



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 08 OF 2019

PATRICK KITHAKA BORICI.....1ST APPELLANT

MISHECK MWANIKI NJERU.....2ND APPELLANT

VERSUS

SHADRACK NYAGA NJERU.....RESPONDENT

RULING

1. This application is dated **1st October, 2019**. It states that it has been brought to court under order 42 rule 6 of the Civil Procedure rules 2010, section 3A Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. It seeks the following orders:

1. That this application be certified as urgent and heard ex-parte in the first instance.
2. That pending the hearing and determination of the application inter-partes, there be a stay of execution of judgment delivered by the honourable court at Chuka in Civil Case No. 127 of 2014 on 24th July, 2018 and all consequential orders.
3. That pending the hearing and determination of this appeal there be a stay of execution of the judgment delivered by the honourable court at Chuka in Civil Case No. 127 of 2014 on 24th July, 2018 and all consequential orders.

2. The application is supported by the affidavit of Patrick Kithaka Borici, the 1st appellant/applicant filed on **2nd October, 2019** and has the following grounds:-

- a) The appellants/applicants have filed the appeal after being aggrieved by the judgment delivered against them in Chuka Civil Case No. 127 of 2014 where the appellants were some of the defendants and the respondent was the plaintiff in the said suit.
- b) That the honourable court gave judgment against the appellants/applicants that the appellants 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, eviction against the appellants from the suit property be effected on or after the expiry of a period of 3 months from the date hereof and that the plaintiff shall have the costs of the suit and interest.
- c) The appellants/applicants will suffer substantial loss and damage if the judgment delivered on the 24th July, 2018 is executed before the appeal is heard and determined as they will be evicted from their land parcels which neighbours the respondent's land parcel after the lapse of 3 months from the date of judgment.
- d) That this appeal shall be rendered nugatory if the judgment delivered on the 24th July, 2019 is not stayed.
- e) That this application has been brought without unreasonable delay.

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

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

APPLICANT'S WRITTEN SUBMISSIONS TO THE APPLICATION DATED 15TH OCTOBER 2019.

The applicants have filed the instant application praying for stay of execution of the Judgement delivered by the honourable court in

civil case no. 127 of 2014 on 24th July 2019 and all consequential orders.

The applicants wish to make submissions that there is a slight typing error that the date of the Judgement is indicated as 24th July 2018 instead of 24th July 2019 and we invite the court to observe the correct date.

The application is supported by the grounds on the face of it and the supporting affidavit of the 1st applicant together thereto and the supplementary affidavit filed herein. Which contents the applicants fully and entirely rely on.

My lord the applicants were sued by the respondent in the lower court that they move out of the suit land as indicated in the sketch map of LDT IGA/01/04 or in default they be forcibly evicted from the suit property.

The parties were heard and Judgement delivered as per the orders sought in the plaint by the honourable court on 24th July 2019. The applicants were aggrieved by the said Judgement, filed the appeal herein and the application herein for stay of execution of the said Judgement.

The application herein is premised on order 42 rule 6 of the civil procedure rules 2010 and section 3A of civil procedure Act.

Order 42 rule 6(2) of the civil procedure rules provides that:

“No orders 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 the application has been made without unreasonable delay and

b) 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.”

The applicants herein have demonstrated that they will suffer substantial loss if the orders of stay of execution are not granted and the application herein was done without unreasonable delay.

The applicants also submit that they are ready to provide a reasonable security as the court orders for the due performance of such decree or order and we urge my lord to consider that the applicants are a primary school teacher and a peasant farmer respectively. If the court is inclined to order them to deposit security in court.

The applicants aver that they will seriously suffer substantial loss if the orders sought herein are not granted in that they will be evicted from their respective land parcels which they occupy and where the 1st applicant has built a permanent house as seen in the photographs attached in the affidavit.

The brief background of the lower court is that the parties herein are neighbors at Kiaritha village Tharaka Nithi County.

The respondent herein had sued one Christopher Njeru in LDT IGA/01/04 and the tribunal drew a sketch plan which was the subject of the lower court proceedings.

