. J. M. Njoroge Chief Magistrate in Civil Case No. 127 of 2014 at Chuka.
3. That pending the hearing and determination of appeal No. 9 of 2019 there be a stay of execution of the judgment and orders issued on 24th June, 2019 by Hon. J. M. Njoroge, Chief Magistrate in Civil Case No. 127 of 2014 at Chuka.
4. That costs be in the cause.

Your Lordship, we submit that the applicant stands to suffer irreparably if and when he is evicted on the suit land. The applicant risks being evicted from his land that he rightfully owns and in which he lives with his family and his property is at the risk of being destroyed.

A judgment was made on 24th June, 2019 and eviction orders were to be executed in three (3) months' time from the date of the judgment. The period within which the three (3) months lapse is 24th October, 2019. My Lordship, we believe that this is substantial loss which the applicant/appellant stands to suffer if the execution is carried out.

More so your Lordship, this application has been made in due time and the appeal if successful will be rendered nugatory if stay of execution is not granted. The applicant will have no parcel of land to claim for if stay is not granted.

We also maintain that the appeal herein has chances of success as the learned magistrate entered judgment against the appellant whereas the land indicated in the sketch map of LDT/IGA/01/014 is not known nor is the map drawn to any scale.

We maintain that the applicant has fulfilled the conditions for stay as provided under Order 42 Rule 6 of the Civil Procedure Rules.

The applicant has since served and filed his Memorandum of Appeal which he intends to rely on in the appeal. He has intensively developed the suit land.

In Antoine Ndiaye vs African Virtual University [2015]eKLR, High Court at Nairobi, Civil Suit No. 422 of 2006 Judge Gikonyo J, held *inter alia* that stay of execution should only be granted where sufficient cause has been shown, the court should be guided by three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.

We submit that we have fully complied with the requirement for stay of execution and we urge the honourable court to grant us stay pending the hearing and determination of the appeal matter.

Dated at Embu this 5th day of October, 2019

P. M. KAHIGA & CO. ADVOCATES

ADVOCATE FOR THE APPLICANT/APPELLANT

5. The respondent's submissions are reproduced in full herebelow, without any alterations whatsoever, including correction of spelling or any other mistakes, if they exist.

RESPONDENT'S SUBMISSIONS

(In respect of the Appellant's Application dated 7th October, 2019)

May it please the Honourable Court.

BACKGROUND

1. **BY** dint of a judgment delivered on 24th July, 2019 by the Honourable J.M Njoroge(CM) in Chuka Cmcc number 127 of 2014 *Shadrack Nyaga Njeru vs Patrick Kithaka & 2 others*, the Court therein decreed *inter alia*, the Defendants therein, to move out of the suit property in particular the property indicated in the sketch map of LDT/IGA/01/04 of the Tribunal case.

2. **BEING** aggrieved with the decision in Chuka Cmcc number 127 of 2014 aforementioned, the Appellant herein (3rd Defendant in the lower court suit) lodged a separate appeal from his other Defendants, now Appeal being Chuka ELC number 9 of 2019. Simultaneously to the lodgment of the Appeal the Appellant proffered an application dated 7th October, 2019 seeking stay of the Judgment.

3. **THE** Respondent has strenuously opposed the instant Application Replying Affidavit Sworn on 1st November, 2019.

FACTUAL ANALYSIS BY THE RESPONDENT

4. **MY** Lord, the Respondent having reviewed the stay application as filed by the Appellant, submits that the ordinarily he would not have sought opposition to the Motion dated 7th October, 2019, but due to the misleading averments contained therein and the facts leading to the instant appeal, it is of fundamental importance that two principle issues are highlighted as to the reason of the opposition, to wit;

I. The Appellant/Applicant does not reside/were not on the suit property and/or are not in possession of the suit property at the time the Judgment was delivered, and consequently, there is nothing to stay.

II. The grounds in support of the Application for stay and the affidavit in support thereof are premised on a deliberate scheme to conceal material facts and hoodwink the court as to the true status of the suit property.

5. **IT** is beyond peradventure that the suit property is not titled. For the reason that adjudication is yet to be done. The more reason, the dispute herein started way back in 2004 and at one point found its way before the then gazetted District Land Disputes Tribunal. We submit that based on this backdrop; we wish bring to bring to the attention of the court;

i. The purported photographs as annexures ENM3 on the supporting affidavit of the Applicant) are not the true representation of the suit property. In fact, during the trial of the matter at the lower court, the Appellant herein did not produce or adduce any pictorial evidence as claimed now herein.

ii. That indeed there is a material admission by the Applicants during the trial (he was DW3) that he is not in possession of the suit property. He cannot now turn around and purport that he stays on the suit property. We humbly submit My Lord, that this admission and later inconsistencies corroborates the Respondent's assertion that there would be no foundation for granting stay, since the Appellant is not in possession of the suit property.

6. **MY** Lord, we submit as a matter of fact, the suit property is situate in an area known as Kamwimbi Adjudication Section B. The area is awaiting adjudication hence there are no title documents/deeds. It would therefore amount to a serious grave abuse of the Court process for the Applicant to mislead the court and allege through the purported photographs attached to their supporting affidavit, by making reference to titles that do not exist. If the Appellant own any title documents, what would be so difficult for him to produce the same as evidence?

7. **IN** so far are the factual underpinning of the application before court is concerned, the same is opposed for the two germane reason whereof, the Applicants averred in the lower court that he is not in possession and secondly the suit property is different from his.

THE LAW ON STAY

8. **GRANTING** a stay in the High Court is governed by Order 42 Rule 6 (1) & (2) the question to be decided being

a. whether substantial loss may result unless the stay is granted and the application is made without delay and

b. the applicant has given security.

These are the paramount consideration for stay pending appeal or intended appeal as was canvassed in *Kenya Shell Ltd vs. Kibiru & Another [1980] KLR 410* by the Court of Appeal.

9. **SUBSTANTIAL** loss is the cornerstone in an application for stay. Substantial loss could render an appeal nugatory see *Mukuma vs. Abuoga [1988] KLR 645 That* is what has to be prevented, because such loss could render the appeal nugatory. Therefore, it is necessary to preserve the status quo. The question that begs an answer is what is the status of the suit property? My Lord, it is evidence that the Appellant has contended that the property in question is different from his and secondly, during trial there was overwhelming evidence that the Appellant was not have possession of the suit property and he admitted to this fact while on the stand as DW3.

Whether the Applicants will suffer substantial loss.

10. **WE** humbly submit that no substantial loss will be occasioned to the applicant in the event the orders being sought are not granted because the said judgment is not monetary. Importantly there is evidence on record that the Applicant aver that the property in question is not his. His only apprehension is that the Respondent in obtaining vacant possession may interfere with his boundaries. To this end my Lord the Respondent relies on the case of **James Wangalwa & Another –vs- Agnes Naliaka Cheseto in Misc Appl No. 42 of 2011 [2002] eKLR** Gikonyo J. stated that;

“No doubt, in law the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

11. ORDER42 Rule 6 (1) & (2) provides as follows: -

1. No appeal or 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 application being made, to consider such application and make such order thereon as may to it seem just, and 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 such order set aside.