The respondent then engaged an auctioneer Quickline Auctioneer to come and fence his land as per the said sketch plan which he did. The applicants in this case were not parties to the tribunal case. They did not participate in the said fencing.

The respondent even fenced a portion belonging to the 2nd applicant and the 2nd applicant filed a case at the tribunal which was disbanded before hearing the said case.

The respondent despite doing the said fencing filed the suit against the applicants and one Edward Ngari Musa. Judgement was entered in the respondent's favour despite the applicant's overwhelming evidence that they are outside the fenced portion.

The respondent in his evidence in the lower court said that the auctioneer did not fence properly as per the sketch plan which was not drawn to any scale so even the area which it covers is not known. The respondent did not tell the court what size is his land.

The respondents have submitted that then applicants are not in occupation of the suit property.

We submit that the applicants are outside the fenced land but what is not clear is what is the suit property as per the said map which is not drawn to any scale and therefore the acreage on the ground cannot be interpreted.

The applicants have no problem if the respondent will not forcefully occupy and evict them from their respective land parcels allegedly in implementation of the court's decree.

The worry the applicants have and they suspect that, that is the respondent's intention was, if they are outside the fenced land and he sued them he has intentions of grabbing their land parcels which neighbor his and they will suffer substantial loss if this happens as they will be evicted from the land parcels they call home and which is their ancestral land parcels.

We also submit that the appeal filed by the appellants herein has overwhelming chances of success and it will be rendered nugatory if the orders sought herein will not be granted as the applicants will be evicted from their land parcels and properties destroyed pending the hearing of the appeal herein and that is what they are challenging in the appeal.

We rely on the authority of **STANBIC BANK OF KENYA LTD VERSUS GEOFFREY NDIKU MUTISYA & ANOTHER NAIROBI HIGH COURT CIVIL APPEAL NO. 460 OF 2007. (Copy attached)**

Where the learned Justice ROSELINE NAMBUYE analyzed the principles for the court to consider before granting a stay of execution as per the provisions of orders 42 rule 6 of the civil procedure rules.

In the case of **BUTT VERSUS RENT RESTRICTIONS TRIBUNAL [1979] e KLR (Copy attached)**

Where the court of appeal held that ***“it is the discretion of the court to grant a stay but what has to be judged in every case is whether particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.”***

It is the applicant’s submissions urging that the court do grant the orders sought herein in the interest of justice and to prevent the appeal herein from being nugatory as the applicants have satisfied the ingredients for granting stay of execution as per provisions of order of order 42 rule 6 civil procedure rules.

The applicants will suffer substantial loss if the orders sought are not granted and they are ready to deposit security if the court so orders. We pray the application herein be allowed as drawn.

We so humbly submit.

AUTHORITIES

- 1. STANBIC BANK OF KENYA LTD VERSUS GEOFFREY NDIKU MUTISYA NAIROBI CIVIL APPEAL NO. 460 OF 2007.**
- 2. BUTT VERSUS RENT RESTRICTION TRIBUNAL 1979 e KLR.**
- 3. Civil procedure Act cap 21 laws of Kenya.**
- 4. Civil procedure Rules 2010.**

DATED AT EMBU THIS 9TH DAY OF NOVEMBER 2019

MUTHONI NDEKE & CO.

ADVOCATES FOR THE APPELLANTS/APPLICANTS

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 ana 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 principle 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 labored 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. It is noted that the appellants/applicants in the heading of their written submissions incorrectly say that the application is dated **15th October, 2019** when in fact their application is dated **1st October, 2019**.

7. I opine that the grounds of opposition dated **7th October, 2019** filed by the respondent on 8th October, 2019 are satisfactorily subsumed by his written submissions.

8. 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.

9. 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.

10. 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."

11. 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 applicants 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.

12. 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."

13. 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 applicants deposit 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 applicants/appellants are 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 applicants'/appellants' submissions.
- 5) The parties will come to court for opposite 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 Muthoni for the Applicants

Shadrack Nyaga Njeru - Respondent

P. M. NJORGE,

JUDGE.