2. No order of stay 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 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

12. WE are alive to the fact that the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. The Court of appeal in the case of **Butt vs Rent Restriction Tribunal(1982) KLR, 417**Madan, Miller and Porter JJA while considering an application of this nature had this to say:-

i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power...

ii. **The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

iii. **A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.**

iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

13. IT’S submitted that the Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. Unfortunately, the Applicants have not discharged this burden. In the case of **MOHAMMED SALIM T/A CHOICE BUTCHERY –vs- NASSERPURIA MEMON JAMAT (2013)eKLR**, the court upheld the decision of **M/S PORTREITZ MATERNITY –vs- JAMES KARANGA KABIA CIVIL APPEAL NO. 63 OF 1997** and 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”

14. MY lord we also advert the mind of the court that the Respondent/Plaintiff is entitled to the fruits of the judgment. He has belabored since 2004 when other intruders trespassed into the suit making the matter to land to the then Land Dispute Tribunal. And before he could realize the judgment therein, the Applicants encroached into the suit property, necessitating him to file the suit in 2014 before the Chuka magistrates court that gave rise to the judgment which the Appellants have appealed against. The Respondent has suffered and he must be guaranteed his right to enjoy the fruits of his judgment.

15. THE words stated in **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR**, citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** are apt:

“We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal.....” (See also **James Wangalwa & Another –Vs- Agnes Naliaka Cheseto [2012] eKLR.**)

Conclusion

16. MY lord, we have demonstrated that the Subject Application is NOT merited. It is not brought in good faith. It is founded on a deliberate scheme to mislead and distort facts. We urge you to dismiss the same.

17. WE also urge you my lord to find credence and inspiration in the authorities cited before you.

DATED at NAIROBI this 8th November 2019

SIMBA & SIMBA

ADVOCATES FOR THE RESPONDENT

6. I have carefully considered the pleadings, the authorities and the submissions proffered by the parties in support of their diametrically divergent assertions. I opine that the authorities proffered by the parties are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. I have considered all of them before arriving at my determination in this application.

7. In coming to my decision regarding stay of execution, I wish to refer to the orders issued in the impugned judgment. The orders were:

- a. An order that the defendants do move out of the suit land as indicated in the sketch map of LDT IGA/01/04 Tribunal Case or in default they be forcibly evicted with their property and possessions.
- b. Eviction of the 1st, 2nd and 3rd defendants from the suit property be effected on or after the expiry of a period of 3 months from the date hereof.
- c. The plaintiff shall have the costs and interest of the suit.

8. At page 2 of the respondent's submissions, it is stated as follows:-

“1. The Appellant/Applicant does not reside/were not on the suit property and/or are not in possession of the suit property at the time the judgment was delivered, and consequently, there is nothing to stay.”

9. Surely, the orders issued in the impugned judgment are for eviction and removal of the appellants from the suit land. Indeed, they were the only orders issued. An issue arises, if the applicant(s) was/were not in the suit land, then what was the rationale/purpose of the orders issued by the Hon. Magistrate in the lower court? I find that an order for stay of execution is tenable in this case.

10. Order 42 rule 6 sub rule 2 of the Civil Procedure Rules states as follows:

“(2) 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.”**

11. Limb (a) of Order 42 rule 6 sub rule 2 has been satisfied. For limb (b), an applicant is required to provide such security as the court orders for the due performance of such decree or order as may ultimately be binding on him. I issue the following orders:

1. Stay of execution of the judgment and orders issued on 24th June, 2019 by Hon. J. M. Njoroge, CM in Civil Case No. 127 of 2014 at Chuka is **HEREBY GRANTED** on condition that the applicant deposits with court as security the sum of Kenya Shillings Five Hundred Thousand (Kshs.500,000/=) within the next 21 days **FAILING WHICH** the stay of execution granted by this order will automatically lapse and will stand vacated.
2. The appeal in this suit will be canvassed by way of written submissions.
3. The applicant/appellant is directed to file and serve written submissions concerning the appeal within 21 days of today.
4. The respondent is directed to file and serve written submissions concerning the appeal within 21 days after receipt of the applicant/appellant's submissions.
5. The parties will come to court for apposite **directions on 19th February, 2020.**
6. Costs shall be in the cause.

Delivered in open court at Chuka this 11th day of December, 2019 in the presence of:

CA: Ndegwa

Miss Bore present for the Appellant/Applicant

Shadrack Nyaga Njeru – Respondent

P. M. NJORGE,

JUDGE.